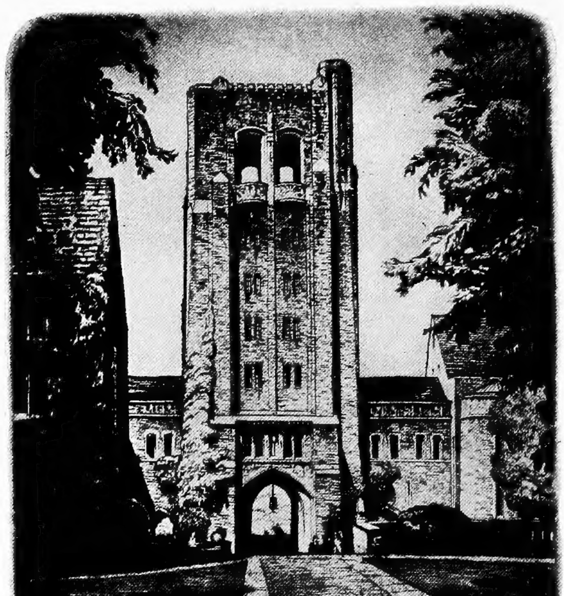

A TREATISE

ON THE LAW OF

CORPORATIONS

HAVING A

CAPITAL STOCK

BY

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CHAPTER XX.

SALES OF STOCK — THE FORMATION AND PERFORMANCE OF THE CONTRACT — GAMBLING SALES — FRAUDULENT SALES.

A. FORMATION AND PERFORMANCE OF CONTRACTS TO SELL STOCK.

§ 331. *Shares of stock are transferable.*—That shares of stock in a corporation are transferable the same as other personal property is a principle of law coeval with the existence of stock itself. The few decisions holding that shares of stock were real estate were exceptional rulings, and are no longer considered good law.[1] The right to transfer stock is of vital importance, since the two chief causes of the phenomenal growth of corporations in recent times are the limited liability of the members and the readiness of buying or selling an interest in the corporation by a transfer of the stock a person has therein. The common law regards shares of

[1] See § 12, *supra.*

stock as personal property, capable of alienation or succession in any of the modes by which personal property may be transferred.[1]

§ 332. *Restrictions on right to sell stock and contracts against selling.*— By-laws restricting the sales of stock and contracts against selling are generally made in connection with contracts for voting at elections so as to control the management of corporations. These two classes of contracts, to sell together and to vote together, are closely allied, and consequently are treated under the subject of "Elections," in another part of this work.[2]

§ 333. *"Pools," "corners," and combinations in stock.*— This subject also is closely connected with the subject of restrictions on the right to vote and pooling arrangements for the purpose of controlling elections, and consequently is considered elsewhere.[3]

§ 334. *Contract for sale of stock may be valid without delivery or specific time for delivery — Construction of various contracts.*— Generally a sale of stock is attended with an immediate delivery of the certificates therefor, or it is agreed that the certificates shall be delivered at some specified time in the future. If, however, the vendor offers to sell his stock and the vendee accepts the offer, the contract is complete and binds both parties, although nothing has been said as to the time when the certificates of stock shall be delivered. The law implies that the contract will be performed by a delivery of the certificates immediately or within a reasonable time, and either party may insist upon carrying out the contract.[4]

[1] Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558 (1873); Cole *v.* Ryan, 52 Barb. 168 (1868); Heart *v.* State Bank, 2 Dev. Eq. (N. C.) 111 (1831); Allen *v.* Montgomery R. R., 11 Ala. 437, 451 (1847); Boston Music Hall Assoc. *v.* Cory, 129 Mass. 435 (1880); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855); Poole *v.* Middleton, 29 Beav. 646 (1861); Brightwell *v.* Mallory, 10 Yerg. (Tenn.) 196 (1836).

[2] See § 622, *infra.*

[3] See §§ 621*a*, 622, *infra.*

[4] "The performance of a contract, or the tender of performance, is no part of the contract. The making of a contract is one thing, but the performance thereof, or the tender of performance, is another and quite different thing. The contract set up in the paragraph in question is an executory one, by which the plaintiff agreed to sell to the defendant the shares of the stock, and the defendant agreed to pay him therefor the sum of $25. No time was fixed for the performance; the law will imply, therefore, that it was to be performed immediately, or perhaps within a reasonable time. Had a future day been agreed upon for the performance of the contract on each side, there could have been no doubt as to its validity, or the right of either party to enforce it, he having done all he was required to do on his part. The fact that no time was agreed upon for performance does not change the character of the contract. The contract did not pass any title to the stock, but it was, nevertheless, a valid contract, and one which either party can enforce, he having been in no default himself." Bruce *v.* Smith, 44 Ind. 1 (1873); Kerchner *v.* Gettys, 18 S. C. 521 (1882); Cheale *v.* Kenward, 3 De G. & J. 27 (1858). Usage may determine what is a reasonable

It has been held that an option, for which nothing is paid, is unilateral, and hence, even though, by a subsequent writing, the option is exercised, it cannot be enforced as against the purchaser, there being no new consideration at the time of the exercise of the option.[1] Where the vendor says, in his contract, "I have sold" cer-

time for delivery. Seven days held reasonable. Stewart *v.* Cauty, 8 M. & W. 160 (1841). In a contract by which one "agrees to deliver" to the other certain stock at a certain price, performance is to be within a reasonable time, and the vendor may tender the stock and then sue for the price. Boehm *v.* Lies, 60 N. Y. Super. Ct. 436 (1892). A contract of sale may be an executed contract, even though it reads that the parties "have agreed to sell." State *v.* Whited, etc., 104 La. 125 (1900). Where two persons own a share of stock in common, each agreeing to pay one-half of future assessments, and one of them gives his interest to the other if the latter will pay future assessments, this is a sale and transfers title. Boll *v.* Camp, 92 N. W. Rep. 703 (Iowa, 1902). Specific performance of a contract to sell stock will not be enforced, where the time of performance and of payment is not fixed, and where five years have elapsed, and where the vendee, the corporate secretary, misrepresented the value of the stock to the vendor. Todd *v.* Diamond State Iron Co., 8 Houst. (Del.) 372 (1889). An agreement to transfer stock at any time to a trustee for creditors is not enforceable against the insolvent estate of the deceased stockholder. Chafee *v.* Sprague, 16 R. I. 189 (1888). A vague offer to sell stock, with a statement that the stock could probably be sent with a draft, even when accepted with a direction to send it on, does not made a binding contract. Topliff *v.* McKendree, 88 Mich. 148 (1891). Where stock is sold on condition that the vendee shall be "in a position to take up the stock," the condition is fulfilled if the vendee accepts the stock and acts as a director, and holds the stock for five months. Wills *v.* Fisher, 112 N. C. 529 (1893).

[1] Wescott *v.* Mitchell, 95 Me. 377 (1901). A unilateral contract is not binding. A consideration must exist or the covenants be mutual. Jordan *v.* Indianapolis, etc. Co., 61 N. E. Rep. 12 (Ind. 1901). In the case of Clark *v.* Campbell, 23 Utah, 569 (1901), the court discussed the question of whether an option, given without consideration, was binding. Where an option to purchase stock provides for immediate delivery in the hands of a third person, and for payments by instalments in case the option is exercised, the payment of the first instalment constitutes an exercise of the entire option. Obery *v.* Lander, 179 Mass. 125 (1901). An option to sell mining stock, with no definite time fixed as to the duration of the option, may be revoked three months later, no sale having been made in the meantime; and a subsequent sale by the owner of the stock at an advanced price to a party whom the party receiving the option had been negotiating with does not entitle such party receiving the option to any interest in the sale. Rees *v.* Pellow, 97 Fed. Rep. 167 (1899), the court holding that such an option may be terminated at any time in good faith. The various stockholders of a company may give interchangeably a first option of thirty days to purchase their shares of stock whenever any one desires to sell, each contracting for himself, the contract further providing that such thirty days are to commence in case of the death of a stockholder, so far as his stock was concerned, and they may further contract that another person is to have a similar option in case the first option

tain stock, deliverable at seller's option, within a specified time, a sale *in præsenti* is made, and the vendor assumes to have the stock and to hold it for the benefit of the purchaser until delivery.[1] An agreement to purchase stock when the corporation is created is enforceable only after a complete and legal incorporation is effected.[2] A sale of stock with an agreement to take it back whenever the vendee desires is an enforceable contract, even though the contract is oral.[3]

Great difficulty often arises in determining whether a contract of sale of stock is an executed or is merely an executory contract of sale. There are a few general rules on this subject,[4] but each contract for the sale of stock is construed and enforced by the courts

is not exercised. A party entitled to such option may have specific performance of it. The mutual covenants of the contract are a sufficient consideration to support it. Scruggs *v.* Cotterill, 67 N. Y. App. Div. 583 (1902). A contract of sale of stock, to be delivered in blocks of five shares or more as called for by the vendee, is not an option, but an obligation on the part of the vendee to purchase, and if he does not call for the stock it may be tendered within a reasonable time and the price recovered, and the vendor may obtain judgment and retain the stock until payment is made. Cragin *v.* O'Connell, 50 N. Y. App. Div. 339 (1900). An option to sell certain stock at a certain price "on or after three months from November 6, 1891," must be exercised within a reasonable time thereafter and cannot be exercised seven years thereafter. McCracken *v.* Harned, 66 N. J. L. 37 (1901). An offer to buy stock, open to acceptance after January 1, must be accepted before July 9. Park *v.* Whitney, 148 Mass. 278 (1889). An option to purchase stock within three years is enforceable, though one party has an option which the other has not. Seddon *v.* Rosenbaum, 85 Va. 928 (1889). An option running to two persons cannot be exercised by one of them. Pratt *v.* Prouty, 104 Iowa, 419 (1898). A person holding stock in escrow under an option agreement may interplead between the parties in interest if they make conflicting claims. Walker *v.* Bamberger, 17 Utah, 239 (1898). Where the owner of stock offers to sell it to a person at a certain price, the offer to remain open until a certain date, the contract is not unilateral, if the latter accepts the offer within that time. If the vendor then avoids the vendee so that the vendee is unable to tender the money, tender is excused and the vendor may sue the vendee for breach of contract. Guilford *v.* Mason, 53 Atl. Rep. 284 (R. I. 1902).

[1] Currie *v.* White, 45 N. Y. 822 (1871). When the option is exercised, the time of delivery as fixed is as though that time had been specified in the original contract. Kelley *v.* Upton, 5 Duer, 336 (1856), holds otherwise where the contract has also the words "at buyer's option in ninety days." Such a contract is executory as to time of passing title, and tender is necessary.

[2] Childs *v.* Smith, 55 Barb, 45 (1869). If stock is sold conditionally, and the condition does not happen, the sale is void. Mitchell *v.* Wedderburn, 68 Md. 139 (1887).

[3] See § 339, *infra.*

[4] A contract of sale of stock was worded as follows:

"I hold of the stock of the Washington and Hope Railway Company $33,250 or 1,350 shares, which is sold to Paul F. Beardsley [the appellee], and which, though standing in my name, belongs to him, subject to a payment

according to the intent of the parties as manifested by the written terms and conditions of the contract itself. Various contracts relative to the sale of stock are explained and referred to in the notes below.[1]

of $8,000, with interest at same rate and from same date as interest on my purchase of Mr. Alderman's stock."

The court held that this was an executed contract by which the ownership of the stock passed to the purchaser, with a reservation of title, simply as security for the purchase-money — an equitable mortgage. The court pointed out the difference between an executed and executory contract of sale as follows:

"If an agreement to sell, the moving party must be the purchaser. If a sale, an executed contract with reservation of security, the moving party is the vendor, the one retaining security. If an agreement to sell, the moving party, the purchaser, must within a reasonable time tender performance or make excuse therefor. If an executed contract, a completed sale, then the moving party is the vendor, the security-holder, and he assumes all the burdens and risks of delay. . . . It is not always easy to determine whether an instrument is a contract of sale or one to sell; yet certain rules of interpretation have become established. . . . Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Beardsley *v.* Beardsley, 138 U. S. 262 (1891).

[1] See, in general, Lindley, Company Law, 6th ed., pp. 676–688. An agreement of a party to sell bonds for another party at a certain price may be enforced by the party who is to give the bonds to the other party to sell. Plumb *v.* Campbell, 129 Ill. 101 (1888). The fact that the corporation loses a large amount of money after a partner agrees to take stock as a part of his share of the partnership assets does not allow him to decrease the price which it was estimated to be worth. Donahue *v.* McCosh, 70 Iowa, 733 (1886). Only a *de facto* corporation need be proved. Reynolds *v.* Myers, 51 Vt. 444 (1879).

The memoranda of the contract, together with the certificates of stock, are sufficient presumptive evidence of the existence of the corporation and the legal issue of the stock. Mann *v.* Williams, 143 Mass. 394 (1887). Where stock is issued to a person for construction work, and he sublets the contract and agrees to divide the stock with others who are to share the expense of construction, they all are liable to the subcontractor. McFall *v.* McKeesport, etc. Co., 123 Pa. St. 259 (1889). Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full exent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900). A broker who claims to be acting for an undisclosed principal in contracting for the purchase of bonds, and who stipulates that he shall not be personally liable, cannot enforce such contract if in fact he

A contract whereby a stockholder delivers certain stock for money to be paid to the corporation, the money to be repaid out

was the principal himself. Paine *v.* Loeb, 96 Fed. Rep. 164 (1899). In the case of Clews *v.* Jamieson, 89 Fed. Rep. 63 (1898), where the broker was authorized to sell at 229 and actually did sell at 221, the court held that the principal could not adopt and enforce the contract, inasmuch as the broker was not authorized to sell at that price, and the contract not binding the principal when made did not bind the other parties. Even though the president of a corporation brings about a sale of all its stock, under a contract by which the corporation is to pay him a certain sum, nevertheless he cannot collect that sum from the corporation itself. Wood *v.* Manchester, etc. Co., 54 N. Y. App. Div. 522 (1900). It is legal for a person to contract with the directors of an insurance company to purchase at least sixty-five per cent. of the stock of the company, the same offer being made to all the stockholders, even though it is proposed to thereupon wind up the company. Garrett Co. *v.* Morton, 65 N. Y. App. Div. 366 (1901). Where a person has turned in securities under a plan of consolidation which states the aggregate capacity of properties which it is proposed to acquire, or so many of them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet, if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith who had no notice of personal representations. Jewell *v.* McIntyre, 62 N. Y. App. Div. 396 (1901). Where the stockholders transfer a portion of their stock to one of their number to be disposed of by him for the interests of the company and to raise money to carry on business, he may use a portion of the same to reimburse one of the stockholders for stock which the latter used in the interest of the company. Playa, etc. Co. *v.* Gage, 60 N. Y. App. Div. 1 (1901). Where the evident intent of a contract of sale of stock with partial deliveries was that the entire amount should be taken by the vendee, he cannot have specific performance to the extent of a majority of the stock only. Clowes *v.* Miller, 50 Atl. Rep. 728 (Conn. 1901). A sale of stock in a company to be organized is legal. Van Dam *v.* Tapscott, 40 N. Y. App. Div. 36 (1899). Where the incorporators named in a special charter organize by subscribing one share each and allowing another person to subscribe for the remainder, he at the same time entering into a personal contract with them that he would construct the street railway called for by the charter within a certain time, and for failure so to do he was to "return the charter," a suit by the original incorporators to cancel his subscription and to obtain control of the board of directors will not lie, inasmuch as the contract was an attempt to transfer the corporate franchise. Simonds *v.* East Windsor, etc. Ry., 73 Conn. 513 (1901).

Where, in order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to anyone else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in dam-

of dividends and in other ways, and the stock then to be returned, is a conditional sale and not a loan to the corporation.[1] Where a

ages, inasmuch as it is clear that, even though the stock were appraised, the corporation would not buy it. Whiton *v.* Batchelder, etc. Corp., 179 Mass. 169 (1901). It may be shown by parol that a written sale of stock was to be binding only in case an agent had not already sold the stock. Reiner *v.* Crawford, 23 Wash. 669 (1901). Where a corporation having treasury stock in its treasury sells all its assets to another corporation, excepting its patent rights, such sale is not a sale of the treasury stock within the meaning of a prior stock-pooling contract of the old corporation that certain other stock should be sold before such treasury stock was sold. Myers *v.* Buell, 67 N. Y. App. Div. 290 (1901). Stockholders in selling their stock in connection with the transfer of all the property to a new corporation may reserve what may be thereafter realized from a suit. Independent, etc. Co. *v.* Anderson, 106 La. 95 (1901). The vendee who agrees to pay in addition to a certain price a specified sum whenever the same is received by him from the corporation is not liable on the contract if he sells the stock before receiving anything from the corporation. Hamilton *v.* Miller, 24 Ind. App. 617 (1900). An agreement of the borrower of stock to pay for the same in case the stock is not returned accrues when the stock is sold by the pledgee on default of the borrower, and the statute of limitations then begins to run. Jones *v.* Powning, 25 Nev. 399 (1900). A contract to return borrowed stock or pay for it is a debt. Dibble *v.* Richardson, 171 N. Y. 131 (1902). A contract whereby a person receives stock and agrees to return it within a specified time or else pay a specified sum is not a bailment, and hence if the stock is not returned at the specified time the specified price may be recovered, even though the party at a later time desires to return the stock. Haskins *v.* Dern, 19 Utah, 89 (1899). A stockholder may hold liable in damages a person who has broken his agreement to loan money to the corporation, the consideration of such agreement having been furnished by the stockholder. But if the agreement did not provide for any particular duration of the loan, only nominal damages can be recovered. Kelly *v.* Fahrney, 97 Fed. Rep. 176 (1899). Where an agreement for the pooling and voting of stock provides that any holder of trustees' certificates may on six months' notice demand from the trustee repayment of the price which he paid for the stock, such demand may be enforced by a suit and the money collected from the trustee. Waggaman *v.* Nutt, 88 Md. 265 (1898). When a subscriber to stock agrees to sell $5,000 worth of the same at its "original cost," such cost is the cost to the subscriber and not the par value, nor the cost including loans by the subscriber to the corporation. Eagan *v.* Clasbey, 5 Utah, 154 (1887). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. Tilkey *v.* Augusta, etc. R. R., 83 Ga. 757 (1889). A contract calling for "original ground-floor, or treasury stock" means any of the stock that is issued, where the statutes prohibit fictitious stock. All the stock is then presumed to be "ground-floor" stock and to represent at par the actual value received. Williams *v.* Searcy, 94 Ala. 360 (1891). A contract by a corporation that it will issue its stock for one-fifth of its par value is void under the Alabama constitutional prohibition. The subscriber having sold his contract to another

[1] Crimp *v.* McCormick Const. Co., 71 Fed. Rep. 356 (1896). See also § 76, *supra.*

note is given in payment for stock, and recites on its face that it is for value received, parol evidence is not admissible to show that the sale was on condition that the stock would afterwards pay a certain dividend, and in case such dividend was not paid the note was not to be paid.[1] Nor can it be shown by parol that a written contract to deliver a certain amount of stock was to be satisfied by the delivery of a less amount.[2] If a contract of sale is conditional

person cannot collect on such sale. Williams *v.* Evans, 87 Ala. 725 (1889). See ch. III, *supra*. An agency to sell the stock of a company refers to the stock then issued by the company. Gates *v.* National, etc. Union, 46 Minn. 419 (1891). An executory contract to purchase stock is not such a claim against the estate of an insolvent vendee as to be provable against the assignee. *Re* Ives, 11 N. Y. Supp. 650 (1890). A vendor of the stock of a street railway company may collect damages for breach of the contract of the vendee to construct the street railway to certain land owned by the vendor, even though the corporation, the stock of which was sold, had agreed to acquire certain rights of way and had not done so. Blagen *v.* Thompson, 23 Oreg. 239 (1892). Where a vendor of stock, in addition to the price received, is to have an additional sum equal to the highest price paid to any others for their stock, he cannot recover such additional price by proof that the vendee, in order to stop a stockholder's suit, paid a higher price for other stock. Stewart *v.* Huntington, 124 N. Y. 127 (1890). An executory agreement by the holder of a note that he will cancel it in payment for stock is a contract by itself, and is no defense to the note. It is not a satisfaction of the note nor a substituted contract. It may, however, give a right to damages. Hayes *v.* Allen, 160 Mass. 286 (1894). Where an employee is to receive certain stock if he remains in the employ of the company up to a certain date, a receiver of his property prior to that date cannot demand the stock prior to that date. Delahunty *v.* Hake. 10 N. Y. App. Div. 230 (1896). The holder of an option, who thereafter takes the stock and agrees to pay for it or return it within a certain time, must pay for it if he keeps the stock beyond that time. Stevens *v.* Hertzler, 109 Ala. 423 (1896). An agreement to sell and deliver all the stock of a corporation within a certain time is valid even though the promisor does not own or control the stock. He may be sued for damages for a breach. Wamsley *v.* H. L. Horton Co., 77 Hun, 317 (1894). Where the proposed seller offers to sell at a certain price, and the buyer accepts the offer payable on three days' sight draft, and on the next day the buyer asks for certain explanations before confirming his offer, the seller may refuse to carry out the sale. Cameron *v.* Wright, 21 N. Y. App. Div. 395 (1897): aff'd, 163 N. Y. 586. Where stock is placed in escrow to become the property of a person in case he is obliged to pay a certain obligation, and he is so obliged to pay, the creditors of the party placing the stock in escrow cannot reach the stock nor redeem it. Pabst, etc. Co. *v.* Montana, etc. Co., 19 Mont. 294 (1897). Where upon the sale of stock it is placed in the hands of a third person to be delivered when paid for, and is partly paid for, it is conversion for the person so holding the certificates to deliver them to still another person on the order of the vendor. Kahaley *v.* Haley, 15 Wash. 678 (1896).

[1] Dinkler *v.* Baer, 92 Ga. 432 (1893).

[2] Where a stockholder has agreed to sell and deposit in a trust company seven hundred and twenty shares, but only deposited six hundred and eighty-

on the stock being increased, and the vendor prevents such increase, the vendee is entitled to recover back a partial payment already made by him.[1] Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company.[2] But an agreement of various stockholders in several street railway companies to form a new corporation and transfer their interest thereto, and divide the new stock in a certain proportion, does not constitute such a partnership as to entitle one to sue the others for an accounting of profits, where the others had formed such a corporation with other parties, leaving out the first-named party.[3] Where the vendor guarantees that the vendee can sell the stock within a year at a certain price, and the vendee sells it after the year at a less price, he may recover the difference from the vendor.[4] The agreement of vendors of stock to protect the

seven shares, and the vendor has on his part deposited the purchase price with the trust company to be paid on the delivery of the seven hundred and twenty shares, the vendor cannot rescind on the ground that there was a contemporaneous oral understanding that six hundred and eighty-seven shares would be sufficient. Dady *v.* O'Rourke, 172 N. Y. 447 (1902). A contract by a person with another to purchase all of certain stock held by a third person is broken by a failure to purchase only a part thereof; but where there are other provisions in the contract sufficient to support it, the rule may be different. Stokes *v.* Foote, 172 N. Y. 327 (1902).

[1] Lovell *v.* Jacobs, 150 N. Y. 84 (1896).

[2] Dennison *v.* Chapman, 105 Cal. 447 (1895).

[3] Schantz *v.* Oakman, 163 N. Y. 148 (1900). *Cf.* §§ 705-707, *infra*, and § 320, *supra*.

[4] Lobeck *v.* Duke, 50 Neb. 568 (1897). The vendor may guarantee that the stock will be at par within a certain time. Suit lies if it is not at par within that time. Hill *v.* Smith, 21 How. 283 (1858). A contract guaranteeing a certain dividend over and above certain corporate expenses does not include payment of salaries, etc. Central, etc. Assoc. *v.* James, 81 Ga. 762 (1888). A guaranty upon the sale of stock that certain dividends will be declared is enforceable against the guaranteeing firm, even though they acted as agents for an undisclosed principal. Their obligation is primary, and not that of guarantors for the company. Kernochan *v.* Murray, 111 N. Y. 306 (1888). See also as to guarantees, § 775, *infra*. Where the vendors of stock guaranty that the stock shall be non-assessable until they have advanced $30,000, a stockholder who is held liable on a statutory liability may hold the guarantors liable if they have not paid the $30,000. Omo *v.* Bernart, 108 Mich. 43 (1895). An agreement between a stockholder of an insolvent company and another person that in case the assets did not net to such stockholder a specified sum, the latter would make up the difference, is not assigned by a sale by the former of his stock, such sale being made subject to such agreement. The benefit of the agreement belongs to the vendor of the stock. Bacon *v.* Grossman, 37 N. Y. Misc. Rep. 165 (1902). A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation for two years is enforcible against the person so purchasing the stock, even though the corporation

vendee against the payment of existing claims of a corporation is not enforcible until payment is actually made.[1] Many cases are referred to in the notes below relative to the contracts and rights of agents, promoters, and partners, in the purchase or sale of stock.[2]

passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. Kinsman *v.* Fisk, 37 N. Y. App. Div. 443 (1899).

[1] Cochran *v.* Selling, 36 Oreg. 333 (1899). Where in the sale of the stock of a street railroad a warranty is made that the liabilities of the company do not exceed a certain sum, a note given in payment for the stock may be defeated if the liabilities exceed that sum. Millsaps *v.* Merchants', etc. Bank, 71 Miss. 361 (1893). A corporation cannot enforce a promise made by a stockholder to a purchaser of his stock that he, the vendor, would pay the corporate debts. German St. Bank *v.* Northwestern, etc. Co., 104 Iowa, 717 (1898). See also § 354, *infra*.

[2] For a sale of stock where the vendee was to divide with the vendor the amount for which the stock should be resold by the vendee, see Jones *v.* Kent, 80 N. Y. 585 (1880). An agreement to divide the profits on stock in consideration of information to be furnished is enforceable. Parsons *v.* Robinson, 59 N. Y. Super. Ct. 546 (1891); aff'd, 133 N. Y. 537. But an agreement to set on foot and to help carry along a congressional investigation into the affairs of a corporation, in anticipation that it would depress the market value of its stock, which it did, and to furnish the defendants with information from time to time respecting damaging facts brought out against it upon the investigation to enable them to take advantage of the market, in consideration of sharing in the profits of their speculation, is void as against public policy; and the courts will not permit a recovery upon such an agreement. Veazey *v.* Allen, 173 N. Y. 359 (1903). A contract whereby an agent, one of the partners, is to have half of what he could sell partnership shares of stock for, is legal and enforceable by him. Wight *v.* Wood, 85 N. Y. 402 (1881). A promoter who has brought about the sale of a large plant to new parties, who have agreed to organize a new corporation and give the promoter a certain amount of stock therein, cannot, upon the ground that he is being defrauded of his commissions, enjoin the parties from closing the transaction irrespective of the promoter, nor can he have specific performance of the contract to incorporate a company and deliver the stock. There is no fiduciary relation between the parties; the value of the stock can be estimated in damages; there was no allegation of defendant's insolvency, and the promoter has ample remedy at law for damages. Avery *v.* Ryan, 74 Wis. 591 (1889). A promise and contract of promoters to subscribers to certain bonds may create an equitable lien on the bonds enforceable in equity. Badgerow *v.* Manhattan Trust Co., 64 Fed. Rep. 931 (1894). The question of whether a sale or pledge was involved in the relations between a contractor and the party who financiered the matter for him was involved in Griggs *v.* Day, 58 N. Y. Super. Ct. 385 (1890), finally decided in 158 N. Y. 1 (1899). The fact that a vendee makes out a check to a person and delivers it to him in payment for stock does not prove that the latter is the vendor and liable for misrepresentations. Aron *v.* De Castro, 131 N. Y. 648 (1892). For a breach of an agreement to give a certain quantity of stock in payment for services to be performed, the person entitled to the stock may sue for damages. Alford *v.* Wilson, 20 Fed. Rep. 96 (1884). The corporation is not liable for the

§ 335. *Remedies for breach of a contract to sell stock—Tender.*— A person who is under contract to sell and deliver shares of stock may fulfill the obligation on his part by tendering to the vendee certificates of stock, duly indorsed by himself, and containing a power of attorney authorizing the vendee to obtain a registry of the transfer on the corporate books.[1] If the vendor causes the stock

breach of an agreement among the organizers as to the distribution of stock. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890).

Where the promoters of a company agree to sell property to the company in consideration of a certain number of paid-up shares, specific performance may be had. See Fyfe *v.* Swabey, 16 Jur. 49 (1851), M. R. As to promoters' contracts, see §§ 705–707, *infra*. Where a party to a contract relative to an incorporation and division of the stock sues to recover his interest according to the contract, the court will decree a proper division of the stock, all parties being allowed the amounts invested by them in forwarding the enterprise. Bates *v.* Wilson, 14 Colo. 140 (1890). Where the owner of a patent agrees to convey it to a corporation for stock, and then to divide the stock with others, he may be compelled to perform his agreement. But where the patentee does not convey the patent to the corporation, but conveys to another corporation, the latter is protected in its title, though some of its incorporators and directors knew all the facts. Davis, etc. Co. *v.* Davis, etc. Co., 20 Fed. Rep. 699 (1884). Where a patentee agrees with a promoter to sell the patent to the corporation for stock, and divide the stock with the promoter, but the patentee, after obtaining the stock, sells the certificates to a *bona fide* purchaser, the latter is protected, though the transfer is not registered on the corporate books. The purchaser may come into a suit instituted by the promoter against the corporation to compel a transfer. Thurber *v.* Crump, 86 Ky. 408 (1887). Where a person holds property in trust or as agent for others, and conveys that property to a corporation for its shares of stock, the persons who had an equitable interest in the property may compel this agent or trustee to transfer to themselves such stock. But all the principals or *cestuis que trust* must be made parties to the suit. O'Connor *v.* Irvine, 74 Cal. 435 (1887). Where there is a joint operation in stocks, a "pool," the transactions being carried on in the name of one only, the others may have specific performance leading to a division of the stocks. Johnson *v.* Brooks. 46 N. Y. Super. Ct. 13 (1880); Thornton *v.* St. Paul, etc. Ry., 45 How. Pr. 416 (1873); s. c. dismissed, 6 N. Y. Week. Dig. 309 (1878). Equity has jurisdiction to compel the transfer of stock as between parties. Thus, where stock is issued in payment for property, and the party to whom the certificate is issued refuses to divide it among the owners of the property, as provided by contract, a court of equity may compel the division, and may enjoin any election of the corporation until such division is made. Archer *v.* Amer. etc. Co., 50 N. J. Eq. 33 (1892). It is a question of fact whether a person selling stock is an agent or vendee of the person from whom he obtained the stock, and whether the latter is liable on misrepresentation made by such person. Henneberger *v.* Matter, 88 Mich. 396 (1891); Florida, etc. Co. *v.* Merrill, 52 Fed. Rep. 77 (1892). A party selling stock is not liable for the false representations of the vendee to another person to whom the vendee is reselling the stock. Masterton *v.* Boyce, 6 N. Y. Supp. 65 (1889).

[1] "When certificates of shares are given to a purchaser they are analogous

to be transferred on the corporate book to the vendee, this is sufficient.[1] A tender of a certificate indorsed in blank, not by the vendor, but by some previous owner, is insufficient. The vendee is not obliged to trace his vendor's title from the name appearing on the certificate.[2] A contract to buy stock in a West Virginia corporation cannot be enforced by tendering stock in a Connecticut corporation.[3] An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by delivering common stock, where there is preferred stock issued also.[4] The vendor in order to sue for the purchase price must keep on hand or within control from the time of tender to the time of trial the stock involved.[5] Where tender of the stock is made in court and the vendor obtains judgment for the price, the tender is

to the sale of chattels, and the assignment and delivering of the certificates is a symbolical delivery of the shares themselves." Noyes *v.* Spaulding, 27 Vt. 420 (1855); Duchemin *v.* Kendall, 149 Mass. 171 (1889); Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); Eastman *v.* Fiske, 9 N. H. 182 (1838); Munn *v.* Barnum, 24 Barb. 283 (1857); Bruce *v.* Smith, 44 Ind. 1 (1873). *Cf.* Moore *v.* Hudson River R. R., 12 Barb. 156 (1851). It is not a sufficient tender to deposit the certificates of stock with the clerk of the court unindorsed. Subsequent indorsement after the stock has been sold for non-payment of assessments is insufficient. Kelley *v.* Owens, 120 Cal. 502 (1898); aff'd, 52 Pac. Rep. 797 (1898). Where a firm contracts to sell stock, and then both members of the firm die, a tender of certificates standing in the names of the individual members of the firm, and not signed in blank, is not a sufficient tender. Nicholls *v.* Reid, 109 Cal. 630 (1895). See also Holmes, etc. Manuf. Co. *v.* Holmes, etc. Metal Co., 53 Hun, 52 (1889); aff'd, 127 N. Y. 252. Where the vendor brings into court a certificate for fifty-six shares of stock, and the sale was for only fifty-one shares, he cannot recover the purchase price. Hamilton *v.* Finnegan, 91 N. W. Rep. 1039 (Iowa, 1902).

[1] White *v.* Salisbury, 33 Mo. 150 (1862). See Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879). Where an executory sale of stock is made, with a forfeit in case it is not completed, and the vendor, without the knowledge of the vendee, causes the stock to be transferred to the vendee on the books of the company, and the company fails, and the next day the parties, without knowledge of the failure, close the transaction, the vendor may be held liable on the statutory liability on such stock. May *v.* McQuillan, 89 N. W. Rep. 45 (Mich. 1902).

[2] Hare *v.* Waring, 3 M. & W. 362, 380 (1838), per Parke, B. "The party is to convey and deliver certificates showing either on the face of them or from the indorsements that the title is in the person conveying."

[3] Craig Silver Co. *v.* Smith, 163 Mass. 262 (1895).

[4] McIlquham *v.* Taylor, [1895] 1 Ch. 53. See also Faulkner *v.* Robinson, 70 S. W. Rep. 990 (Tex. 1902). An agreement that a note may be paid by certain stock in case the stock is not sold when the note becomes due is effective only in case the stock is tendered when the note becomes due, and if, in the meantime, the stock has been largely increased, the tender is not good. Tranter *v.* Hibberd, 56 S. W. Rep. 169 (Ky. 1900).

[5] Ortmann *v.* Fletcher, 117 Mich. 501 (1898).

presumed to have been continued.[1] A person holding an option or right to buy stock need not make a technical common-law tender of the money, inasmuch as there is something to be performed on both sides, and hence if the purchaser cannot find the vendor after due search for him and the purchaser then notifies the vendor by letter, there is a sufficient tender on his part.[2] Tender of stock may be made by the vendors depositing the same in a bank and notifying the vendees of such deposit, where the vendees are nine in number and the sale is to all of them jointly, and where such delivery is a reasonable one. Even though such tender is made after the day fixed by the contract, yet, if other features of the contract have been carried out by the vendor, a tender after the day fixed may be sufficient.[3] An owner of stock, having the option to sell the same to a person on a certain day, must tender it on that day, even though it is a holiday other than Sunday. The fact that the tender was made later, and the vendee took time to consider and then returned the stock, and the fact that the vendee afterwards offered to take a part of the stock, is not a waiver of the tender.[4] Tender need not be made where the ability to make a tender is shown, and the other party refuses to accept tender and denies the contract.[5] In England, where a transfer of shares is to be made by a deed, it is the duty sometimes of the vendor,[6] and sometimes of the vendee,[7] to furnish the necessary deed, according to the custom of the market in which

[1] West *v.* Averill, etc. Co., 109 Iowa, 488 (1899). See also Cragin *v.* O'Connell, 50 N. Y. App. Div. 339 (1900). Where the purchaser of a plant and stock is sued for the price and judgment is recovered, he may afterwards bring suit for the stock and for dividends paid after the time when he would have been entitled to the stock, if he had fully complied with his contract. Beaty *v.* Johnston, 66 Ark. 529 (1899). See § 476 and note 1, p. 816.

[2] Guilford *v.* Mason. 22 R. I. 422 (1901).

[3] Kauffman *v.* Reader, 108 Fed. Rep. 171 (1901).

[4] Page *v.* Shainwald, 169 N. Y. 246 (1901).

[5] Eames *v.* Haver, 111 Cal. 401 (1896). Where the vendor delivers a part of the securities under a contract of sale, and the vendee retains the same and claims that they had always been his property, the vendor need not tender the remainder before suing for the purchase price, but is liable to the vendee for the part not so tendered. Stokes *v.* Mackay, 147 N. Y. 223 (1895). No tender is necessary under a contract giving the right to return stock one year after date, where, before the termination of the year, the original vendor refused tender and ordered the vendee not to return and stated that the stock was worthless, which was a fact. Williams *v.* Patrick, 177 Mass. 160 (1900). A tender of the stock need not be made by the vendor if the vendee declines to complete the contract on the ground that the contract was not legal. West *v.* Averill, etc. Co., 109 Iowa, 488 (1899). No tender of the stock need be made if the vendor repudiates the contract. Maguire *v.* Halsted, 18 N. Y. App. Div. 228 (1897). A tender may be waived. Kuhn *v.* McKay, 7 Wyo. 42 (1897).

[6] Shaw *v.* Rowley, 16 M. & W. 810 (1847).

[7] Stephens *v.* De Medina, 4 Q. B. 422 (1843).

the sale is made. If, after the vendee accepts a tender of the certificates, the corporation refuses to allow a registry and transfer on the corporate books, the vendor is liable to him, since the registry is held to have been guaranteed.[1] The vendee may decline to accept the certificates if the stock has been attached.[2] But the vendee cannot decline the tender on the ground that the corporation has issued stock at a discount, nor because it has mortgaged its property.[3] A contract whereby stock is sold to be paid for in the future is not forfeited by mere failure to pay as agreed upon.[4]

[1] Wilkinson *v.* Lloyd, 7 Q. B. 27 (1845).

[2] Eastman *v.* Fiske, 9 N. H. 182 (1838).

[3] Noyes *v.* Spaulding, 27 Vt. 420 (1855). See also § 350, etc., *infra*.

[4] Chater *v.* San Francisco, etc. Co., 19 Cal. 219 (1861), where payment was made in notes and labor, and the notes were not paid. Subsequent dividends on the stock are to be applied to the payment of such notes when the dividends have been received by the vendor. A sale of stock to take effect when a note given in payment is paid does not enable the vendee to claim the stock long subsequently, the note not having been paid. Davison *v.* Davis, 125 U. S. 90 (1888). Where, however, two parties, one owning stock, the other bonds, contract to exchange the same, delivery being in escrow at once, and absolutely after the performance of certain things, a failure of one party to perform on his part enables the other to have the contract canceled by a court of equity. Wilson *v.* Roots, 119 Ill. 379 (1887). Where no certificates of stock are issued and a stockholder delivers an assignment of her stock for a specified sum, delay in paying the sum does not enable the vendor to sell the stock in the meantime to some one else. Judson *v.* Stonnington Min. Co., 87 N. W. Rep. 108 (Mich. 1901). Where fifty shares of stock are sold, but only twenty-five shares are delivered, and the vendor declines to deliver the balance, a suit by the vendor on the ground of fraud and a rescission will fail. Matthews *v.* Cady, 61 N. Y. 651 (1875). Although a party to whom bonds and stock have been sold or issued to be paid for in instalments has paid in part and is unable to pay the remainder, the vendor cannot rescind and demand back the securities unless he returns the money already paid. American Water-works Co. *v.* Venner, 18 N. Y. Supp. 379 (1892). Where the owner of a majority of the stock sells it, the purchase price being only paid in part, and retains the stock in his own name until the full price is paid, he cannot be compelled to deliver the stock or to refrain from ousting the vendee from the presidency of the corporation, where the vendee fails to meet the other payments, even though the vendee has proceeded to improve the property. Stockton *v.* Russell, 54 Fed. Rep. 224 (1892). For failure to deliver, the measure of damages is the difference in the market value at the date of the contract and at the date fixed in the contract for the delivery, or the date of the breach of the contract. The price at which the vendee had resold is not admissible unless the vendor had notice thereof. Coffin *v.* State, 144 Ind. 578 (1896). A company may give a person an option to subscribe for shares of stock in the company. If the company sells its assets before such option is exercised, the party holding the option may exercise it and sue for damages. The price at which the company sold its assets is the basis of the damage. *Re* South African, etc. Co., 74 L. T. Rep. 769 (1896); aff'd, 77 L. T. Rep. 377. A person who contracts to sell to another, on or be-

A person who is under contract to purchase stock canot defeat that contract by the fact that the corporation was insolvent at the time the contract was entered into.[1] An agreement to deliver stock free and clear of all incumbrances does not refer to incumbrances against the corporation.[2] The legality of the sale of stock is governed by the law of the state within which it is made.[3] It is no defense to a contract to buy stock for the vendee to allege that the directors have committed an *ultra vires* act in issuing other stock at a discount.[4]

§ 336. Difficulty is often experienced in determining what the measure of damages is for breach of a contract relative to the sale of stock. In certain cases, where the stock has been delivered or tendered, the measure of damages is the purchase price fixed by the contract itself.[5] The vendor may tender the stock to the vendee and

fore three years from date, certain stock at a certain price, interest to be paid by the vendee in the meantime, and the stock to be deposited in escrow, cannot recover the price at the end of the three years if he has not deposited the stock in escrow as agreed. Umfrid *v.* Brooks, 14 Wash. 675 (1896). An agreement of a stockholder that if he sells a certain amount of his stock he shall sell to another stockholder his remaining stock does not apply where he transfers only a portion of the first-mentioned stock. Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896); aff'd, 159 N. Y. 287 (1899). See also § 766*c*, *infra.*

[1] See § 350, *infra.*

[2] Williams *v.* Hanna, 40 Ind. 535 (1872).

[3] Dow *v.* Gould, etc. Co., 31 Cal. 629, 653 (1867). See also § 343, *infra.*

[4] Faulkner *v.* Hebard, 26 Vt. 452 (1854). That fraud is a defense, see §§ 349–357, *infra.*

[5] Where the stock is sold to be delivered thereafter, and the vendee refuses to accept the stock, the vendor may tender the stock and then sue for the contract price. In Mobley *v.* Morgan, 6 Atl. Rep. 694 (1886), the court said: "The court refused to instruct the jury that it was necessary for Morgan to sell the stock on the market for the best price he could get, and that the measure of damages would be the difference between the price thus obtained and the contract price; and this refusal is assigned for error. Of course, the seller would be at liberty, after tender and refusal, to adopt this course; but it was not essential to his right of action. The measure of damages was the difference between the market price of the stock at the time of the breach and the contract price. This is the ordinary rule; but there was evidence that the stock had no value, and there is no certainty — indeed, no proof — that upon a resale any price could have been obtained for the stock, or that it had any market value when Parker finally refused to take it. Under these circumstances we see no reason why the price agreed to be paid should not be adopted as the measure of damages, if that was the only mode by which full compensation could be made for the breach of contract by the purchaser." 67 N. E. Rep. 246.

In Barnes *v.* Brown, 130 N. Y. 372 (1892), the court said: "In the absence of special circumstances in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract where consideration has been received, the value of the property at the time of such conversion or default, with interest, is

sue for the price, or may sell after notice to the vendee and then sue for the difference, or may retain the stock and sue for the dif-

the measure of compensation." As to remedies for a breach, see also Benjamin on Sales. For the measure of damages, see ch. XXXV, *infra*. The vendor of stock which has been delivered to a third person, according to the agreement, may sue for the price, irrespective of the market value of the stock. Obery *v.* Lander, 179 Mass. 125 (1901). As regards the pleadings in an action by a vendor of stock to recover damages against the vendee for refusal to accept and pay for stock which the latter had agreed to accept at a stated price, one year from date, if the former desired to sell, see Struthers *v.* Drexel, 122 U. S. 487 (1887). The vendor may claim damages for a breach, in that the vendee does not pay the contract price and take the stock, or he may bring an action "in effect for the specific performance thereof," in which case he must allege readiness to deliver the stock. Corning *v.* Roosevelt, 11 N. Y. Supp. 758 (1890). For breach the vendor may tender the stock and then sue for the entire price. The judgment will allow the vendor to retain the stock until the judgment is satisfied. Finlayson *v.* Wiman, 84 Hun, 357 (1895). Where the vendee agrees to give a note and the stock as collateral, but gives the note only, the vendor may return the note and sue at once for the price. Rennyson *v.* Reifsnyder, 1 Pa. Dist. Rep. 758 (1892). The court will compel the vendee to take and pay for stock where it would compel the vendor to deliver the stock if he defaulted on the contract to sell. Bumgardner *v.* Leavitt, 35 W. Va. 194 (1891). Where the vendor gets judgment for the price of the stock sold but not delivered, the court will order him to deposit the stock with the court or lose his judgment. McKeever *v.* Dady, 18 N. Y. Supp. 439 (1892).

In Perin *v.* Megibben, 53 Fed. Rep. 86 (1892), the court granted specific performance of a contract to sell stock in behalf of the vendor and against the vendee. The court said: "The agreement was in form a contract to buy all the shares of stock in the incorporated companies. The language of the contract shows that the real agreement was to buy certain real estate, together with the personal property connected with its use for milling and distilling purposes. Without discussing the question whether the sale of shares of stock can be specifically enforced in equity, it is sufficient to say that the sale here was in fact a sale of real estate, and the circumstance that personalty was included in the sale would not affect the power of a court of equity to afford relief by requiring specific performance." The measure of damages for breach of a contract to purchase stock is the difference between the contract price and the market value of the stock at the time and place of delivery, with interest. Corser *v.* Hale, 149 Pa. St. 274 (1892). Where a vendee refuses to carry out an executory contract for the sale of shares, the measure of damages is the difference between the price as fixed by the contract and the value of the stock at the time of tender and refusal of the vendee to fulfill. See Barned *v.* Hamilton, 2 Ry. & Canal Cas. 624 (1841); Tempest *v.* Kilner, 3 C. B. 249 (1846), and Stewart *v.* Cauty, 8 M. & W. 160 (1841); Shaw *v.* Holland, 15 M. & W. 136 (1846). If a person sells and conveys property to a company to be paid for in stock, which the vendee refuses to deliver, the vendor may recover the value of the stock. Humaston *v.* Telegraph Co., 20 Wall. 20 (1873). Where an agent to sell stock is to have any excess of price over a sum named to him by the vendor, and the agent finds a customer at an advanced price and the vendor refuses to

ference between the contract and market price.[1] The supreme court of the United States lays down the rule that the vendor of stock, upon the vendee refusing to fulfill, may sell the same to the highest bidder at a time and place mentioned in a notice to the vendee, and may hold the latter liable for the difference between the price agreed upon and the price realized at such sale. At such sale the vendor may purchase, wide publicity of the notice having been given and full opportunity for competition at the sale having been offered.[2] The statute of limitations may be a bar to the action.[3]

sell, the agent may recover such profit as he lost thereby. Mattingly *v.* Roach, 84 Cal. 207 (1890). See also, as to agents, § 334, *supra*. Where the vendor, after tendering the stock, assumes to be the owner and directs a sale and gives a proxy to vote, he can recover only the difference between the market price at the time of delivery and the contract price. Hamilton *v.* Finnegan, 91 N. W. Rep. 1039 (Iowa, 1902).

[1] See the cases in the preceding note. The vendor's remedies for a breach of a contract to buy stock are: (1) To hold the stock for the vendee and require payment of the entire price; (2) to sell after notice to the vendee and sue for the difference between the contract price and the selling price; (3) to retain the stock and sue for the difference between the contract price and the market value price. *In re* Ives, 11 N. Y. Supp. 650 (1890). No tender is necessary when the suit is for damages and the vendor intends to retain the stock. Nysewander *v.* Lowman, 124 Ind. 584 (1890). When suit is brought to recover the price of stock sold, a delivery or tender must be shown. Holmes, etc. Co. *v.* Morse, 53 Hun, 58 (1889). Where a party is sued on a note he may recoup by setting up that the note was given to plaintiff on plaintiff's agreement to assign and deliver certain shares of stock, which was not tendered until eight months after the time agreed upon. Hill *v.* Southwick, 9 R. I. 299 (1869). For failure to deliver, the measure of damages is the difference in the market value at the date of the contract and at the date fixed in the contract for the delivery, or the date of the breach of the contract. The price at which the vendee had resold is not admissible unless the vendor had notice thereof. Coffin *v.* State, 144 Ind. 578 (1896). An agreement to sell a certain amount of stock in a corporation to be organized with a specified capital is not fulfilled by tendering stock of a corporation with a less capital. Faulkner *v.* Robinson, 70 S. W. Rep. 990 (Tex. 1902).

[2] Clews *v.* Jamieson, 182 U. S. 461, 497, (1901).

[3] The statute of limitations runs against a receipt reciting a first payment of stock "standing in my name but owned by him, and he remaining responsible for the balance of the instalments when called in," there being no agreement as to the future disposition of the stock and of dividends. Cone *v.* Dunham, 59 Conn. 145 (1890). A sale of a certificate to the effect that when stock is issued a specified amount will be issued to the holder is a valid sale and is not defeated by the statute of limitations. Meehan *v.* Sharp, 151 Mass. 564 (1890). Where certain owners of stock place it in the hands of a trustee for sale and the trustee invites subscriptions thereto, the subscription contract providing for payment of one-third down and the balance when called for, the statute of limitations is no bar to an action for the two-thirds, although six years have elapsed since

The vendee's remedy for a failure on the part of the vendor to deliver is an action for damages[1] or a bill in equity to obtain specific performance.[2] In almost all cases, however, his remedy is an action for damages only, inasmuch as specific performance of a sale of personalty is rarely granted.

§ 337. *Specific performance as a remedy for breach of a contract to sell stock.*— It frequently happens that the person who has contracted to purchase stock is particularly anxious to procure that stock, and that, under the circumstances of the case, the stock is worth to him a value not to be compensated for by mere money damages. This cannot happen in the case of a contract to sell securities issued by the government, since they may be easily purchased in the market. Accordingly it is well established, both in

the first payment was made. Williams *v.* Taylor, 120 N. Y. 244 (1890). See also note 6, p. 660, *infra.*

[1] A person entitled by contract to purchase stock of another may collect damages against the latter for failure to comply with the terms of the agreement. Rand *v.* Wiley, 70 Iowa, 110 (1886). For failure to deliver, the measure of damages is the difference in the market value at the date of the contract and at the date fixed in the contract for the delivery, or the date of the breach of the contract. The price at which the vendee has resold is not admissible unless the vendor had notice thereof. Coffin *v.* State, 144 Ind. 578 (1896). The measure of damages in a suit brought by the purchaser of stock for failure of the vendor to fulfill is the difference between the contract price and the market value of the stock on the day of delivery. Market quotations are evidence of value of stock only when such quotations are based on actual sales. Where there have been no sales, evidence of a bid for the stock is not admissible, unless it is shown under what circumstances the bid was made, and whether it was in good faith and with intent to fulfill. Wildes *v.* Robinson, 50 N. Y. App. Div. 192 (1900). In a suit by a purchaser of stock for failure of the seller to deliver, the damage is the difference between the purchase price and the actual value of the stock. Written reports of the corporation to public officials not purporting to give the value of the property are insufficient to prove value. Patterson *v.* Plummer, 10 N. Dak. 95 (1901). Where a person is paid for stock and fails to deliver, the measure of damages for a breach of the contract is what it would cost the party to purchase the stock which he is entitled to. If he cannot purchase it, then the par value of the stock is the measure of value, inasmuch as he would have had to pay that to the corporation in order to have had the stock issued to him. Barnes *v.* Seligman, 55 Hun, 339 (1890). Where a vendor of stock in a corporation which has a franchise, but nothing else, is entitled to two thousand shares of full-paid stock at a later date, according to the contract of sale, his measure of damages for failure of the vendee to deliver the two thousand shares is nominal damages, where there was no market or actual value for the stock. Barnes *v.* Brown, 130 N. Y. 372 (1892). Where the vendor of stock is unable to obtain the stock for delivery by reason of an injunction against the corporation, the vendee may sue for the return of the purchase-money. Rose *v.* Foord, 96 Cal. 152 (1892). That damages are a sufficient remedy, see 1 University Law Rev. 218 (1894).

[2] See next section.

England and America, that a contract for the sale of government securities will not be specifically enforced by a court of equity, but the vendee may sue the vendor in an action at law for damages for breach of contract.[1]

§ 338. An entirely different rule prevails as regards contracts for the sale of stock of private corporations. If the stock contracted to be sold is easily obtained in the market, and there are no particular reasons why the vendee should have the particular stock contracted for, he is left to his action for damages. But where the value of the stock is not easily ascertainable, or the stock is not to be obtained readily elsewhere, or there is some particular and reasonable cause for the vendee's requiring the stock contracted to be delivered, a court of equity will decree a specific performance and compel the vendor to deliver the stock.[2]

This rule, as applicable to contracts for the sale of railway stock, was clearly established in England in 1841, in the case of Duncuft *v.* Albrecht.[3] Contracts for the sale of stock in mining and other private corporations will also be specifically enforced under some circumstances.[4]

[1] Ross *v.* Union Pac. Ry., Woolw. 26, 32 (1863); s. c., 20 Fed. Cas. 1245, 1247; Cud or Cuddee *v.* Rutter, 1 P. Wms. 570 (1719); s. c., 5 Vin. Abr. 538 (1720); Dorison *v.* Westbrook, 5 Vin. Abr. 540 (1722); Cappur *v.* Harris, Bunb. 135 (1723); Buxton *v.* Lister, 3 Atk. 383 (1746). *Cf.* Doloret *v.* Rothschild, 1 Sim. & S. 590 (1824); Colt *v.* Nettervill, 2 P. Wms. 304 (1725). See also South, etc. Co. *v.* Wallington, 78 L. T. Rep. 426 (1898).

[2] Quoted and approved in Ryan *v.* McLane, 91 Md. 175 (1900).

[3] 12 Sim. 189 (1841); Parish *v.* Parish, 32 Beav. 207 (1863), granting also an accounting of dividends; Poole *v.* Middleton, 29 Beav. 646 (1861); Turner *v.* Moy, 32 L. T. Rep. 56 (1875); Beckitt *v.* Bilbrough, 8 Hare, 188 (1850), dictum. *Contra,* dictum in Ross *v.* Union Pacific Ry., Woolw. 26, 32 (1863); s. c., 20 Fed. Cas. 1245, 1247, per Miller, J. In Cheale *v.* Kenward, 3 De G. & J. 27 (1858), the court said: "There is no doubt that a bill will lie for a specific performance of an agreement to transfer railway shares. This was set at rest by Duncuft *v.* Albrecht, 12 Sim. 189 (1841)." Where the control of a railroad is deposited with a third party to be delivered to the vendee upon certain things happening, and such things do happen, he may have specific performance, the stock having no ascertainable value. Rumsey *v.* New York, etc. R. R., 53 Atl. Rep. 495 (Pa. 1902). In Leach *v.* Fobes, 77 Mass. 506 (1858), specific performance of a contract to convey land and stock was granted chiefly because of the land part of the contract. Todd *v.* Taft, 89 Mass. 371 (1863), decreed specific performance of contract to convey railway shares. See also Baldwin *v.* Commonwealth, 11 Bush (Ky.), 417 (1875); Ashe *v.* Johnson, 2 Jones, Eq. (N. C.) 149 (1855). As to when specific performance of a contract to sell stock will be specifically enforced, see also 1 White & T. Lead. Cas. 914-923, etc. As to possibility of mandatory injunction, see authorities in High on Injunctions.

[4] Treasurer *v.* Commercial Coal Min. Co., 23 Cal. 390 (1863). Specific performance of a contract to sell stock may be had where its value is not easily ascertainable. Manton *v.* Ray, 18 R. I. 672 (1894). See also Frue *v.* Houghton, 6 Colo. 318 (1882), and § 61, *supra.* Spe-

The various stockholders of a company may give interchangeably a first option of thirty days to purchase their shares of stock

cific performance of a contract relative to stock is not an absolute right and will not be granted if it would result in injustice to either party. Shinkle *v.* Vickery, 156 Mo. 1 (1900). Specific performance will be granted where the stock has no market value and cannot be purchased in the market; but where the contract is an unconscionable one and by mistake omits an important provision, specific performance will not be granted. Newton *v.* Wooley, 105 Fed. Rep. 541 (1900). An agreement of several parties to sell their property to a corporation in exchange for stock of the latter, the amount of stock going to each to be determined by arbitrators, will not be specifically enforced where the arbitrators have fixed the value in an illegal way. Any party may withdraw from such a contract prior to the time when it has been signed by all. Consolidated, etc. Co. *v.* Nash, 109 Wis. 490 (1901). Where a purchaser of stock knew or had reason to know that the stock was not owned by the vendor personally, but by a firm in which he was interested, the purchaser cannot have specific performance, but will be remitted to a court of law. Jones *v.* Tunis, 99 Va. 220 (1901). Specific performance will not be granted at the instance of the purchaser of stock where the purchase is from the committee of a pool of such stock, where it is shown that the pooling agreement required a vote of three-fourths of the stock in the pool before a sale could be made, and it is also shown that the contract of purchase was partly an option in that the purchaser was to forfeit a deposit he had already made, in case he did not fulfill, and it being further shown that in another suit the complainant had stated the value of the stock, and it being further shown that the purpose of the contract was to obtain control of a large system of railroads, including the board of directors. Ryan *v.* McLane, 91 Md. 175 (1900). Even though stock has no market value and no dividends have been paid, yet in an action for specific performance it must be alleged that the stock had no value that could be estimated in an action for damages. Moulton *v.* Warren, etc. Co., 81 Minn. 259 (1900). A corporation cannot have specific performance of an agreement of a person to purchase its debentures. The remedy is an action for damages. South, etc. Co. *v.* Wallington, [1898] A. C. 309, aff'g [1897] 1 Q. B. 692. Where an insolvent corporation which has never issued any certificates of stock resolves by a vote of its stockholders to apply its assets to the extent of their value to the payment of the debts, and that new stock be issued to the stockholders upon their paying therefor in full, and one stockholder sells his interest in the original stock, and the purchaser for seven years does not complain, he cannot, after the corporation has become prosperous, claim that he is entitled to the old stock or any interest in the corporation. Stoddard *v.* Decatur, etc. Co., 184 Ill. 53 (1900). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder and has issued all its stock to other parties who took with notice. It is unnecessary to bring into the suit the other parties who actually have the stock, the stock having been held by the company as collateral security. Morey *v.* Fish, etc. Co., 108 Wis. 520 (1901). See also § 58, *supra*. A contract between the owner of property and a promoter, by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in

whenever anyone desires to sell, each contracting for himself, the contract further providing that such thirty days are to commence

equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. Brehm *v.* Sperry, 92 Md. 378 (1901). As applicable to manufacturing corporations, see Chater *v.* San Francisco, etc. Co., 19 Cal. 219 (1861). Granted in a towboat association case in White *v.* Schuyler, 1 Abb. Pr. (N. S.) 300 (1865). Refused in the case of stock in a land association. Jones *v.* Newhall, 115 Mass. 244 (1874). And in a paper company. Noyes *v.* Marsh, 123 Mass. 286 (1877). See Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879), the court saying: "While the general rule is for courts of equity not to entertain jurisdiction for a specific performance on the sale of stock, this rule is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy." This case, however, was not a case of specific performance of a sale of stock, but of compelling the corporation to register a transfer. See also, in general, Austin *v.* Gillaspie, 1 Jones, Eq. (N. C.) 261 (1854); Nutbrown *v.* Thornton, 10 Ves. Jr. 160 (1804); Shaw *v.* Fisher, 5 De G., M. & G. 596 (1855); Wynne *v.* Price, 3 G. & Sm. 310 (1849); Wilson *v.* Keating, 7 W. R. 484 (1859); Oriental, etc. Steam Co. *v.* Briggs, 2 Johns. & H. 625 (1861); Paine *v.* Hutchinson, L. R. 3 Eq. 257 (1866); Shepherd *v.* Gillespie, L. R. 5 Eq. 293 (1867); Bermingham *v.* Sheridan, 33 Beav. 660 (1864); Strasburg R. R. *v.* Echternacht, 21 Pa. St. 220 (1853); Fallon *v.* Railroad Co., 1 Dill. 121 (1871); s. c., 8 Fed. Cas. 977. In regard to a specific performance of a trust of stock, see Ferguson *v.* Paschall, 11 Mo. 267 (1848); Cowles *v.* Whitman, 10 Conn. 121 (1834); Clark *v.* Flint, 39 Mass. 231 (1839); Mechanics' Bank *v.* Seton, 1 Pet. 299 (1828); Gage *v.* Fisher, 5 N. Dak. 297 (1895). Specific performance of a contract to sell stock will be decreed where the stock has no recognized market value and cannot be bought in the market. Goodwin, etc. Co.'s Appeal, 117 Pa. St. 514 (1888). Specific performance was refused in Eckstein *v.* Downing, 64 N. H. 248 (1886), there being no evidence that the vendee had any wish or reason for wishing to own that particular stock or stock in that particular corporation. See also Cruse *v.* Paine, L. R. 6 Eq. 641 (1868). Where a stockholder, who is also a director, contracts to give a person a certain amount of stock if he will do certain work for the corporation, and the board of directors, including this director, discharge such person without cause, and thus prevent completion, a court of equity will compel a delivery of the stock. Price *v.* Minot, 107 Mass. 49 (1871). In suits in equity to compel a transfer of stock, parties interested by a purchase from the defendant should be brought in. O'Connor *v.* Irvine, 74 Cal. 435 (1887). Specific performance of a contract to sell stock will be decreed where the property of the corporation is real estate — a distillery — and the real transaction is a sale of the entire property. Megibben *v.* Perin, 49 Fed. Rep. 183 (1892). Specific performance will not be decreed where there is doubt both as to the contract actually being made and as to the consideration, one party being dead. Hibbert *v.* Mackinnon, 79 Wis. 673 (1891). Where a debtor agreed to transfer stock as collateral security for a debt, and died insolvent before doing so, the court refused to enforce specific performance of the agreement to the injury of other creditors. City F. Ins. Co. *v.* Olmstead, 33 Conn. 476 (1866). The vendee may file a bill in equity for a specific per-

in case of the death of a stockholder, so far as his stock was concerned, and they may further contract that another person is to

formance. Willis *v.* Jefferis, 51 Atl. Rep. 1110 (N. J. 1902). Specific performance of a contract to deliver stock for services was granted in Le Vie *v.* Fenlon, 39 N. Y. Misc. Rep. 265 (1902). In general, see also Stevens *v.* Wilson, 18 N. J. Eq. 447 (1867). An alleged vendee's suit for a dividend is *res judicata* as to a suit for the stock. Shepard *v.* Stockham, 45 Kan. 244 (1891).

Where a person claims that he has a contract for the purchase of stock which the stockholder vendor is about to sell or has already sold to others, and the first-named person brings a suit in equity to obtain the stock, he must show, first, that it is a case for specific performance; and second, that the stock was impressed with a trust, and that the last purchaser took with notice of that trust. See 1 White & T. Lead. Cas. 914, 919, and Pooley *v.* Budd, 14 Beav. 34, 43, 44 (1851).

Lindley on Company Law (5th ed.), pp. 499, 500, states the rule as follows: "A contract for the sale of shares by one individual to another is distinguishable in many respects from a contract for the allotment and acceptance of shares in a company, and Lord Romilly refused to decree specific performance of a contract of this kind, on the ground that the decree would be ineffectual, as the shares might be transferred immediately after the contract was performed. Sheffield Gas, etc. Co. *v.* Harrison, 17 Beav. 294 (1853); Bluck *v.* Mallalue, 27 Beav. 398 (1859); Columbine *v.* Chichester, 2 Ph. Ch. 27 (1846). . . . In this last case there were circumstances to show that specific performance was impossible." Page 586.—"In order that specific performance of an agreement to take or deliver shares in a company may be decreed, it is necessary that the agreement should be concluded and binding (which it was not in Oriental, etc. Co. *v.* Briggs, 4 De G., F. & J, 191—1861), and be untainted by fraud (which was not the case in New Brunswick, etc. Co. *v.* Muggeridge, 4 Drew. 686—1859, and 1 Drew. & Sm. 363; or in Maxwell *v.* Port Tennant, etc. Co., 24 Beav. 495—1858), or unfairness (as to agreements between co-directors, see Flanagan *v.* Great Western Ry., L. R. 7 Eq. 116—1868), and be capable of being performed by the defendant (Ferguson *v.* Wilson, L. R. 2 Ch. App. 77—1866; Columbine *v.* Chichester, 2 Ph. Ch. 27—1846), and not involve any breach of trust (Fry, Sp. Perf., p. 177, 2d ed.; and see Flanagan *v.* Great Western Ry., L. R. 7 Eq. 116—1868), or performance by either party of obligations the performance of which a court cannot practically enforce (Flanagan *v.* Great Western Ry., 7 Eq. 116—1868; Stocker *v.* Wedderburn, 3 K. & J. 393—1857)." Page 587.—"An action will lie for specific performance of a contract for the purchase and sale of shares, if it is capable of being performed (see as to this, Bermingham *v.* Sheridan, 33 Beav. 660—1864, and compare Poole *v.* Middleton, 29 Beav. 646—1861); . . . and the purchaser will be compelled to pay the price, although it may have been expressed to be paid in the deed of transfer, if, in fact, it was not thus paid (Wilson *v.* Keating, 27 Beav. 121, and 4 De G. & J. 588—1859). The case seems, at first sight, to have been a hard one upon the defendant; but the deed stated that *he* had paid the money, and this he knew was not the fact. He could not, therefore, be treated as having been misled by the plaintiff or by the contents of the deed; and will be compelled to accept a transfer of the shares he has bought and to indemnify the seller from all liabilities accruing subsequently to the sale (Wynne *v.* Price, 3 De G. & S. 310—1849). As to the right of a mortgagee of shares to an indemnity from his mortgagor, see

have a similar option in case the first option is not exercised. A party entitled to such option may have specific performance of it.[1]

In Pennsylvania it is held that specific performance will be granted at the instance of the vendee in a contract for the sale of five-sixths of the capital stock of the company and a portion of its bonds, inasmuch as such stock and bonds cannot be secured el se-

Phené *v.* Gillan, 5 Hare, 1 (1845); and the seller will be compelled to account for any moneys he may have received from an improper subsequent sale to another person (Beckitt *v.* Bilbrough, 8 Hare, 188 — 1850). The court has, however, refused to compel a purchaser of scrip to accept shares, and indemnify the seller from calls upon them (Jackson *v.* Cocker, 4 Beav. 59 — 1841. Compare this with the last case); and to compel an allottee of shares to accept them, and to execute the company's deed in respect of them (Sheffield, etc. Gas Co. *v.* Harrison, 17 Beav. 294 — 1853); and to compel the promoters of a company to deliver shares to a subscriber to the company (Columbine *v.* Chichester, 2 Ph. Ch. 27 — 1846. In this case, however, the promoters did not appear to have any shares which they could allot). Neither will the court interfere to compel the completion of a gratuitous and intended transfer (see Milroy *v.* Lord, 4 De G., F. & J. 264— 1862)."

[1] The mutual covenants of the contract are a sufficient consideration to support it. Scruggs *v.* Cotterill, 67 N. Y. App. Div. 583 (1902). In the case of Jones *v.* Brown, 171 Mass. 318 (1898), in a close corporation, the stockholders made a contract, the essential parts of which are set forth in the opinion of the court, providing for the purchase of the stock of a certain stockholder in case of his death, and for the purchase of the stock of any other stockholder who ceased to be connected with the corporation. The former stockholder having died, the court granted specific performance of the contract and compelled his estate to deliver the stock upon payment of the specified price. A court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration. Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899). Where one person advances money to another to purchase a certain stock on an agreement that they will co-operate, and in case the latter wishes to sell he will not sell to unfriendly parties without giving the former the first chance to purchase, and the stock is in the possession of the former as security for the loan, a sale by the latter to an unfriendly party with notice of the facts is not sufficient to sustain a bill in equity to compel the first-named party to transfer the stock to such purchaser. The court said: "One or more stockholders in a corporation may agree to stand together in carrying out an honest business policy consistent with what they believe to be to the best interests of all the stockholders. This was not a pooling agreement, to vest the government of the corporation for a time in certain members of it, or to yield the control to a few who might dominate, regardless of the interests of the many. It was intended to maintain a status of independence for the railway company that it might be operated under the purposes of its charter." Rigg *v.* Reading, etc. Ry., 191 Pa. St. 298 (1899). See also § 622, *infra;* 54 Atl. Rep. 488.

where and a money judgment would not afford a substitute for the sale; and it is further held that, even though the vendor has sold the stock to other parties, yet, if the latter took with notice of the prior contract, they may be joined as parties defendant and compelled to deliver up the stock.[1]

Specific performance is often granted as between several parties each of whom is entitled to a certain part of stock which is received by or held in the name of one of them. A court will compel him to distribute the stock in accordance with the contract.[2] Such cases arise often in "pools" of stock, and in selling property to the company in consideration of stock, and in buying stock in the names of other persons or agents. Thus, where parties to a construction contract agreed to divide the stock in a certain way, a court of equity will grant specific performance and order transfers of the stock, it having no market value and the remedy at law being inadequate.[3]

Specific performance may also be said to be granted where a corporation is ordered by a court to issue certificates of stock to its stockholders.[4] Principles of law somewhat similar to the above are involved in suits brought by a purchaser of stock to compel the corporation to transfer the stock on the corporate books,[5] and in suits instituted by claimants of stock against other parties claiming the same stock;[6] or by the corporation to recover back stock improperly issued.[7]

[1] Northern, etc. R. R. *v.* Walworth, 193 Pa. St. 207 (1899). The court held also that the fact that the contract recited that the seller merely claimed to be the owner of the stock did not render the contract so uncertain as to prevent specific performance, and that the fact that the contract provided that the buyer purchased only on condition that his examination of the books should be satisfactory and should corroborate the correctness of a statement as to liabilities, did not prevent specific performance, and that the fact that the seller agreed that all debts of the company should be paid on the day of the transfer did not prevent specific performance.

[2] Where it is agreed between two brothers that one shall buy stock in a corporation in joint account, and this is done, and the one purchasing charges his brother with the cost of the portion of the stock, and this account is accepted, a suit in equity lies to obtain the stock upon payment therefor, the corporation being a close corporation. Rand *v.* Whipple, 71 N. Y. App. Div. 62 (1902). Where, by contract between two stockholders owning an equal share in the corporation, future stock acquired by either of them is to belong one-half to each, such contract may be specifically enforced. Stewart *v.* Pierce, 89 N. W. Rep. 234 (Iowa, 1902). See also § 320, *supra*; 78 N. Y. App. Div. 219.

[3] Krohn *v.* Williamson, 62 Fed. Rep. 869 (1894); aff'd, 66 Fed. Rep. 655. See also §§ 333, 334, *supra*, and § 705, *infra*, and Jones *v.* Brown, 171 Mass. 318 (1898).

[4] See § 61, *supra*, and § 766c, *infra*, relative to contractors.

[5] See § 391, *infra*.

[6] See § 391, *infra*.

[7] See § 387, *infra*.

Specific performance will not be granted where the purpose of the purchaser of stock is to obtain control of a national bank, when the change in management would probably be to the detriment of the bank.[1] Where the vendor's contract is to deliver stock and construct a railway, the court will not decree specific performance, since part of the contract is never the subject of such compulsory performance.[2] Specific performance of a contract to deliver bonds will not be granted where the party seeking performance is not himself able to fully perform.[3] A vendor cannot have specific performance where he had told the vendee that a certain person of responsibility had offered a higher price for the stock, when in fact such person, after making the offer, had investigated and then had withdrawn the offer.[4] If the vendor is not in possession of the desired stock, specific performance will not be granted,[5] except to the amount of stock which he has.[6] But where a person, who is under contract to deliver certain stock, gives the stock to a relative for nothing, the party entitled to the stock by contract may compel such relative to give up the stock.[7] Although a court of equity refuses to grant specific performance, yet it will not always send the party to a court of law, but in some of the states will grant him damages.[8] Where a vendee of stock seeks specific performance he

[1] Foll's Appeal, 91 Pa. St. 434 (1879), the court saying: "I know of no instance in this state in which a court of equity has decreed specific performance of a sale of stock."

[2] Ross *v.* Union Pac. Ry., Woolw. 26 (1863), per Miller, J.; s. c., 20 Fed. Cas. 1245. The court will not decree specific performance of a contract of a company to deliver its stock to a constructor of its road, even though the latter, the complainant, is willing to perform. The court cannot compel the latter to perform, and hence will not tie up the stock of the former. Peto *v.* Brighton, etc. Ry., 1 Hem. & M. 468 (1863).

[3] Stokes *v.* Stokes, 148 N. Y. 708 (1896).

[4] Moline Plow Co. *v.* Carson, 72 Fed. Rep. 387 (1895).

[5] Columbine *v.* Chichester, 2 Ph. Ch. 27 (1846). Specific performance as to issuing stock is not decreed when performance is impossible. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890). An injunction against a transfer in the meantime may be granted. Ruttman *v.* Hoyt, N. Y. L. J., July 19, 1890.

[6] Turner *v.* Moy, 32 L. T. Rep. 56 (1875). In the case of Lamb, etc. Co. *v.* Lamb, 119 Mich. 568 (1899), where a party claiming to be the real owner of stock filed a bill to compel the holder of such stock to deliver up the same, but it appeared that the defendant had already disposed of the stock before the commencement of the suit, the court refused to grant relief, even though it further appeared that the defendant had other stock in the same corporation equal in amount to the stock in issue.

[7] Graham *v.* O'Connor, 73 L. T. Rep. 712 (1896).

[8] Wonson *v.* Fenno, 129 Mass. 405 (1880). *Cf.* Austin *v.* Gillaspie, 1 Jones, Eq. (N. C.) 261 (1854). Even though the vendor of stock in an agreement providing for general releases and the giving of certain new notes cannot obtain a specific performance, the court being

must tender the price, and cannot first demand that the stock be deposited in a bank.[1] In a suit for specific performance of a sale of stock, the complaining vendee may have a preliminary injunction against the vendor's selling to others.[2] Where a vendee of stock brings action for a specific performance, and obtains judgment, the judgment should be in the alternative, either for the stock or for damages specified in the decree.[3] In a suit by a claimant of stock to obtain the stock from another person, the corporation is a proper but not a necessary party.[4] But in a suit to compel a corporation to transfer to the plaintiff stock standing on its books in the name of a third person, the corporation and the third person are both necessary parties.[5] Laches may constitute a bar to the bill in equity to enforce specific performance.[6] Where a person

unable to grant complete specific performance, yet the court may retain the suit and assess damages for that part of the contract which cannot be specifically enforced. Lyle *v.* Addicks, 62 N. J. Eq. 123 (1901).

[1] Wescott *v.* Mulvane, 58 Fed. Rep. 305 (1893), holding also that if the vendee, after obtaining an injunction against a sale of the stock by the vendor to others, withdraws his demand for specific performance and asks merely for damages, the injunction will be dissolved.

[2] McLure *v.* Sherman, 70 Fed. Rep. 190 (1895). See also §§ 363, 391, 579, *infra.*

[3] Eastman *v.* Reid, 101 Ala. 320 (1893).

[4] Williamson *v.* Krohn, 66 Fed. Rep. 655 (1895); Johnson *v.* Kirby, 65 Cal. 482 (1884). In a suit between stockholders as to the title to stock the corporation is a proper party defendant, but is a nominal party, and is not considered in determining whether the suit is removable to the United States court. Higgins *v.* Baltimore, etc. R. R., 99 Fed. Rep. 640 (1900). And see §§ 356, 363, 391, 579, *infra.* The corporation is a proper but not a necessary party to an action by one person to compel another person to transfer stock to him in accordance with the contract. Sayward *v.* Houghton, 82 Cal. 628 (1890). Where a citizen of Wisconsin claims stock in a Wisconsin corporation as against a citizen of Illinois in whose name the stock stands on the corporate books, the corporation is a necessary party defendant and the case cannot be removed to the federal courts. Rogers *v.* Van Nortwick, 45 Fed. Rep. 513 (1891). The corporation is a proper party defendant. Kendig *v.* Dean, 97 U. S. 423 (1878); Budd *v.* Munroe, 18 Hun, 316 (1879); Crump *v.* Thurber, 115 U. S. 56 (1885). The reason of this rule is that complete possession of the stock can be obtained only by obtaining a transfer of that stock on the corporate books to the plaintiff. Where, in a suit for specific performance, the corporation is joined as a party defendant, in order to obtain a transfer on the books, it is a necessary party, and the other defendant cannot remove the case to the federal court if the complainant and the corporation are citizens of the same state. Patterson *v.* Farmington, etc. Ry., 111 Fed. Rep. 262 (1901).

[5] St. Louis, etc. Ry. *v.* Wilson, 114 U. S. 60 (1885).

[6] Seven years' delay in bringing suit for specific performance is a bar. York *v.* Passaic, etc. Co., 30 Fed. Rep. 471 (1887). Five years' delay held fatal where "the relations of the parties have changed and the stock has greatly appreciated in value." Mundy *v.* Davis, 20 Fed. Rep. 353 (1884). Where a person sells stock to be delivered within

claims to hold stock in a corporation, as against another person, and sues the corporation without joining the second claimant, the latter is not bound by the judgment, even though he is notified of the suit, it appearing that he was not allowed to take part in the trial.[1] A suit by the purchaser of a certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication.[2] Where, pending an appeal from a decree ordering a person to turn stock over to another, the former pays assessments on the stock, he can recover these assessments from the latter if the decree is affirmed.[3] If a decree directs the transfer of certain stock in the distribution of an estate, and the corporation makes such transfer, and thereafter the decree is reversed on appeal, the executors may bring suit to

a reasonable time, and receives the money for it, but is unable to perform his contract by reason of an injunction, the statute of limitations begins to run from the vendee's demand for the return of the purchase-money. Rose *v.* Foord, 96 Cal. 154 (1892). Three years' delay in bringing action for specific performance, the stock in the meantime having increased tenfold in value, is fatal. Rogers *v.* Van Nortwick, 87 Wis. 414 (1894). Specific performance will not be granted to the vendee of stock where he has delayed for over two years in commencing suit and in the meantime the situation has materially changed and the vendee commenced the suit for the benefit of other parties. Ringler *v.* Jetter, 35 N. Y. Misc. Rep. 750 (1901). Where one of the partners in a firm organized to locate, develop and operate mines does not turn into the firm a mine located by him, but transfers the same to a corporation for stock, and the other partners delay for two years after knowledge thereof before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money and the stock may have passed into other hands, the court will refuse relief on the ground that the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to claim an interest if it turned out to be valuable. Curtis *v.* Lakin, 94 Fed. Rep. 251 (1899). A court of equity may enforce a written agreement for the delivery of stock. A court of equity has jurisdiction although the party who contracted to deliver the stock has disposed of the stock for cash. The lapse of time is no bar to the suit, there being a complete breach of trust, unless such lapse is exceptionally great, the facts having been concealed. Wood *v.* Perkins, 57 Fed. Rep. 258 (1893). See also note 3, p. 751, *supra.*

[1] Fifth, etc. Society *v.* Holt, 184 Pa. St. 572 (1898).

[2] Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897). A citizen of Alabama cannot maintain in the courts of Alabama a suit to enjoin non-residents from transferring stock in a non-resident corporation where the defendants are not personally served within the state. Rucker *v.* Morgan, 122 Ala. 308 (1899). Where a corporation has not yet issued stock as called for by a contract, a claimant of such stock may bring suit in the state where corporation was organized to obtain the stock, even though the other claimant is a non-resident. Jennings *v.* Rocky Bar, etc. Co., 70 Pac. Rep. 136 (Wash. 1902). See §§ 12, 363; 44 S. E. Rep. 20.

[3] Irvine *v.* Angus, 93 Fed. Rep. 629 (1899).

have the transfer canceled.[1] Where a sale of stock is decreed and an appeal taken and a bond given on appeal, and the stock depreciates during the appeal and the decree is affirmed, the liability on the bond is the amount of the depreciation.[2]

§ 339. *Seventeenth section of statute of frauds as affecting sales of stock.*— In England the rule is firmly established that the seventeenth section of the statute of frauds, relating to contracts for the sale of "goods, wares, and merchandise," does not apply to sales of stock. No delivery, payment of earnest money, or memorandum in writing is necessary in order to render the contract of sale valid. This principle of law was doubted in the early cases,[3] but was determined by the case of Humble *v.* Mitchell, in 1839.[4] In 1838 this question arose in this country, apparently for the first time, and it was decided in Tisdale *v.* Harris,[5] chiefly on the authority of the early English cases, that a contract for the sale of stock was within the seventeenth section of the statute of frauds. This decision has been uniformly followed in America.[6]

[1] The suit is properly in equity. Ashton *v.* Heggerty, 130 Cal. 516 (1900). Under the statute of California, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties. Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). See also § 330, *supra*.

[2] Welch *v.* Welch, 60 S. W. Rep. 409 (Ky. 1901).

[3] Mussell *v.* Cooke, Finch's Prec. in Ch. 533 (1720), holding that the statute applied, but was not properly pleaded; Pickering *v.* Appleby, 1 Com. Rep. 353 (1721), not decided, the judges being divided six and six; Colt *v.* Nettervill, 2 P. Wms. 304 (1725), not decided, the lord chancellor saying it was too difficult to decide on a demurrer; Crull *v.* Dodson, Sel. Cas. Ch. t. King (2d ed., p. 113 — 1725), statute held to apply.

[4] 11 A. & E. 205, followed in Duncuft *v.* Albrecht, 12 Sim. 189 (1841), the court saying that the statute applies only to goods capable of part delivery; Hibblewhite *v.* McMorine, 6 M. & W. 200, 214 (1840); Tempest *v.* Kilner, 3 C. B. 249 (1846); Heseltine *v.* Siggers, 1 Exch. 856 (1848).

[5] 37 Mass. 9.

[6] Baltzen *v.* Nicolay, 53 N. Y. 467 (1873), rigidly applying the rule; North *v.* Forest, 15 Conn. 400 (1843), where the court said: "Such contracts fall clearly within the mischiefs which the legislature by the statute intended to remedy. There is as much danger of fraud and perjury in the parol proof of such contracts as in any other;" Pray *v.* Mitchell, 60 Me. 430 (1872); Fine *v.* Hornsby, 2 Mo. App. 61 (1876); Colvin *v.* Williams, 3 Har. & J. (Md.) 38 (1810); Sherwood *v.* Tradesman's Nat. Bank, 16 N. Y. W. Dig. 522 (1883); French *v.* Sanger, N. Y. L. J., July 22, 1892. *Cf.* Brownson *v.* Chapman, 63 N. Y. 625 (1875). *Contra*, dictum, Vawter *v.* Griffin, 40 Ind. 593, 602 (1872). See Reed, Stat. of Frauds, § 234; Hagar *v.* King, 38 Barb. 200 (1862), holding that the sale of railroad bonds is within the statute. An oral agreement to sell stock, the price being more than $50, is void under the statute of frauds, even though the

A broker, however, as a common agent, may make the memorandum for both parties.[1] A part payment of the consideration makes the contract valid,[2] and a payment in property[3] or services[4] suffices. The usual transfer on the back of a certificate of stock, when signed by the stockholder, is sufficient to satisfy the statute of frauds.[5] The statute does not apply as between partners for the

agreement involved other stock which was actually delivered and paid for. Tompkins *v.* Sheehan, 158 N. Y. 617 (1899). A sale of stock is within the meaning of the statutes of frauds relative to the sale of goods. Raymond *v.* Colton, 104 Fed. Rep. 219 (1900). A subscription for stock is not a contract for the sale of goods, etc., within the meaning of the statutes of fraud. Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893). In Florida the statute applies, the word "personal" property being used. Southern Life Ins. Co. *v.* Cole, 4 Fla. 359, 378 (1852). See also Mason *v.* Decker, 72 N. Y. 595 (1878), affirming 10 Jones & S. 115; Johnson *v.* Mulry, 4 Rob. (N. Y.) 401 (1867), holding that the New York Stock Jobbing Act (Laws N. Y. 1858, ch. 134) did not affect the application of the statute of frauds. The statute is not sufficiently pleaded by alleging that the contract of sale of stock "was void in law and not binding upon him." Vaupell *v.* Woodward, 2 Sandf. Ch. 143 (1844). The question of whether there was a delivery sufficient to take a case of sale of stock out of the statute of frauds was submitted to the jury in Hinchman *v.* Lincoln, 124 U. S. 38 (1888), discussed in N. Y. D. Reg., Jan. 28, 1888. A contract to sell stock at the vendee's option within three years is not void by the statute of frauds, since the option may be exercised within a year. Seddon *v.* Rosenbaum, 85 Va. 928 (1889). A subscription payable when the road reaches a certain point becomes absolutely payable then upon demand. The statute of frauds does not apply to such a subscription. Webb *v.* Baltimore, etc. R. R., 77 Md. 92 (1893).

[1] Colvin *v.* Williams, 3 Har. & J. (Md.) 38 (1810). Without a memorandum in writing a contract for the sale of stock is not enforceable, although made in the Stock Exchange, whose rules provide that the contract shall be enforceable. Ryers *v.* Tuska, 14 N. Y. Supp. 926 (1891). Where a stockholder in a letter offers a commission to a broker to sell his stock, this is sufficient to satisfy the statute of frauds. Jones *v.* Wattles, 92 N. W. Rep. 765 (Neb. 1902).

[2] Thompson *v.* Alger, 53 Mass. 428 (1847). A check is a part payment, taking a sale of stock out of the statute of frauds. McLure *v.* Sherman, 70 Fed. Rep. 190 (1895). An oral agreement to purchase stock is void by the statute of frauds, notwithstanding the vendor claims that he resigned as president and delivered the stock in escrow, there being a conflict of testimony on that subject. Reynolds *v.* Scriber, 69 Pac. Rep. 48 (Oreg. 1902).

[3] Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857).

[4] White *v.* Drew, 56 How. Pr. 53 (1878), holding that the furnishing of reliable information is sufficient.

[5] Flowers *v.* Steiner, 108 Ala. 440 (1895). Where stock is sold and the certificate transferred to the vendee, and is then attached to a note given in payment of part of the purchase price, this constitutes a delivery and acceptance of the stock, and the statute of frauds does not invalidate the sale. Dinkler *v.* Baer, 92 Ga. 432 (1893). In Cameron *v.* Tompkins, 72 Hun, 113 (1893), it was held that the statute of frauds prevented the collection of a note which was given in payment for stock, even though the stock was collateral security for the note, and even though there were letters prior to the sale in which

purpose of buying stock.[1] A contract for the sale of stock in a corporation not yet incorporated has been held not to be within the statute.[2] The statute must be pleaded in order to be effective as a defense.[3] The assignee of a contract for the sale of stock, void by the statute of frauds, takes nothing by the assignment.[4] An agreement by the vendor of stock to take it back at any time is not affected by the statute, and such an agreement is a part of the executed sale.[5] Where the vendor of stock agrees to take it back,

the proposed sale was referred to. The court said: "A contract to sell shares of stock in a private corporation is within the third section of the statute of frauds of the state of New York."

[1] Tomlinson *v.* Miller, 7 Abb. Pr. (N. S.) 364 (1869). Nor as between persons, one of whom buys stock in his own name for the joint benefit of both. Stover *v.* Flack, 41 Barb. 162 (1862).

[2] Gadsden *v.* Lance, McMull. Eq. (S. C.) 87 (1841); Green *v.* Brookins, 23 Mich. 48, 54 (1871), where a person was induced to subscribe on parol contract that a purchaser for the stock would afterwards be found. In Massachusetts, on similar facts, except that a certain person agreed to purchase, a contrary decision was rendered. Boardman *v.* Cutter, 128 Mass. 388 (1880).

[3] Porter *v.* Wormser, 94 N. Y. 431, 450 (1884).

[4] Mayer *v.* Child, 47 Cal. 142 (1873).

[5] Fitzpatrick *v.* Woodruff, 96 N. Y. 561 (1884); Thorndike *v.* Locke, 98 Mass. 340 (1867); Fay *v.* Wheeler, 44 Vt. 292 (1872); Bank of Lyons *v.* Demmon, Hill & D. Supp. 398 (1844). An agreement by promoters with a subscriber for stock that they would take the stock from him within a certain time, if he desired, is valid and enforceable. Meyer *v.* Blair, 109 N. Y. 600 (1888); Morgan *v.* Struthers, 131 U. S. 246 (1889). An agreement to take back bonds if the vendee desires to return them is valid and enforceable. Johnston *v.* Trask, 116 N. Y. 136 (1889). A guaranty that a vendor will take back the stock sold if the vendee desires is enforceable, even after the company sells out to another company for its shares of stock, the vendee not assenting. Richter *v.* Frank, 41 Fed. Rep. 859 (1890). An agreement of the vendor to buy back the stock is enforceable. Graham *v.* Houghton, 153 Mass. 384 (1891). A broker's agreement to take bonds back at a certain price at any time is enforceable, where the bonds were sold in 1888, and in 1890, when the bonds were tendered back, the broker delayed action and said he would take them at any time, and in 1895 a final tender was made, and in 1897 suit was commenced. Lydig *v.* Braman, 177 Mass. 212 (1900). In a suit on a note given in payment for stock the defendant may prove an oral agreement showing that he had a right to return the stock and demand back the note. Germania Bank, etc. *v.* Osborne, 81 Minn. 272 (1900). The joint guarantee by several parties of a specified dividend for a specified time on certain stock, in order to bring about its sale, together with their agreement to purchase the stock at par at the end of the time, and if they fail to do so to continue to pay the guaranteed dividends, is enforceable against all for the guaranteed dividends for the specified time, but as to the purchase is enforceable against those only upon whom a demand is made that they purchase the stock in accordance with the agreement. Rogers *v.* Burr, 105 Ga. 432 (1898). The Illinois statute against options does not apply to a contract by which the vendor of stock agrees to buy it back at the end of five years if the vendor so desires, the vendee on

and in the meantime the corporation fails and the stock is assessed, the vendor must refund to the vendee the assessment as well as

his part agreeing not to sell the stock to anyone in the meantime, without first offering it to the vendor. Ubben *v.* Binnian, 182 Ill. 508 (1899). An agreement of the vendor of bonds to buy them back at the same price at a certain time if the vendee wishes is not a gambling contract. Wolf *v.* Nat. Bank of Illinois, 178 Ill. 85 (1899). Where the vendee has the right to return the stock within a reasonable time, the statute of limitations on such right is not to begin to run until a reasonable time after the date of the contract. Oaks *v.* Taylor; 30 N. Y. App. Div. 177 (1898). The agreement of the vendor of stock to buy it back at the price paid, and one per cent. a month in addition, is not usurious as a matter of law. Phillips *v.* Mason, 66 Hun, 580 (1893). Where the vendor agrees to refund the money upon the return of the stock sold, the vendee cannot sue for the money unless he returns the stock. Henderson *v.* Wheaton, 139 Ill. 581 (1891). Where stock is sold with a contract on the part of a vendor that he will repurchase it if desired "at the end of one year," the time may be extended by oral agreement. Weld *v.* Barker, 153 Pa. St. 465 (1893). The vendee, in enforcing the contract of the vendor to take the stock back, must make and allege a tender. Taylor *v.* Blair, 59 Hun, 347 (1891). An agreement of the vendor to repurchase the stock at the option of the purchaser at the end of one year becomes enforceable at the end of one year, excluding the day of the contract from the count. A custom of brokers to the contrary does not apply to such a transaction. An extension of the time by the original vendor by agreement does not waive his rights. Weld *v.* Barker, 153 Pa. St. 465 (1893). Where, however, the vendee turns in his stock on a reorganization and takes new stock, he cannot enforce the vendor's contract. Kolsky *v.* Enslen, 103 Ala. 97 (1894). Where a party has a right to return the stock and receive back his money, he may, after making a tender, do any acts in regard to the stock reasonably necessary to protect his interest, and yet not lose his right to rescind. But where he directs a sale of the stock, and gives a proxy thereon and attends meetings, he waives his right to rescind. Jessop *v.* Ivory, 158 Pa. St. 71 (1893). A receipt given by a vendor may, by its wording, be a contract on the part of the vendor to take the stock back if the vendee becomes dissatisfied. Jessop *v.* Ivory, 172 Pa. St. 44 (1895). Where it is agreed between the vendor and vendee stockholder that the money should be paid to the corporation in order to meet corporate debts, and the vendor agreed to repay the money if the stock became worthless, the statute of frauds does not prevent the vendee from recovering the money, even though the contract was oral. Kilbride *v.* Moss, 113 Cal. 432 (1896). Where a corporation issues stock in payment for a patent right, and agrees to take back the stock and pay the par value thereof at the end of five years, if the purchaser so wishes, the purchaser may enforce the agreement. Browne *v.* St. Paul Plow Works, 62 Minn. 90 (1895). A contract to repurchase stock may be assigned by the holder of the stock. Mitchell *v.* Taylor, 27 Oreg. 377 (1895). A verbal agreement to take the stock back is not good as against a note given in payment. Riley *v.* Treanor, 25 S. W. Rep. 1054 (Tex. 1894). The right to rescind and tender back stock after one year can be exercised only by a tender after the year and not before; but the tender is waived if the vendor states that he will not accept the tender. The fact that the vendee has sold some of the stock is immaterial if he has other

the purchase price.[1] Where the vendee agrees in writing to resell the stock to the vendor at a specified price, an oral notice by the vendor that he wishes to repurchase is sufficient, but he must tender the money unless such tender is excused by the conduct of the vendee.[2]

So, also, the agreement of third parties to take the stock, or to protect from loss the party buying it, is enforceable if founded on a sufficient consideration.[3]

shares to take the place of the part sold. The fact that, by agreement, the property has been merged in another corporation in the meantime is immaterial. Schultz *v.* O'Rourke, 18 Mont. 418 (1896). An agreement to repurchase at the end of a year if thirty days' notice is given is effective if the thirty days' notice is given at any time before the expiration of the year. Maguire *v.* Halsted, 18 N. Y. App. Div. 228 (1897). An agreement to reimburse a party as to stock "at or before" a certain date cannot be enforced by the promisee prior to the expiration of the specified time. Wilson *v.* Bicknell, 170 Mass. 259 (1898). An agreement to take back stock on a certain day if the purchaser so desires does not enable the purchaser to tender the stock back after that day. Cabot *v.* Kent, 20 R. I. 197 (1897).

[1] Gay *v.* Dare, 103 Cal. 454 (1894).

[2] Hanson *v.* Slaven, 98 Cal. 377 (1893).

[3] Where a stockholder subscribes for an increased capital stock on the agreement of parties to take the stock if the subscriber does not want it, the latter may hold the former liable for the difference between what the latter pays for the stock and what he is able to sell it for. Herd *v.* Thompson, 149 Pa. St. 434 (1892). A guaranty that the vendee of stock shall not lose money by the purchase may be enforced by the vendee when he proves that the stock has no market value, and that he has tried to sell it but has failed. Phipps *v.* Sharps, 142 Pa. St. 597 (1891). A statement of a party who is endeavoring to sell stock for another, that he will see the latter whole in the matter, creates no liability on the part of the former. Martin's Estate, 131 Pa. St. 638 (1890). A person who writes to a party, when the latter subscribes for stock, that the former will pay the subscription if the road is not completed within a certain time, is a surety and may be held liable. Allison *v.* Wood, 147 Pa. St. 197 (1892). The agreement of a person with a subscriber for stock that he will pay to the latter one hundred cents on the dollar for the stock within ninety days is not enforcible unless the subscriber tenders the stock and demands the money within that time; and a guaranty to save the subscriber harmless from any loss as a stockholder does not guaranty against loss by a decline in the value of the stock itself. Morris *v.* Veach, 111 Ga. 435 (1900). An oral promise by a stockholder that he would repay at any time after one year the amount paid by an individual to the corporation for stock, if the latter did not receive a profit of twenty per cent., is void under the statute of frauds. Moore *v.* Vosburgh, 66 N. Y. App. Div. 223 (1901). The promise of the directors of a corporation, inducing a person to purchase stock from the corporation, that they will pay enough to make the dividend eight per cent. as long as the corporation exists, is not void, under the statute of frauds, and is enforceable. People, etc. *v.* Most, 36 N. Y. Misc. Rep. 139 (1901). An agreement of a stockholder that another stockholder shall be made "whole" for any loss due to not selling stock is without consideration and void. Martin's Estate, 4 Ry. & Corp. L. J. 449 (Orphans' Ct. Phil. 1888). A person induced to

§ 340. *Other sections of statute of frauds as affecting sales of stock.*— The provision of the statute of frauds relative to answering for the debts, defaults, or miscarriages of another does not apply to a guaranty that there will be a certain dividend on stock purchased,[1] nor to broker's relation towards his client.[2] The provision of the statute relative to transfers of land does not apply to stock,[3] since shares of stock are personal property.[4] A transfer of stock for the purpose of defrauding the transferrer's creditors is void, and a court of equity will set it aside,[5] or the stock may be attached or sold under execution the same as though no attempt at transfer had been made.[6] An oral agreement whereby one party makes a loan to the corporation in consideration of the other party keeping the former in control and giving him an option on the latter's stock does not sustain a suit for damages, even if broken by the latter, inasmuch as it is void, under the statute of frauds, as not to be performed within a year.[7]

B. GAMBLING SALES OF STOCK.

§ 341. *What are wager stock sales.*— Executory contracts for the sale of stock may be made with an intent to actually deliver the stock, or they may be made with an intent not to deliver it, but to pay in cash the amount lost or won by the rise or fall of the mar-

subscribe by an agreement of a third person to purchase the stock at par at any time may collect from the latter the difference between the price at which the former sells and the par value, the latter having declined to perform. Lewis *v.* Coates, 93 Mo. 170 (1888). See also § 334, *supra.* A memorandum, "We agree to pay A. Rampacker the par value of this stock . . . upon the surrender of this certificate" indorsed on the back of the certificate enables him to tender the stock and collect the par value, even though there was no consideration for the promise. Wheaton *v.* Rampacker, 3 Wyo. 441 (1891). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur *v.* Stoepel, 82 Mich. 344 (1890). Where certain stockholders agreed with a subscriber for stock that he shall receive certain dividends and that they will take his stock if he desires after three years, he has a reasonable time after the three years to exercise his right to sell to them. Rogers *v.* Burr, 97 Ga. 10 (1895); S. C., 105 Ga. 432 (1898). See also § 775, *infra.*

[1] Moorehouse *v.* Crangle, 36 Ohio St. 130 (1880). *Cf.* 73 S. W. Rep. 477.

[2] Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213 (1848): Rogers *v.* Gould, 6 Hun, 229 (1875).

[3] Watson *v.* Spratley, 10 Exch. 222 (1854); Powell *v.* Jessopp, 18 C. B. 336 (1856); Walker *v.* Bartlett, 18 C. B. 845 (1856); Ashworth *v.* Munn, L. R. 15 Ch. D. 363, 368 (1880).

[4] See ch. I, *supra.*

[5] See § 481, *infra.*

[6] See § 484, *infra.*

[7] Gazzam *v.* Simpson, 114 Fed. Rep. 71 (1902).

ket price of the stock. A sale with the former intent is, at common law, legal and valid.[1] A sale with the latter intent is a gambling or wager contract, and is not enforceable.[2] The essen-

[1] Irwin *v.* Williar, 110 U. S. 499, 508 (1884), the court saying: "The generally accepted doctrine of this country is . . . that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them; but such a contract is only valid when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if under guise of such a contract the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void. And this is now the law in England by force of the statute of 8 and 9 Vict., c. 109, § 18, altering the common law in that respect." In England it is held that although the parties may have contemplated that, as a whole, there would be a mere payment of differences between them, yet, inasmuch as the actual contracts entered into involved the liability for the actual delivery of the stock dealt with, they were not gaming or wagering transactions. Universal Stock Exch. *v.* Stevens, 66 L. T. Rep. 612 (1892). It may be speculation; nevertheless it is valid. Clarke *v.* Foss, 7 Biss. 540 (1878); S. C., 5 Fed. Cas. 955; Smith *v.* Bouvier, 70 Pa. St. 325 (1872); Kirkpatrick *v.* Bonsall, 72 Pa. St. 155 (1872), where the court said: "We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed speculation. Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly." Hatch *v.* Douglas, 48 Conn. 116 (1880); Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884); Kent *v.* Miltenberger, 13 Mo. App. 503 (1883). If deliveries are made the transaction is not gambling. Pratt *v.* Boody, 55 N. J. Eq. 175 (1896). A corporation organized to act as a broker in buying and selling grain is subject to the same rule as regards gambling contracts that individuals are. Peck *v.* Doran, etc. Co., 57 Hun, 343 (1890). An agreement of the vendor of bonds to buy them back at the same price at a certain time if the vendee wishes is not a gambling contract. Wolf *v.* Nat. Bank of Illinois, 178 Ill. 85 (1899).

[2] "Wagers at common law are valid and enforceable in the courts;" and, with certain exceptions growing out of the peculiar subject of the wager, they have been held to be valid contracts. Dewey, Contracts for Future Delivery, etc. (1886), p. 10. To same effect: Good *v.* Elliott, 3 T. R. 693 (1790); Gilbert *v.* Sykes, 16 East, 150 (1812); Atherfold *v.* Beard, 2 T. R. 610 (1788); Morgan *v.* Pebrer, 4 Sco. 230 (1837); Hussey *v.* Crickitt, 3 Camp. 168 (1811); Grant *v.* Hamilton, 3 McLean, 100 (1842); S. C., 10 Fed. Cas. 978; Campbell *v.* Richardson, 10 Johns. 406 (1813); Bunn *v.* Riker, 4 Johns. 426 (1809); Johnson *v.* Fall, 6 Cal. 359 (1856); Johnston *v.* Russell, 37 Cal. 670 (1869); Dewees *v.* Miller, 5 Harr. (Del.) 347 (1851); Porter *v.* Sawyer, 1 Harr. (Del.) 517 (1832); Griffith *v.* Pearce, 4 Houst. (Del.) 209 (1870); Richardson *v.* Kelly, 85 Ill. 491 (1877); Petillon *v.* Hipple, 90 Ill. 420 (1878); Trenton, etc. Ins. Co. *v.* Johnson, 24 N. J. L. 576 (1854); Dunman *v.* Strother, 1 Tex. 89 (1846); McElroy *v.* Carmichael, 6 Tex. 454 (1851); Wheeler *v.* Friend, 22 Tex. 683 (1859); Monroe *v.* Smelly, 25 Tex. 586 (1860). *Contra:* In Pennsylvania — Edgell *v.* McLaughlin, 6 Whart. 176 (1841); Phillips *v.* Ives, 1

tial difference between a wager contract and a contract not a wager is whether there is an intent to deliver the property sold.[1] Even though the original intent was not to deliver, yet a subsequent actual sale and purchase validates the transaction.[2] "In order to invalidate a contract as a wagering one, both parties must intend that instead of the delivery of the article there shall be a mere payment of the difference between the contract and the market price."[3] A sale for future delivery, although a "short" sale, is not a gambling contract *per se*.[4] An "option," "put," "call," "straddle," or other similar stock-exchange contract, may be made with an intent

Rawle, 36 (1828); Brua's Appeal, 55 Pa. St. 294 (1867); in Vermont — Collamer *v.* Day, 2 Vt. 144 (1829); Tarleton *v.* Baker, 18 Vt. 9 (1843); in New Hampshire — Clark *v.* Gibson, 12 N. H. 386 (1841); Winchester *v.* Nutter, 52 N. H. 507 (1872); in Maine — McDonough *v.* Webster, 68 Me. 530 (1878); Gilmore *v.* Woodcock, 69 Me. 118 (1879); Missouri — Waterman *v.* Buckland, 1 Mo. App. 45 (1876); and Massachusetts — Ball *v.* Gilbert, 53 Mass. 397 (1847); Babcock *v.* Thompson, 20 Mass. 446 (1826); Sampson *v.* Shaw, 101 Mass. 145 (1869). The supreme court of the United States said, in Irwin *v.* Williar, 110 U. S. 499 (1884): "In England it is held that the contracts, although wagers, were not void at common law, . . . while generally, in this country, all wagering contracts are held to be illegal and void as against public policy," citing Dickson *v.* Thomas, 97 Pa. St. 278 (1881); Gregory *v.* Wendell, 40 Mich. 432 (1879); Lyon *v.* Culbertson, 83 Ill. 33 (1876); Melchert *v.* American U. Tel. Co., 3 McCrary, 521 (1882); s. c., 11 Fed. Rep. 193 and note; Barnard *v.* Backhaus, 52 Wis. 593 (1881), Love *v.* Harvey, 114 Mass. 80 (1873); Embrey *v.* Jemison, 131 U. S. 336 (1889). A contract for the sale and purchase of stocks with no intent of delivery, but merely to pay differences, is illegal. *Re* Gieve, [1899] 1 Q. B. 794.

1 Roundtree *v.* Smith, 108 U. S. 269 (1883); *Re* Hunt, 26 Fed. Rep. 739 (1886). Mr. Dewey (Contracts for Future Delivery and Commercial Wagers, p. 28) states the rule accurately as follows: "Where the parties to a contract in the form of a sale agree expressly or by implication, at the time it is made, that the contract is not to be enforced, that no delivery is to be made, but the contract is to be settled by the payment of the difference between the contract price and the market price at a given time in the future, such a transaction is a wager," citing many cases. If there is an intent to deliver, then the transaction is legal, though the parties "exercise the option of settling the difference in price, rather than make delivery of the property." Ward *v.* Vosburgh, 31 Fed. Rep. 12 (1887). As regards sales and margins, see § 457, *infra*. In Indiana it was held that a note given in New York to settle a gambling cotton debt was governed by New York laws as to its legality. Sondheim *v.* Gilbert, 117 Ind. 71 (1888).

2 *In re* Taylor, etc., 192 Pa. St. 304 (1899). Where the broker actually buys the securities for the customer the transaction is not gambling, even though the securities are afterwards resold, and where the purchaser takes up stocks still held by the broker he legalizes all the past transactions. Young *v.* Glendenning, 194 Pa. St. 550 (1900).

3 Clews *v.* Jamieson, 182 U. S. 461, 489 (1901).

4 Clews *v.* Jamieson, 182 U. S. 461, 489 (1901).

to actually deliver the stock, and, if so, are unobjectionable and are enforceable.[1]

The fact that stock transactions were carried on by "margins" is no evidence that they were gambling contracts,[2] excepting in Maryland and New Jersey. In these states this fact alone seems to

[1] For definitions of these terms, see § 445, n., *infra*. A "put" is not *per se* conclusive evidence of an intent not to deliver. Bigelow *v.* Benedict, 70 N. Y. 202 (1877). A "straddle" follows the same rule. The parties may have intended to deliver the stock. Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Story *v.* Salomon, 71 N. Y. 420 (1877). *Cf. Ex parte* Young, 6 Biss. 53 (1874); s. c., 30 Fed. Cas. 828; Webster *v.* Sturges, 7 Ill. App. 560 (1880); Tenney *v.* Foote, 4 Ill. App. 594 (1879); Lyon *v.* Culbertson, 83 Ill. 33 (1876); Gilbert *v.* Gauger, 8 Biss. 214 (1878); s. c., 10 Fed. Cas. 345. A short sale is not *per se* a wager, nor is it presumed to be. Maxton *v.* Gheen, 75 Pa. St. 166 (1874); Hess *v.* Rau, 95 N. Y. 359 (1884); Knowlton *v.* Fitch, 52 N. Y. 288 (1873); White *v.* Smith, 54 N. Y. 522 (1874); Cameron *v.* Durkheim, 55 N. Y. 425 (1874); Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 243 (1882). These decisions rest upon the principle of law laid down in Stanton *v.* Small, 3 Sandf. 230 (1849), that "a contract for the sale of goods to be delivered at a future day is not invalidated by the circumstance that at the time of the contract the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them at the time appointed for delivering them, otherwise than by purchasing them after making the contract." See also § 457, *infra*. There are many cases to the same effect. See Noyes *v.* Spaulding, 27 Vt. 420 (1855); Shales *v.* Seignoret, 1 Ld. Raym. 440 (1700); Frost *v.* Clarkson, 7 Cow. 25 (1827); Dewey, Contracts for Future Delivery, p. 97; Thacker *v.* Hardy, L. R. 4 Q. B. D. 685 (1878), holding that, if the intent at the time of buying was to deliver, it is not a wager, even though that intent be afterwards changed. As to the legality of a "corner," see § 621*b*, *infra*. Where there is evidence of some intent to deliver, the transaction is not gambling. Cothran *v.* Ellis, 125 Ill. 496 (1888). A sale, delivery to be in twelve months, or, if vendor wishes, before then, is not a gambling contract. Perryman *v.* Wolffe, 93 Ala. 290 (1890).

[2] Sawyer *v.* Taggart, 14 Bush (Ky.), 727 (1879); Wall *v.* Schneider, 59 Wis. 352 (1884); Bartlett *v.* Smith, 13 Fed. Rep. 263 (1882); Whitesides *v.* Hunt, 97 Ind. 191 (1884); Union Nat. Bank *v.* Carr, 15 Fed. Rep. 438 (1883); Hatch *v.* Douglas, 48 Conn. 116 (1880). A purchase of stock on margin is not necessarily gambling, but is gambling if there is no intention to deliver but merely to settle the loss or gain. Wagner *v.* Hildebrand, 187 Pa. St. 136 (1898). Many other cases do not directly pass on this question, but assume that the deposit of a margin, as a security to the broker, does not prove an intent not to have a delivery of the stock. Where the customer called for the stock, and it is tendered to him, the broker may recover the price, even though the stock was first bought on a margin. Anthony *v.* Unangst, 174 Pa. St. 10 (1896). Transactions on margins are not necessarily gambling. Hopkins *v.* O'Kane, 169 Pa. St. 478 (1895). But see Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881); Dickson *v.* Thomas, 97 Pa. St. 278 (1881); Fareira *v.* Gabell, 89 Pa. St. 89 (1879); Maxton *v.* Gheen, 75 Pa. St. 166 (1874); North *v.* Philips, 89 Pa. St. 250 (1879).

be sufficient evidence of a wager.[1] A cotton mill may purchase cotton to be delivered in the future and may put up a margin to carry the contract.[2] A wager contract is not proved by the fact that the party selling stock to be delivered at a future time intends to purchase that amount of stock in time for the delivery, or *vice versa.*[3] "An executory contract for the sale of goods for future delivery is not infected with the quality of a wager by reason of the fact that at its date the vendor had not the goods, and had not entered into any arrangement to provide them, and had no expectation of receiving them, unless by subsequently going into the market and buying them."[4] A *bona fide* sale of grain deliverable in a certain month, on a day to be fixed by seller, is not a gambling contract.[5]

§ 342. *Statutes prohibiting wager contracts, and also certain stock contracts.*— There are two classes of statutes affecting stock

[1] Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884). See also Justh *v.* Holiday, 13 Mackey, 346 (1883). A purchase on margin is gambling *per se.* Cover *v.* Smith, 82 Md. 586 (1896). A broker cannot enforce a contract between himself and his customer, where the customer testifies that he put up $100 as a margin for one hundred shares of stock, and that if the stock advanced a point he would have a profit, and if it declined a point he would lose the $100, and also another $100 to be paid. Billingslea *v.* Smith, 77 Md. 504 (1893).

[2] Sampson *v.* Camperdown Cotton Mills, 82 Fed. Rep. 833 (1897).

[3] In Ashton *v.* Dakin, 7 W. R. 384 (1859), the court held it not to be a wager contract to order a broker to buy stock, "and let the bargain be so as to the day of payment that you may have an opportunity of reselling it for me by such a day, when I expect the market will have risen, and then you will pay the seller for me with the money you receive from the purchaser, and I shall receive the gain from you, if any, or pay you the loss." So, also, Smith *v.* Bouvier, 70 Pa. St. 325 (1872), holds that stocks bought and sold upon speculation are not necessarily wager contracts. A person may sell without owning the stock, and at time of delivery buy to deliver, and yet the transaction be not a wager, where the jury finds that there was an intent to deliver in both the selling and buying. See also Thacker *v.* Hardy, L. R. 4 Q. B. D. 685 (1878); Sawyer *v.* Taggart, 14 Bush (Ky.), 727 (1879). In Massachusetts it is held that the contract is not gambling merely because there was an expectation that only differences would be settled. Barnes *v.* Smith, 159 Mass. 344 (1893). Where the seller of grain does not intend to deliver the property sold, but simply to settle the difference in price, the transaction is illegal under a statute, whether his brokers and the purchaser knew of his intention or not. Margins lost in such transactions cannot be recovered back. Connor *v.* Black, 132 Mo. 150 (1896). A purchase of corn may be legal although made to fill certain sales which the party had made previously. A mortgage given to a broker for advancements made in the transaction is valid. Douglas *v.* Smith, 74 Iowa, 468 (1888).

[4] Conner *v.* Robertson, 37 La. Ann. 814 (1885), the court saying also that Lorymer *v.* Smith, 1 Barn. & C. 1 (1822), has been repeatedly overruled. See also *supra*, p. 770, n. 1.

[5] White *v.* Barber, 123 U. S. 392 (1887).

sales as regards their speculative character. One class does not specify sales of stock, but declares in general terms that all gaming and wagering contracts shall be void, thereby rendering actions for the recovery of money won on such wagers unsustainable. Such statutes exist in England [1] and New York.[2] The second class of statutes is more explicit, and prohibits specified transactions in stock, irrespective of whether such transactions be wager contracts or not. Statutes affecting speculative sales of stock exist in many of the states. In Massachusetts short sales are prohibited;[3] in Ohio, sales of stock for future delivery, which the vendor has not on hand or the vendee the means to pay for;[4] in Illinois, all options are made gambling contracts and are void;[5] in Georgia, short

[1] 8 & 9 Vict., c. 109, § 18; Grizewood *v.* Blane, 11 C. B. 526 (1851). Agreements between buyers and sellers of stock to pay or receive the differences between their prices on one day and their prices on another day are gaming and wagering transactions within the meaning of the statute. Thacker *v.* Hardy, L. R. 4 Q. B. D. 685 (1878). The statute does not necessarily affect "corners" in stocks. Barry *v.* Croskey, 2 J. & H. 1 (1861). As to the application of this statute, see also Heiman *v.* Hardie, 12 Ct. of Sess. 406 (Sc., 4th ser., 1885).

[2] 1 N. Y. Rev. Stats. 662, § 8 (vol. III, p. 1962, 7th ed.). As applied to stock cases, see Kingsbury *v.* Kirwan, 77 N. Y. 612 (1879); Story *v.* Salomon, 71 N. Y. 420 (1877); Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Yerkes *v.* Salomon, 11 Hun, 471 (1877).

[3] Mass. Gen. Stat., ch. 105, § 6. For cases arising under this and similar statutes, see Howe *v.* Starkweather, 17 Mass. 240 (1821); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Barrett *v.* Mead, 92 Mass. 337 (1865); Brigham *v.* Mead, 92 Mass. 245 (1865); Barrett *v.* Hyde, 73 Mass. 160 (1856); Durant *v.* Burt, 98 Mass. 161 (1867); Brown *v.* Phelps, 103 Mass. 313 (1869); Price *v.* Minot, 107 Mass. 49 (1871): Colt *v.* Clapp, 127 Mass. 476 (1879); Rock *v.* Nicholls, 85 Mass. 342 (1862); Wyman *v.* Fiske, 85 Mass. 238 (1861); Pratt *v.* American Bell Teleph. Co., 141 Mass. 225 (1886), following the decisions under the New York statute, from which the statute in question was copied.

In Pennsylvania, by statute, sales for future delivery were formerly prohibited. See Pa. Laws 1841, p. 398, § 6. This statute has been repealed. For decisions, see Krause *v.* Setley, 2 Phila. Rep. 32 (1856); Chillas *v.* Snyder, 1 Phila. Rep. 289 (1852).

[4] Ohio Laws, 1885, p. 254. Gambling contract in grain. Lester *v.* Buel, 49 Ohio St. 240 (1892).

[5] Ill. Rev. Stat. (Starr & C.), p. 791, ¶ 178. For decisions, see Wolcott *v.* Heath, 78 Ill. 433 (1875); Pickering *v.* Cease, 79 Ill. 328 (1875); Pixley *v.* Boynton, 79 Ill. 351 (1875); Sanborn *v.* Benedict, 78 Ill. 309 (1875); Cole *v.* Milmine, 88 Ill. 349 (1878). This statute is restricted by the decisions to cases where the transaction is to be "adjusted only by differences." But see Ward *v.* Vosburgh, 31 Fed. Rep. 12 (1887). In Illinois, by statute, an option to buy coal at a future time is void. Osgood *v.* Bauder, 75 Iowa, 550 (1888). A sale with an agreement of the vendor to take the stock back at the same price and interest within a certain time if the vendee desired is not a gambling contract under the Illinois statute. Richter *v.* Frank, 41 Fed. Rep. 859 (1890). Concerning an indictment under the Illinois law for keeping a "bucket shop," see Soby *v.* People, 134 Ill. 66 (1890). In Illinois, by statute, a "put" is void. Schneider *v.* Turner, 130 Ill. 28.

sales cannot be enforced.[1] A state statute declaring illegal all options to sell or buy at a future time is constitutional, even though it may interfere with what would otherwise be legitimate contracts.[2] The California constitutional provision making void all contracts for sales of stock on a margin and providing for recovery back of money paid on such contracts is constitutional, even though it applies to *bona fide* transactions as well as gambling transactions.[3] In New York, the statute of 1812,[4] re-enacted in the Revised Statutes of 1828,[5] prohibiting short sales, was repealed by implication by the statute of 1858, declaring the sale to be valid though there be no consideration or payment of consideration, or no ownership by the vendor of such stock at the time of the sale. Various other states have statutes on this subject.[6] Where a customer gives to his broker in Missouri an order to buy stock and the order is executed in New York, the statute of Missouri rendering illegal the purchase of stock without intent to pay for the same does not apply, but the common law, which is presumed to be the law of New York, does apply, and the transaction is legal. Moreover, proof that one of the parties intended the contract to be gambling does not invalidate the transaction, and the broker may recover from the customer his losses.[7] In California the question

(1889). The statute against cornering the market applies to a purchase of corn to raise its price. Foss *v.* Cummings, 149 Ill. 353 (1894). Under the Illinois statute a suit by one stock exchange firm against another stock exchange firm for damages for failure to purchase stock, in accordance with a contract made on the exchange, fails where it is shown that by the rules of the exchange differences are paid instead of the stocks being delivered, and other evidence in the case shows that there was no intent to deliver. Clews *v.* Jamieson, 96 Fed. Rep. 648 (1899).

1 Ga. Code, § 2638.

2 Booth *v.* Illinois, 184 U. S. 425 (1902).

3 Otis *v.* Parker, 187 U. S. 606 (1903).

4 2 R. L. 187, § 18.

5 1 R. S., p. 710, § 6. For cases coming under this statute, see Dykers *v.* Townsend, 24 N. Y. 57 (1861), disapproving Stebbins *v.* Leowolf, 57 Mass. 137, 143 (1849). See also Thompson *v.* Alger, 53 Mass. 428 (1847), on the New York statute; Staples *v.* Gould, 9 N. Y. 520 (1854), (criticising Gram *v.* Stebbins, 6 Paige, 124 — 1836); Frost *v.* Clarkson, 7 Cow. 24 (1827); Cassard *v.* Hinmann, 14 How. Pr. 84 (1856); aff'd, 1 Bosw. 207. In New York a director is prohibited from selling "short." Penal Code, § 610. In Arkansas a broker and others are liable criminally for doing business in futures. Fortenbury *v.* State, 47 Ark. 188 (1886).

6 A promissory note is void under the Tennessee act against gambling in futures where such note was given therein. Snoddy *v.* American Nat. Bank, 88 Tenn. 573 (1890). The California constitution renders void a transaction wherein a broker buys stock for the customer with the broker's money and holds the stock as security and charges the customer interest and commissions. Cashman *v.* Root, 89 Cal. 373 (1891). Gambling stock transactions have been held void under the Kentucky statute in Lyons *v.* Hodgen, 90 Ky. 280 (1890).

7 Edwards, etc. Co. *v.* Stevenson, 160 Mo. 516 (1901). A sale is not gambling merely because one of the parties in-

whether stock purchased on a margin violates the constitutional prohibition is one of fact.[1] The constitutional provision in California against sales of stock on margins and authorizing the recovery back of money paid is not in conflict with the constitution of the United States, and a suit may be maintained under such constitutional provision.[2] In Massachusetts also the statute enables the customer to sue the broker for any losses,[3] but a cause of action given by the statute for margins paid may be released after it has accrued.[4] In England the statute of 1734,[5] prohibiting gambling in the public funds, was repealed in 1860,[6] but the statute of 1845 still exists.[7] It is evident from the history of these statutes against

tended it so to be; and where orders are given in Missouri to be executed in New York, the New York law governs. Gaylord *v.* Duryea, 69 S. W. Rep. 607 (Mo. 1902). A note given by a resident of Rhode Island, dated in Rhode Island but payable to brokers in Boston and delivered in Boston, becomes valid only upon delivery, and hence its validity is governed by Massachusetts law. Winward *v.* Lincoln, 51 Atl. Rep. 106 (R. I. 1902).

[1] Kullman *v.* Simmens, 104 Cal. 595 (1894).

[2] Parker *v.* Otis, 130 Cal. 322 (1900).

[3] Crandell *v.* White, 164 Mass. 54 (1895). The Massachusetts statute enabling the principal to recover back money paid by him to his broker on stock gambling contracts does not apply where the broker actually bought the securities and the principal knew it. Rice *v.* Winslow, 62 N. E. Rep. 1057 (Mass. 1902). For a case where a recovery was had against the broker, see Ballou *v.* Willey, 62 N. E. Rep. 1064 (Mass. 1902). In the case of Davy *v.* Bangs, 174 Mass. 238 (1899), a customer recovered against a broker the value of stock lost in a gambling contract, such recovery being based on the Massachusetts statute. A suit by a customer to recover back losses under the Massachusetts statute succeeded in Allen *v.* Fuller, 65 N. E. Rep. 31 (Mass. 1902). The Massachusetts statute against gambling transactions in stock was enforced in Marks *v.* Metropolitan Stock Exchange, 63 N. E. Rep. 410 (Mass. 1902), where the defendant was to deliver certain stock at a certain price on three days' notice, or by mutual consent was to pay any profit thereon above that price, and, on the other hand, the margin deposited was to be applied to any loss. And it was also enforced in Corey *v.* Griffin, 63 N. E. Rep. 420 (Mass. 1902), where, in order to evade the statute, a customer agreed to indemnify the defendant against all damage. Under the Kentucky statute a customer may recover back money lost in gambling in stocks. Boyd, etc. Co. *v.* Coates, 69 S. W. Rep. 1090 (Ky. 1902). Under the Massachusetts statute a customer may file a bill to have a mortgage canceled, such mortgage having been given to pay gambling debts. Rice *v.* Winslow, 65 N. E. Rep. 366 (Mass. 1902).

[4] Wall *v.* Metropolitan Stock Exchange, 168 Mass. 282 (1897).

[5] 7 Geo. II., c. 8, and 10 Geo. II., c. 8. For cases under this statute, see Hewitt *v.* Price, 4 Man. & G. 355 (1842); Fisher *v.* Price, 11 Beav. 194 (1848); Mortimer *v.* McCallan, 6 M. & W. 58 (1840); Ellsworth *v.* Cole, 2 M. & W. 31 (1836); Byles on Bills, 15th ed., p. 161; 2 Kent, Com., 468, note (*i*). The statute did not apply to stock in private corporations. Hibblewhite *v.* McMorine, 5 M. & W. 462 (1839), overruling Bryan *v.* Lewis, Ryan & M. 386 (1826).

[6] 23 & 24 Vict., c. 28.

[7] Where both parties to a transaction on the stock exchange intend that no

stock gambling that it is a difficult and delicate task to frame a statute that will cure the evil. The great danger is that any such statute will interfere with legitimate transactions — transactions which for many years have been building the railways and developing the material resources of the country.[1]

§ 343. *Test of legality of stock transactions.*— Although, as already stated, stock sales, where no delivery, but merely a settlement of gain or loss, is intended, are wagers, and although such wagers are void by the statutes of some states, and by the rules of public policy in others,[2] yet difficulty is experienced in determining whether the parties really intended to deliver the stock or to pay differences. The question of intent is always difficult of ascertainment and of positive proof. It is pre-eminently a question for the jury. It is accordingly found in most of the cases involving the question whether the transaction was stock gambling, that the court submitted to the jury whether an actual delivery of the stock was intended or not. If there was no such intent, then, as a matter of law, the transaction was a wager. If a wager, it is, by statute in some states, by public policy in others, a void transaction, and the parties have only the rights given them on void contracts.[3]

§ 344. *When intent to deliver is question for the jury and when not.*— The question whether the parties to an executory sale of stock intended to actually deliver the stock, or merely to pay

stocks shall be delivered, but only that "differences" shall be paid, the fact that the contract provides that either party may require completion of the purchase and delivery or receipt of the stock does not prevent the transaction from being a gaming and wagering contract within the Gaming Act, 1845 (8 & 9 Vict., c. 109), and therefore void. Universal, etc. Exchange *v.* Strachan, [1896] A. C. 166, holding also that securities deposited in connection with such a contract may be recovered back.

1 Dos Passos, Stock Brokers & Stock Exch. (1882), p. 405, says: "The history of these stock-jobbing acts seems to prove conclusively that they have never been effective in preventing speculations in stocks. In almost every instance in which they have been adopted, after lingering for years on the books, scorned and violated by 'the unbridled and defiant spirit of speculation,' despite the earnest efforts of the courts to enforce them, they have finally been repealed. It is, perhaps, better to allow the evil to correct itself, as it surely does, than to bring the administration of justice into contempt by filling the books with useless laws, which are at all times openly violated and laughed at, and which seem hardly more effective to prevent the practices at which they are aimed than legislation directed against the laws of nature."

2 Particularly in Pennsylvania are such stock wagers void by public policy. North *v.* Phillips, 89 Pa. St. 250 (1879); Fareira *v.* Gabell, 89 Pa. St. 89 (1879); Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881); Dickson *v.* Thomas, 97 Pa. St. 278 (1881); Brua's Appeal, 55 Pa. St. 294 (1867).

3 See §§ 345, 346, *infra.* See also Greenhood, Pub. Policy, pp. 230-237.

and receive the gain or loss, may be for the jury.[1] In the application of this rule, however, great care is to be exercised in submitting the question and charging the jury. The parties may be asked directly whether they intended that a delivery should be made.[2] If one party intended to have a delivery the transaction is valid, even though the other party intended otherwise.[3] As between a party and his broker, however, greater difficulty arises, and in some jurisdictions the intent between them governs their relations, irrespective of the intent of the party dealing with them.[4] The financial responsibility of the parties,[5] and

[1] Whitesides *v.* Hunt, 97 Ind. 191 (1884); Gregory *v.* Wendell, 39 Mich. 337 (1878). And all the circumstances are to be taken into consideration. Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Hawley *v.* Bibb, 69 Ala. 52 (1881); Brand *v.* Henderson, 107 Ill. 141 (1883); Barnard *v.* Backhaus, 52 Wis. 593 (1881); Kirkpatrick *v.* Bonsall, 72 Pa. St. 155 (1872).

[2] Yerkes *v.* Salomon, 11 Hun, 471 (1877); Cassard *v.* Hinman, 6 Bosw. 9, 14 (1860); First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa, 41 (1885); *Ex parte* Young, 6 Biss. 53 (1874); s. c., 30 Fed. Cas. 828. In the case of Porter *v.* Viets, 1 Biss. 177 (1857); s. c., 19 Fed. Cas. 1077, the court refused to admit parol evidence that the contract was gambling, for the reason that it varied a written contract.

[3] Wall *v.* Schneider, 59 Wis. 352 (1884); Irwin *v.* Williar, 110 U. S. 499 (1884); Whitesides *v.* Hunt, 97 Ind. 191 (1884); Pixley *v.* Boynton, 79 Ill. 351 (1875); Ward *v.* Vosburgh, 31 Fed. Rep. 12 (1887); Powell *v.* McCord, 121 Ill. 330 (1887); Lehman *v.* Strassburger, 2 Woods, 554 (1875); s. c., 15 Fed. Cas. 254; Conner *v.* Robertson, 37 La. Ann. 814 (1885). *Contra,* Fareira *v.* Gabell, 89 Pa. St. 89 (1879). *Cf.* Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881). In Tennessee, by statute, dealing in futures is gambling, if either party does not intend to deliver. See McGrew *v.* City Produce Exchange, 85 Tenn. 572 (1887). If either of the parties intends, at the close of a series of transactions in buying and selling stocks, to accept or make actual delivery of the remaining stock, the transaction is not gambling, as between the customer and broker, although the buying and selling are done upon a margin in the hope of profit from the fluctuations. Dillaway *v.* Alden, 88 Me. 230 (1895). The intent of the principal not to have deliveries but to pay differences does not invalidate a note given in settlement, where there is no proof of any such intent on the part of the brokers. Winward *v.* Lincoln, 51 Atl. Rep. 106 (R. I. 1902). A gambling intent on the part of one party is immaterial where there was no such intent on the part of the other party. McCarthy *v.* Weare, etc. Co., 91 N. W. Rep. 33 (Minn. 1902). The fact that a broker advanced all the money except the margin, and never delivered any stock excepting on one occasion, and remitted gains and collected losses on various occasions, is evidence to prove that the contract was a gambling contract. Sharp *v.* Stalker, 52 Atl. Rep. 1120 (N. J. 1902).

[4] See §§ 345, 346, *infra.*

[5] Kirkpatrick *v.* Bonsall, 72 Pa. St. 155 (1872); First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa, 41 (1885); *Re* Green, 7 Biss. 338 (1877); s. c., 10 Fed. Cas. 1084; Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Justh *v.* Holliday, 13 Mackey, 346 (1883); North *v.* Phillips, 89 Pa. St. 250 (1879); Patterson's Appeal, 16 Rep. 59 (Pa. 1883); Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884); Colderwood *v.* McCrea, 11 Ill. App. 543 (1882). The fact that

their other transactions in the same line,[1] are admissible as evidence as to whether there was an intent to deliver the stock or merely to pay the gain or loss. The burden of proving that a stock transaction is a gambling contract is upon him who affirms it.[2]

§ 345. *Gambling stock contracts as affecting the relations between the principal and his broker.*— A broker is but an agent of his principal. As such he may hold the principal liable for commissions and for losses paid on stock transactions where those stock transactions are legitimate and legal. Where, however, the stock contracts are of a wager or gambling nature, a more difficult question arises, and the decisions are irreconcilable. In England, in 1878, Judge Lindley, in Thacker *v.* Hardy,[3] a carefully-considered case, held that, where the principal has been carrying on gambling transactions, he cannot escape or repudiate his liabilities to his broker in those transactions, even though the latter knew of the gambling character of the business. The principal is liable to his broker as though the transactions were free from such objections. This is the well-established rule in England.[4]

one of the parties is already under obligation to other parties to purchase cotton several times greater in value than his fortune is evidence of an intent to gamble. Beadles *v.* McElrath, 85 Ky. 230 (1887). The fact that a party is financially unable to pay for property is evidence that the contract is gambling. Myers *v.* Tobias, 16 Atl. Rep. 641 (Pa. 1889).

[1] Kirkpatrick *v.* Bonsall, 72 Pa. St. 155 (1872); Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Irwin *v.* Williar, 110 U. S. 499 (1884). *Contra*, Tomblin *v.* Callen, 69 Iowa, 229 (1886). The jury, in passing upon the defense to a note that it was given in a stock-gambling operation, may consider all the acts and accounts and the actual dealings. Gaw *v.* Bennett, 153 Pa. St. 247 (1893). As to the competency of evidence herein, and that evidence of custom of settling by differences is incompetent, see Scofield *v.* Blackmarr, 4 Atl. Rep. 208 (Pa. 1886). Proof of intent to deliver may be by the conduct of the parties as well as the contract. Press *v.* Duncan, 100 Iowa, 355 (1896).

[2] Dewey, Contracts for Future Delivery, p. 207, says: "All the cases except Barnard *v.* Backhaus, 52 Wis. 593 (1881); Cobb *v.* Prell, 15 Fed. Rep. 774 (1883); Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Stebbins *v.* Leowolf, 57 Mass. 137 (1849), and possibly Chandler's Case, *Ex parte* Young, 6 Biss. 53 (1874); s. c., 30 Fed. Cas. 828, hold that these contracts are presumed to be *bona fide;* and in order to show them to have been used as covers for wagers, an agreement to that effect must appear to have been made. According to these excepted cases, option contracts are presumed to be invalid, and proof must be made that they are *bona fide.*" See also Dewey, Contracts for Future Delivery, p. 46. In Illinois the burden of proof is on the defendant to prove a gambling intent on the part of both parties. In Wisconsin a contrary rule seems to prevail. See Ward *v.* Vosburgh, 31 Fed. Rep. 12 (1887).

[3] L. R. 4 Q. B. D. 685.

[4] *Re* Hart, 5 W. N. 95 (1870); Cooper *v.* Neil, 13 W. N. 128 (1878); *Ex parte* Rogers, L. R. 15 Ch. D. 207 (1880); Faikney *v.* Reynous, 4 Burr. 2069 (1767); Jessopp *v.* Lutwyche, 10 Exch. 614 (1854); Knight *v.* Cambers, 15 C. B. 562 (1855); Knight *v.* Fitch, 15 C. B. 566

§ 346. In this country an opposite rule prevails for the most part. The great weight of authority holds that, where the broker has knowledge of the purpose to gamble in stocks and aids in carrying out that purpose, he cannot recover for services rendered or losses incurred and paid by himself.[1] A few cases hold to the same effect as the English rule.[2] Many cases which seem to favor the English

(1855); Lyne *v.* Siesfeld, 1 H. & N. 278 (1856); Rosewarne *v.* Billing, 15 C. B. (N. S.) 316 (1863). In Pidgeon *v.* Burslem, 3 Exch. 465 (1849), the court says expressly: "The case differs altogether from those in which the contract is forbidden, as under the acts against stock-jobbing, or where the purpose for which the money was paid was illegal." *Contra*, Byers *v.* Beattie, Ir. Rep. 2 C. L. 220 (1867). A contract is not a gaming contract, and a broker may recover the balance due him on account, although the customer, a person of small means, instructed the broker to make purchases and sales and advanced only a small part of the purchase-money, the balance being obtained by the broker by pledge of the security, and the customer never asking for delivery of the stock, and, as the broker well knew, did not purchase as an investment, but as a speculation, to sell again when the price went up, and the broker was paid by commissions on the transactions. Forget *v.* Ostigny, [1895] A. C. 318. A customer may recover from his broker margins which he deposited, the transactions having resulted in a profit to the customer. *Re* Cronmire, [1898] 2 Q B. 383.

[1] Irwin *v.* Williar, 110 U. S. 499, 510 (1884); Flagg *v.* Gilpin, 17 R. I. 10 (1890); McLean *v.* Stuve, 15 Mo. App. 317 (1884), per Thompson, J.; Ream *v.* Hamilton, 15 Mo. App. 577 (1884). *Cf.* Kent *v.* Miltenberger, 13 Mo. App. 503, 511 (1883). See also, as supporting above rule, Everingham *v.* Meighan, 55 Wis. 354 (1882); *Re* Green, 7 Biss. 338 (1877); S. C., 10 Fed. Cas. 1084; Bartlett *v.* Smith, 13 Fed. Rep. 263 (1882); Tenney *v.* Foote, 4 Ill. App. 594 (1879); affirmed, 95 Ill. 99 (1880), defeating a note given to the broker; Colderwood *v.* McCrea, 11 Ill. App. 543 (1882); Webster *v.* Sturges, 7 Ill. App. 560 (1880); Barnard *v.* Backhaus, 52 Wis. 593 (1881), defeating notes; Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881); Whitesides *v.* Hunt, 97 Ind. 191, 203 (1884); Melchert *v.* American U. Tel. Co., 11 Fed. Rep. 193 (1882); First Nat. Bank *v.* Oskaloosa Packing Co., 66 Iowa, 41 (1885), holding a note void; Stewart *v.* Schall, 65 Md. 289 (1886). Suit by broker against customer for moneys lost in purchase of grain for the customer. Mohr *v.* Miesen, 47 Minn. 228 (1891). Brokers are bound to know that banks have no power to purchase cotton futures on margins, and cannot recover commissions and losses on such transactions. The *ultra vires* contract was not executed, inasmuch as the corporation received no property. Jemison *v.* Citizens' Sav. Bank, 44 Hun, 412 (1887). A broker may recover commissions, etc., from his principal when the former knew nothing of the latter's intention to gamble. Lehman *v.* Feld, 37 Fed. Rep. 852 (1889); Edwards *v.* Hoeffinghoff, 38 Fed. Rep. 635 (1889); Boyd *v.* Hanson, 41 Fed. Rep. 174 (1890).

[2] Brown *v.* Speyers, 20 Gratt. (Va.) 296 (1871); Wyman *v.* Fiske, 85 Mass. 238 (1861), on the ground that the note sued on was a voluntary payment to the broker; Warren *v.* Hewitt, 45 Ga. 501 (1872); Marshall *v.* Thruston, 3 Lea (Tenn.), 741 (1879), where also a note had been given; Jackson *v.* Foote, 12 Fed. Rep. 37 (1882), also a note case, the court saying that, as between the broker and his principal, the decision probably would be different. *Cf.* Tinsley's Case, cited in 10 Fed. Rep. 248.

rule do so only by dicta, inasmuch as the transactions involved in such cases are held not to be wager contracts.[1] In Pennsylvania and New Jersey the American rule is rigidly enforced. The broker is held to be dealing as a principal, not as an agent, in all stock-gambling transactions.[2] He cannot recover commissions or losses.[3] If his principal is an infant, the broker is liable to such infant for all sums received by way of margins.[4] If, however, the parties do not raise the question of the legality of the transaction, the court cannot.[5] In Ohio it is held that the broker may be made to account for profits, even though the transaction was a gambling one.[6] A note and mortgage given to the broker in settlement of a gambling transaction will not be interfered with.[7] The broker is not liable for a sale of the stock on failure of margin, without notice to the principal, where the business is gambling.[8] A partner in a partnership for the purpose of carrying on a gambling business on the market cannot have an accounting from his partner.[9] At common law a customer cannot recover margins and profits from a broker on gambling transactions.[10] A bucket-shop corpora-

[1] Lehman *v.* Strassberger, 2 Woods, 554 (1875); s. c., 15 Fed. Cas. 254; Rumsey *v.* Berry, 65 Me. 570 (1876); Sawyer *v.* Taggart, 14 Bush (Ky.), 727 (1879); Durrant *v.* Burt, 98 Mass. 161 (1867); Williams *v.* Carr, 80 N. C. 294 (1879).

[2] Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881).

[3] North *v.* Phillips, 89 Pa. St. 250 (1879); Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884); Fareira *v.* Gabell, 89 Pa. St. 89 (1879), holding that notes given to the broker are void. The agent cannot recover commissions where he knew the transaction was gambling. Dows *v.* Glasfield, 4 N. D. 251 (1894).

[4] Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881), An infant gambling in stocks on a margin may recover from the brokers all that he deposited with them. Mordecai *v.* Pearl, 63 Hun, 553 (1892); aff'd, 136 N. Y. 625.

[5] Gheen *v.* Johnson, 90 Pa. St. 38 (1879); Williams *v.* Carr, 80 N. C. 294 (1879). *Contra*, Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394 (1900).

[6] Norton *v.* Blinn, 39 Ohio St. 145 (1883). Where gambling stock transactions are closed and the account settled, and the balance due the customer is left on deposit with the broker, the latter must pay it over. Peters *v.* Grim, 149 Pa. St. 163 (1892).

[7] Clarke *v.* Foss, 7 Biss. 540 (1878); s. c., 5 Fed. Cas. 955. *Cf.* Tantum *v.* Arnold, 42 N. J. Eq. 60 (1886). At common law a mortgage and note given to a broker for commissions in buying and selling futures and for advances are legal. Where such note has been reduced to judgment in one state it will be enforced in another state. Peet *v.* Hatcher, 112 Ala. 514 (1896).

[8] North *v.* Phillips, 89 Pa. St. 250 (1879).

[9] Wright *v.* Cudahy, 168 Ill. 86 (1897).

[10] Northrup *v.* Buffington, 171 Mass. 468 (1898). A principal cannot call his agent to account on a gambling contract. Rogers *v.* Marriott, 59 Neb. 759 (1900). Brokers receiving a draft of the president of a bank on the bank itself for margins may be compelled to refund the money to the bank. Lamson *v.* Beard, 94 Fed. Rep. 30 (1899). On this point see § 293, *supra*. Money deposited with a broker to make gambling sales may be recovered back, it not having been used. Munns *v.* Donovan, etc. Co., 91 N. W. Rep. 789 (Iowa, 1902).

tion cannot maintain a bill to compel a board of trade to furnish quotations to it.[1]

§§ 347, 348. *Gambling stock transactions as affecting notes, bonds, mortgages, etc., growing out thereof.*— The penalty of engaging in a stock-gambling operation is that, in case the transaction is declared by a court of justice to be illegal as a wager contract, the court declines to aid either party.[2] As a general rule, all liability on the part of either party is unenforceable. Money paid by the principal cannot be recovered back.[3] Neither principal can collect the gains of the transaction, and neither is liable for a loss.[4] Notes given in settlement are void and not collectible,[5] even in the

[1] Central, etc. Exch. *v.* Board of Trade, 63 N. E. Rep. 740 (Ill. 1902).

[2] Rees *v.* Fernie, 13 W. R. 6 (1864), holding that the court will not aid one who has been tricked in gambling in stocks. The Chicago Board of Trade cannot obtain an injunction against the use of its quotations by a bucket-shop concern, where the evidence shows that the transactions of the Chicago Board of Trade were chiefly in futures, which were settled by the payment of differences in violation of law. Board of Trade *v.* O'Dell, etc. Co., 115 Fed. Rep. 574 (1902).

[3] Gregory *v.* Wendell, 39 Mich. 337 (1878); s. c., 40 Mich. 432 (1879); Wyman *v.* Fiske, 85 Mass. 238 (1861). *Cf.* Norton *v.* Blinn, 39 Ohio St. 145 (1883). In Tennessee, by statute, a contrary rule prevails. McGrew *v.* City Produce Exchange, 85 Tenn. 572 (1887); Dunn *v.* Bell, 85 Tenn. 581 (1887), holding also that where there are several partners or co-conspirators who take the principal's money they are liable therefor jointly and severally. Under the New York statute money paid by a customer to a broker on gambling speculations may be recovered back. Peck *v.* Doran, etc. Co., 57 Hun, 343 (1890). Where a gambling contract is illegal by statute, a customer who gave money to the broker to gamble with, according to orders, cannot recover it back. White *v.* Barber, 123 U. S. 392 (1887); Sowles *v.* Welden Nat. Bank, 61 Vt. 375 (1889). A certificate of deposit given to a broker in the course of gambling transactions may be recovered back. Dempsey *v.* Harm, 12 Atl. Rep. 27 (Pa. 1887). The customer may recover back money deposited in the hands of a third person for margins on a gambling contract. Dauler *v.* Hartley, 178 Pa. St. 23 (1896).

[4] Grizewood *v.* Blane, 11 C. B. 526 (1851); Webster *v.* Sturges, 7 Ill. App. 560 (1880); *Ex parte* Young, 6 Biss. 53 (1874); s. c., 30 Fed. Cas. 828; Thompson *v.* Cummings, 68 Ga. 124 (1881); Yerkes *v.* Salomon, 11 Hun, 471 (1877). A partner, however, may have contribution for losses paid at the express request of the other member of the firm. Petrie *v.* Hannay, 3 T. R. 418 (1789).

[5] Barnard *v.* Backhaus, 52 Wis. 593 (1881); Fareira *v.* Gabell, 89 Pa. St. 89 (1879); Lowry *v.* Dillman, 59 Wis. 197 (1884); Davis *v.* Davis, 119 Ind. 511 (1889); Justh *v.* Holliday, 2 Mackey, 346 (1883); Cunningham *v.* Augusta Nat. Bank, 71 Ga. 400 (1883); Tenney *v.* Foote, 4 Ill. App. 594 (1879); affirmed, 95 Ill. 99. *Cf.* Wyman *v.* Fiske, 85 Mass. 238 (1861). A person loaning money and taking notes therefor cannot be defeated in a suit on the notes by evidence that he knew the loan was to be used in gambling operations. Defendant must prove, also, that plaintiff intended that the money should be so used. Waugh *v.* Beck, 114 Pa. St. 422 (1886). Checks, notes, etc., in gambling contracts are void. Kahn *v.* Walton, 46 Ohio St. 195 (1889); Embrey *v.* Jemison, 131 U. S. 336 (1889). Sales and purchases in Ohio on margins

hands of *bona fide* purchasers;[1] but the better rule is that such *bona fide* holders are protected.[2] Bonds and mortgages given in payment are void.[3] Due-bills,[4] acceptances,[5] and guarantees[6] of notes are not valid or enforceable. If a part of the consideration is void the whole contract and all securities given thereunder are void.[7]

are gambling and void, and a note in settlement of such transactions is void. Morris *v.* Norton, 75 Fed. Rep. 912 (1896). Notes given by the customer to the broker on dealings in stock, merely margins being paid, are illegal and not enforceable. Mechanics', etc. Bank *v.* Duncan, 36 S. W. Rep. 887 (Tenn. 1896). A note given by a broker for profits in gambling in grain is not enforceable. Nave *v.* Wilson, 12 Ind. App. 38 (1894). If delivery was intended and made, a note by one of the principals to the other is good, although the warehouse receipts were left with the broker to secure advances. Fisher *v.* Fisher, 8 Ind. App. 665 (1894).

1 Barnard *v.* Backhaus, 52 Wis. 593 (1881); Steers *v.* Lashley, 6 T. R. 61 (1794); Tenney *v.* Foote, 4 Ill. App. 594 (1879); aff'd, 95 Ill. 99; Cunningham *v.* Augusta Nat. Bank, 71 Ga. 400 (1883); Lowry *v.* Dillman, 59 Wis. 197 (1884); Root *v.* Merriam, 27 Fed. Rep. 909 (1886).

2 A *bona fide* holder of a note given in stock-gambling transactions can enforce the same in Pennsylvania. Northern Nat. Bank *v.* Arnold, 187 Pa. St. 356 (1898); Crawford *v.* Spencer, 92 Mo. 498 (1887); Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 243 (1882); Lilley *v.* Rankin, 55 L. T. Rep. 814 (1886). An accommodation indorser to the note may set up the defense of illegality. Justh *v.* Holliday, 13 Mackey, 346 (1883). A note given to a bank is valid, though the proceeds were to pay a stock-gambling debt and the bank knew that fact. Marshall *v.* Thruston, 3 Lea (Tenn.), 741 (1879). *Cf.* Cannan *v.* Bryce, 3 B. & A. 179 (1819).

3 Amory *v.* Meryweather, 2 B. & C. 573 (1824); Flagg *v.* Baldwin, 38 N. J. Eq. 219 (1884); Griffiths *v.* Sears, 112 Pa. St. 523 (1886); Barnard *v.* Backhaus, 52 Wis. 593 (1881). A judgment entered by confession on a bond given for a gambling debt may be set aside. Everitt *v.* Knapp, 6 Johns. 331 (1810); Beveridge *v.* Hewitt, 8 Ill. App. 467 (1881). A court of equity will enjoin the transfer of a note and will decree the cancellation of a mortgage given by a married woman in payment of her husband's stock-gambling debts. Tantum *v.* Arnold, 42 N. J. Eq. 60 (1886). But will not where given by the party himself to his brokers. Clarke *v.* Foss, 7 Biss. 540 (1878); s. c., 5 Fed. Cas. 955. A mortgage to a broker to pay losses on gambling speculations is void and not enforceable. Walters *v.* Comer, 79 Ga. 796 (1887). But see Crawford *v.* Spencer, 92 Mo. 498 (1887). Where a citizen of Alabama gives to a New York broker a deed of land in Alabama in settlement of futures, its validity as to the futures depends on the law of New York. Hubbard *v.* Sayre, 105 Ala. 440 (1895).

4 Rudolf *v.* Winters, 7 Neb. 125 (1878).

5 Steers *v.* Lashley, 6 T. R. 61 (1794). Rawlings *v.* Hall, 1 Car. & P. 11 (1823), holds that the broker on the witness stand need not admit that the consideration was a gambling debt, since it would subject him to a common-law criminal prosecution.

6 Tenney *v.* Foote, 95 Ill. 99 (1880).

7 Tenney *v.* Foote, 95 Ill. 99 (1880). See also Fareira *v.* Gabell, 89 Pa. St. 89 (1879). But where, upon the close of a successful "corner," which is illegal by statute, one of the parties leaves his share of the profits with the other party to invest, the latter must account for it when called upon so to do. Where, upon the close of an unsuccessful "corner," the parties losing settle among themselves, but one of them fraudu-

In Illinois, by statute, a customer who deposits securities with a broker on a gambling stock contract may recover them back, even though he has not paid losses incurred by the transaction.[1] In New Jersey it is held that purchases and sales of cotton for future delivery, the arrangement being to pay differences on the rise and fall of prices, are illegal, and even though a judgment is obtained thereon in New York state and a judgment on that judgment obtained in New Jersey, yet a court of equity will not set aside a deed of land as being in fraud of such judgment, even though the gambling nature of the transaction is not pleaded.[2]

C. FRAUD AS AFFECTING A SALE OF STOCK.

§ 349. *Extent of subject treated herein.*—In a previous chapter of this treatise the effect of fraud and fraudulent representations on a subscription for stock was fully treated. There is little difference in the principles of law governing fraud as affecting sales of stock from fraud as affecting subscriptions for stock. Most of the cases assume that the same principles apply to both kinds of transactions. Consequently, the questions of what constitutes fraud herein; what remedies the defrauded person has; and the general principles governing this branch of the law, will be fully understood only by a comparison of these two parts of this work.[3]

§ 350. *What has been held to constitute a fraud herein.*—It is difficult to lay down rules as to what does and what does not amount to fraudulent misrepresentations. The courts, consequently, let each case stand upon its own facts. Certain states of fact have, however, been passed upon as constituting fraud, and as such they aid in coming to a conclusion on facts in somewhat similar cases. Thus, it has been held to be a fraudulent representation to make false statements as to the location, explorations, and developed state of a mine;[4] or that a patent owned by the company was of great value, and that certain other persons were owners of stock;[5]

lently overstates the losses, he is liable to account for the amount fraudulently allowed him. Wells *v.* McGeoch, 71 Wis. 196 (1888).

[1] Jamieson *v.* Wallace, 167 Ill. 388 (1897).

[2] Minzesheimer *v.* Doolittle, 60 N. J. Eq. 394 (1900).

[3] See ch. IX, *supra.* In the important case of Western Bank *v.* Addie, L. R. 1 H. L. (Sc.) 145 (1867), part of the shares had been subscribed for and part purchased. The courts applied the same principles to both.

[4] Morgan *v.* Skiddy, 62 N. Y. 319 (1875). In Crocker *v.* Manley, 164 Ill. 282 (1896), the court held that it was not fraudulent to represent that the mines owned by the company were rich and would pay more than twenty per cent. dividends, and that the ore on hand was of a certain value, where it is shown that the vendee made a personal examination and was satisfied, and no actual fraud is shown. Rescission was refused.

[5] Miller *v.* Barber, 66 N. Y. 558 (1876).

that the company was prosperous, when in fact large overissues of stock had been made;[1] or that the corporate property was free from incumbrance;[2] or that the corporation would guarantee certain dividends;[3] or any false statement or general fraudulent act, or fraudulent concealment of a material fact, whereby the purchaser is induced to complete the sale of stock.[4] It may or may

[1] Cazeaux *v.* Mali, 25 Barb. 578 (1857). False representations as to solvency and financial condition of the corporation are material, and the purchaser may testify that he would not have purchased the stock except for the representations. Pridham *v.* Weddington, 74 Tex. 354 (1889). It is fraud to state falsely that the company is prosperous, that there was no stock for sale, and that defendant was selling stock of others and not his own. Miller *v.* Curtiss, 13 N. Y. Supp. 604 (1891).

[2] Southwestern R. R. *v.* Papot, 67 Ga. 675, 693 (1881), the court saying: "It is, we think, sufficient to show that the misrepresentation or suppression of fact was of such a nature as to prove that the property purchased was of no value to the purchaser for the purposes for which it was bought, or that it would be reasonable to suppose that the purchaser would not have contracted for it had he had knowledge of the existence of this defect." It is fraudulent to make misstatements to the effect that the corporation is out of debt and is making certain profits. It is no defense that the defendant might have ascertained the facts from the corporation. Redding *v.* Wright, 49 Minn. 322 (1892). A misrepresentation as to the amount of corporate indebtedness is material. McElwee *v.* Chandler, 198 Pa. St. 575 (1901). A jury decided that a false representation, on the part of corporate officers, that the company was without debt, was a fraud on the vendee, and held its perpetrators liable in damages. Faville *v.* Shehan, 68 Iowa, 241 (1885). Where a corporation issues bonds having the words printed on their face "first-mortgage bonds," when, as a matter of fact, there was an underlying mortgage which the party to whom the bonds were sold agreed to pay, but did not pay, except in part, the officers and the directors who took part in the issue of the bonds are liable to an innocent purchaser who relied on the statement contained on the face of the bonds. His measure of damages is the difference between the value of the bonds as first-mortgage bonds and second-mortgage bonds. Bank *v.* Byers, 139 Mo. 627 (1897). A purchaser of bonds and stock may rescind on the ground that the vendor falsely represented that there was but one mortgage on the property. It is immaterial that the vendor paid off the other mortgage after suit was brought. Stevenson *v.* Marble, 84 Fed. Rep. 23 (1897). A purchaser of a majority of the stock of the corporation from a stockholder may rescind where a misrepresentation was made that the corporation had practically no debts. Merritt *v.* Ehrman, 116 Ala. 278 (1897).

[3] Gerhard *v.* Bates, 20 Eng. L. & Eq. 129 (1853). Representations that dividends would soon be paid are not fraudulent, but statements as to present condition and prospects may be for the jury. Warner *v.* Benjamin, 89 Wis. 290 (1895).

[4] See further illustrations in ch. IX, *supra.* Declaring a dividend in good faith and sound discretion is not fraud by reason of its turning out to have been ill-advised. Burnes *v.* Pennell, 2 H. L. Cas. 497 (1849). A representation that the stock "is good property or investment and is about to make a dividend" is a false representation when untrue, and where the person taking the stock as trustee from a preceding trustee objected to receiving it on account of his doubt or ignorance as to

not be a fraudulent representation to state that the stock is worth a certain sum, according to the circumstances of the case.[1]

its character. Lawton *v.* Kittredge, 30 N. H. 500 (1855). Representations that a corporate property is valuable and one of the best properties in Colorado, when in fact the company was a bubble company, raises a question of fraud for the jury to pass upon. Bradley v. Poole, 98 Mass. 169 (1867). The payment of an excessive and speculative price for stock is not fraud and is no ground for setting the sale aside. Moffat *v.* Winslow, 7 Paige Ch. 124 (1838). The vendor warrants the title to the stock, but not its quality or value. Allen *v.* Pegram, 16 Iowa, 163 (1864). A sale of stock in a company formed to purchase a railroad cannot be set aside merely because its title to the railroad fails. State *v.* North Louisiana, etc. R. R., 34 La. Ann. 947 (1882). In Wright's Appeal, 99 Pa. St. 425 (1882), it was held that the corporation was not liable for the conversion of stock by its president, who obtained the certificates indorsed in blank from the owner on false representations that the corporation wished to use them. Newlands *v.* National, etc. Assoc., 53 L. T. Rep. 242 (1885); March *v.* Eastern R. R., 43 N. H. 515 (1862), holding that the fact that the earnings were not distributed by dividends until after a sale of stock does not constitute fraud. A confidential agent who uses his position to obtain stock of which the principal has been deprived wrongfully must turn it over to the principal. Hardenbergh *v.* Bacon, 33 Cal. 356 (1867). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would continue the management of the concern, and concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business, and statements leading to the conclusion that all subscribers for stock stood on an equal footing, constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. Walker *v.* Anglo-Am. etc. Trust Co., 72 Hun, 334, 341 (1893).

[1] That it is not, see Union Nat. Bank *v.* Hunt, 76 Mo. 439 (1882). A false representation that the stock sold is worth eighty cents on the dollar — it being worth but forty cents — will not sustain an action for deceit. Ellis *v.* Andrews, 56 N. Y. 83 (1874). A representation as to the value of stock is material where the vendor was a director, and evidence may be introduced to show that the stock was issued for property at an overvaluation and that some of the stock was issued without being paid for. Shelton *v.* Healy, 50 Atl. Rep. 742 (Conn. 1901). It is fraudulent to represent that the stock is worth par when in fact it is worthless. If the vendor persuades the vendee to make no inquiries, the latter may recover, although he made none. The measure of damages is not the value of the land given for the stock, but the difference between the actual and the represented value of the stock. Nysewander *v.* Lowman, 124 Ind. 584 (1890). False representations may consist of statements that the stock is worth a certain price and is sold to plaintiff at a reduced price in order to obtain his services. Maxted *v.* Fowler, 94 Mich. 106 (1892). False statements as to the value of stock and the dividends it would pay and the purpose for which it was incorporated are sufficient to sustain rescission. Murray *v.* Tolman, 162 Ill. 417 (1896). Misrepresentations as to the value of the stock and the condition of the company are material. Blacknall *v.* Rowland, 116 N. C. 389 (1895). The statements by the vendor of what pur-

It is a fraud on the vendee of stock to sell him as paid-up stock that which is not paid up, although issued as paid up, the vendor having participated in the issue.[1] It is fraud in the vendor to represent that property is to be turned in by him to the corporation at a certain price and then to refuse to carry out the latter contract.[2] Where the vendor agrees to sell at a value to be ascertained by an examination of the corporate books and affairs, it is fraud in the vendee to cause false memoranda to be made by the employees of the corporation.[3] The vendee of stock may sue for damages for deceit, where the vendor fraudulently represented the dividends that had been paid on the stock.[4] A misrepresentation as to the amount of property held by the corporation is material.[5] Where

ports to be a certificate of bank stock, that the bank was organized and that the stock was worth par, and that the vendor knew this to be the case because he was one of the first stockholders, and that the stock was a good high dividend-paying stock, constitute a warranty, and the vendee may sue for damages if the facts are not as stated, the measure of damages being the difference between the value of the stock as represented and its actual value. Titus *v.* Poole, 73 Hun, 383 (1893); aff'd, 145 N. Y. 414 (1895). Where an heir sells stock at a nominal figure, it being considered worthless, and then learns that it has value and buys it back at a low figure on his statement that it had no value and that he wished to keep it on account of its having been held by his father, an action for damages for deceit lies. Edelman *v.* Latshaw, 180 Pa. St. 419 (1897). *Cf.* s. c., 159 Pa. St. 644 (1894). See Lynch *v.* Murphy, 171 Mass. 307 (1898).

[1] Sturges *v.* Stetson, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311, holding that the vendee is not liable on a note given in payment thereof; Fosdick *v.* Sturges, 1 Biss. 255 (1858); s. c., 9 Fed. Cas. 501, holding that the vendee may recover back money paid; Reeve *v.* Dennett, 145 Mass. 23 (1887), where the capital of $1,000,000 was issued for a worthless patent; holding also that the misrepresentations may invalidate also a second and subsequent purchase of stock, even though in the meantime the vendee has become a director in the corporation. A person who deeds land in exchange for stock which is represented to be full paid may have the sale rescinded where only $3 a share had been paid in on the stock. Coolidge *v.* Rhodes, 64 N. E. Rep. 1074 (Ill. 1902).

[2] Seaman *v.* Low, 4 Bosw. 337 (1859).

[3] Hager *v.* Thomson, 1 Black, 80 (1861).

[4] Handy *v.* Waldron, 18 R. I. 567 (1894).

[5] Boddy *v.* Henry, 113 Iowa, 462 (1901). A representation by the vendor of a bond that it was secured by a mortgage on real estate worth half a million, when, in fact, the corporation owned no real estate, is sufficient to support an action for false representations, even though the vendor referred to other people as authority for the statement. Whiting *v.* Price, 172 Mass. 240 (1898). A statement to a mercantile agency as follows: "Capital stock paid in, $500,000," is false as to a creditor relying on such a statement where a large part was paid in by supposed profits, consisting of second mortgages which turned out to be worthless. Bradley *v.* Seaboard Nat. Bank, 167 N. Y. 427 (1901). In the case of Burnham *v.* Lutz, 8 Kan. App. 361 (1898), where a mercantile corporation had been organized and twenty-six shares of stock only were issued to supply a board of directors, but not paid for, the court held that a vendor of goods to the corporation might show that such an organization of the corpo-

a person owns a majority of the stock of the corporation and sells it, and agrees with the purchaser to obtain the stock held by others at as low a figure as possible, and misstates to such persons the price which he obtained for his own stock, he is liable in an action for deceit to parties who sell their stock relying on such statements.[1] In a suit for damages for misrepresentations inducing the purchase of bonds, the fact that the interest has been paid on the bonds does not prevent the recovery of damages, inasmuch as the bonds may not be marketable or adequately secured.[2] It is not fraud, however, for a director or other corporate officer to buy or sell stock at a profit, due to his official knowledge of the condition of the corporation;[3] nor to obtain the stock by a threat of a call.[4] The fact that a check given in payment for stock is not honored, although the money is in bank, is not fraud where payment was refused because of other frauds of the vendor;[5] nor is it fraud to issue certificates before anything has been paid thereon, there being no participation by the vendor.[6] It is fraud, however, to represent the company as having a full-paid capital stock when in fact the stock was wholly issued in payment of a worthless mine. The person making such representation is liable to the vendee.[7] It

ration was fraudulent, and hence that the parties interested were liable as partners.

[1] Weaver *v.* Cone, 174 Pa. St. 104 (1896). Where the president induces a stockholder to give up his stock on repayment of the amount paid thereon, on the representation that another party will take all the stock and complete the enterprise, and the fact is that the president himself gets some of the stock so surrendered, a stockholder may have the agreement canceled. Simrall *v.* Williamson, 35 S. W. Rep. 632 (Ky. 1896).

[2] Currier *v.* Poor, 155 N. Y. 344 (1898).

[3] Tippecanoe County *v.* Reynolds, 44 Ind. 509 (1873). Where one of the partners in the building of railroads, and in owning stocks, bonds, etc., dies, and his executor, after an examination of all the assets by means of experts, etc., makes a settlement with the other partner, such settlement is binding although the other partner did not impart all the knowledge or information he might have given. The subsequent rise in value of some of the securities is immaterial. Colton *v.* Stanford, 82 Cal. 351 (1890). The purchaser of stock from the secretary of the company cannot rescind on the ground of fraud, the secretary having given at the time of the sale all the information which he had concerning the company. No confidential or fiduciary relation exists. Krumbhaar *v.* Griffiths, 151 Pa. St. 223 (1892). And see § 320, *supra.*

[4] Grant *v.* Attrill, 11 Fed. Rep. 469 (1882). As to other cases of fraud by the vendee, see Johnson *v.* Kirby, 65 Cal. 482 (1884); Hempfling *v.* Burr, 59 Mich. 294 (1886).

[5] Comins *v.* Coe, 117 Mass. 45 (1875).

[6] Woodruff *v.* McDonald, 33 Ark. 97 (1878).

[7] Cross *v.* Sackett, 2 Bosw. 617 (1858). See also §§ 40, 48, *supra;* Colt *v.* Woolaston, 2 P. Wms. 154 (1723). When a promoter misrepresents to a subscriber the price paid by the promoter for property conveyed by him to the company, the subscriber may sue him for damages. Teachout *v.* Van Hoesen, 76 Iowa, 113 (1888). A sale or pledge of stock stamped

is fraudulent for a vendor to represent that he is selling the stock of others, when in fact he is selling his own stock.[1] Statements that the stock sold is treasury stock, and that others paid the same price to the treasury, are material.[2] A representation as to the cost of the stock, with an agreement to sell at cost, is different from an agreement to sell at a fixed figure which is represented to be cost. A misrepresentation as to the cost of the stock to the vendor is not actionable.[3] Although a contractor, taking stock and bonds in payment for work, subcontracts the work for the stock and then forecloses the mortgage and buys in the property, the subcontractor cannot hold him liable for the stock.[4] The fact that the only property that the company owns consists of worthless patents, being infringements on other patents, is no defense to notes given for stock, there being no warranty or fraud. The value is immaterial.[5] A vendor of stock is not bound to tell the vendee the company is insolvent, even though the former knew that fact at that time;[6] nor is the vendee bound to tell what he

"non-assessable," when in fact it was not legally paid up, renders liable for false representations the president and secretary who made such sale or pledge and who knew that it was not paid-up stock. Windram *v.* French, 151 Mass. 547 (1890). A suit by the purchaser of stock for damages for fraud, in that the stock had been fraudulently paid up by property conveyed to the corporation at an overvaluation, is barred by the statute of limitations applicable to frauds. Smith *v.* Martin, 135 Cal. 247 (1901). A statement filed with the state commissioner as required by statute, in regard to the amount of the paid-up stock, is not such a representation as will sustain an action for damages for fraudulent representations inducing a person to take the notes of the company. Hunnewell *v.* Duxbury, 154 Mass. 286 (1901). But see 65 N. E. Rep. 901.

[1] Mayo *v.* Knowlton, 134 N. Y. 250 (1892); Maturin *v.* Tredinnick, 2 New Rep. 514 (1863). Where a person, upon the statement of the president that the company has no stock for sale, but will get some, authorizes the president to buy for him, and the president turns out stock which the company already has, the contract is voidable by such vendee. McDoel *v.* Ohio, etc. Co., 36 S. W. Rep. 175 (Ky. 1896).

[2] Caswell *v.* Hunton, 87 Me. 277 (1895).

[3] Gassett *v.* Glazier, 165 Mass. 473 (1896).

[4] McLane *v.* King, 144 U. S. 260 (1892). A contractor taking payment in stock cannot complain that the property was foreclosed under a mortgage which he assented to. Kelley *v.* Collier, 11 Tex. Civ. App. 353 (1895).

[5] Watts *v.* Stevenson, 165 Mass. 518 (1896). Where a note is given for entirely worthless stock, the defense of total failure of consideration may be set up against the note, even though no offer to return stock has been made. Taft *v.* Myerscough, 64 N. E. Rep. 711 (Ill. 1902).

[6] Rothmiller *v.* Stein, 143 N. Y. 581 (1894); Jones *v.* Garlington, 44 S. C. 533 (1895). See also § 335, *supra*. A vendor of stock may collect the price although the stock was worthless and known so to be by the vendor. Hunting *v.* Downer, 151 Mass. 275 (1890). A person who is under contract to purchase stock cannot defeat that contract by the fact that the corporation was

knows.[1] A misstatement as to what the corporation received for the stock issued by it is material.[2] A statement that the vendor is selling at the same price to others is fraudulent if such is not the case.[3] Where several subscribers refused to take their stock, and finally, to induce them to do so, a party agrees secretly with one of them to purchase his holdings, such an agreement may be enforced.[4] A person who contracts to purchase stock may defend against an action for the price by setting up that the vendor falsely represented that the vendee was about to be deprived of the presidency of the company, and that thereby the vendee was induced to make the contract of purchase at an unconscionable price.[5]

There are various facts which constitute fraud herein, and various principles of law applicable to the remedy to be pursued. Such cases are arising constantly, and various decisions on this subject are given in the notes below.[6]

insolvent at the time the contract was entered into. Rudge *v.* Bowman, L. R. 3 Q. B. 689 (1868); Gordon *v.* Parker, 10 La. 56 (1836), where the question of whether fraud was involved was submitted to the jury. Crabb *v.* Miller, 19 W. R. 419 (1871), where, by reason of a winding up, a transfer on the corporate books was no longer possible; Kerchner *v.* Gettys, 18 S. C. 521 (1882), holding that a loss by the corporation of its property is no defense. Damages cannot be recovered for the breach of an executory contract to purchase stock, if at the time of making the contract the corporation had been dissolved and the purchaser was not aware of that fact. Kip *v.* Monroe, 29 Barb. 579 (1859). The fact that stock was worthless at the time of the sale thereof is no defense to an action for the purchase price, unless there was fraud or a specific warranty. Peck, etc. Co. *v.* Stratton, 95 Fed. Rep. 741 (1899). A person who pays for land by transferring worthless mining stock is not a *bona fide* purchaser. Sewell *v.* Nelson, 67 S. W. Rep. 985 (Ky. 1902). The vendor is not liable in an action for deceit, even though the stock was worthless, it having a market value and he having no knowledge of its intrinsic value. Kirtley's Adm'x *v.* Shinkle, 69 S. W. Rep. 723 (Ky. 1902).

[1] A sale of stock July 6th, "including all dividends due or to become due thereon," carries a stock dividend declared June 5th and payable to stockholders of record July 1st, and the sale is not fraudulent although the seller did not know of such stock-dividend and the buyer did know. Rose *v.* Barclay, 191 Pa. St. 594 (1899).

[2] Hoxie *v.* Small, 86 Me. 23 (1893).

[3] Kilgore *v.* Bruce, 166 Mass. 136 (1896).

[4] Traphagen *v.* Sagar, 63 Minn. 317 (1895).

[5] Delano *v.* Rice, 23 N. Y. App. Div. 327 (1897).

[6] Where a debtor turned over to his creditor, as trustee, the controlling stock of a corporation, for the latter to manage, and the latter afterwards, by threats of abandoning the enterprise, forced the debtor to sell him the stock outright, a court of equity will set aside such sale and hold the creditor liable as a trustee. Ryle *v.* Ryle, 41 N. J. Eq. 582 (1886). A failure of the vendor to state that the company is a joint-stock association and not a corporation is not fraud avoiding the sale of the stock. Curtiss *v.* Hurd, 30 Fed.

Fraud in the sale of stock frequently arises in the organization of the company. The parties who cause the company to be organ-

Rep. 729 (1887). It is a question for the jury whether it was fraud in representing that the stock was paid up, when in fact the first payment only had been made, and the balance had been paid by dividends. Kryger *v.* Andrews, 65 Mich. 405 (1887). Fraud may be by directors in fraudulently making dividends. See ch. XXXII, *infra.* Where a person owning all the stock of a corporation sells it under circumstances which induce the purchaser to believe that the former has no claim against the corporation, he may be enjoined from enforcing any such claim. Given *v.* Times-Republican, etc. Co., 114 Fed. Rep. 92 (1902). Where, after an agreement to sell land for stock, the owner of the stock attends a corporate meeting and votes to sell all corporate property at sixty cents on the dollar, which is done, the purchaser of the stock may have the land returned. Harris *v.* Piatt, 64 Mich. 105 (1887). Cases of fraud on the part of the vendee sometimes occur, where the vendee is given a majority of the stock, and then uses his control of the corporation to defraud the vendor in the execution of his contract to pay for the stock. Hardenbergh *v.* Bacon, 33 Cal. 356 (1867); Johnson *v.* Kirby, 65 Cal. 482 (1884). Where a stockholder sells a controlling interest to a person who is to pay therefor by improving the corporate property, but who elects a board of directors and defrauds the vendor, the latter's remedy is a difficult one. Cates *v.* Sparkman, etc. Co., 73 Tex. 619 (1889). The vendor cannot rescind on the ground that the vendee said that he was buying for himself alone and such was not the case. Downs *v.* Self, 67 S. W. Rep. 897 (Tex. 1902). The fraud or mistake must have been such that the agreement would not have been made in its absence, where a rescission of the contract is sought by decree. Means *v.* Rees, 26 Fed. Rep. 210, 216 (1886). Even though an inventor is persuaded to turn in his inventions to a corporation for stock on an oral assurance that plenty of money would be forthcoming to take the stock of the company and make the business successful, and even though the parties making such representations do not advance the money, but allow the company to become insolvent and buy in the assets, including the patents, yet the inventor cannot maintain an action for fraud in failing to furnish money according to promise. Smith *v.* Parker, 148 Ind. 127 (1897). A promise of employment is not fraud, even though not performed. Hubbard *v.* Long, 105 Mich. 442 (1894). Fraud may be by the agent's representations as to the cost of mining the coal, of transportation, and of the market price. Booth *v.* Smith, 117 Ill. 370 (1886). On a question of testimony by the defendant, see Reeve *v.* Dennett, 141 Mass. 207 (1886). It has been held that one who was induced by fraud to purchase stock in an insolvent corporation may bring suit to have his part of the corporate assets ascertained, to the exclusion of a debt due from the corporation to the person inducing him to purchase. Poole *v.* West Point, etc. Assoc., 30 Fed. Rep. 513 (1887). A person making sales of stock by false representations may be indicted for obtaining money by false representations. Commonwealth *v.* Wood, 142 Mass. 459 (1886). The statute of frauds as to the answering to the debt, defaults, etc., of another person has no application to a sale of stock herein. The fact that the corporate property sold several years later for a small amount is immaterial and not admissible. French *v.* Fitch, 67 Mich. 492 (1887). A misstatement as to the reason why the vendee purchases is not material. Byrd *v.* Rautman, 85 Md. 414 (1897). Where an in-

ized are called the "promoters" of it. As such they are disqualified from making a profit by selling property to the company at a

solvent pledgor sells the pledge to the pledgee for the debt itself, $7,000, the transaction is legal, even though a jury find that the stock was worth $1,500 more. Wachovia L. & T. Co. *v.* Forbes, 102 N. C. 355 (1897). See § 479, *infra.* Where an agent to sell a mine induces his principals to place in his name all their stock, and he sells the property and accounts to them for part only of the price, and refuses to return the stock, they may sue him for an accounting without previously tendering back the amount they received or demanding the stock. Wooster *v.* Nevills, 73 Cal. 58 (1887).

False representations as to the corporate property, business, and prospects, and the use of a corporate prospectus which the vendee knows contains false statements, sustain rescission of a transfer of land for stock. A person purchasing the land with full knowledge of the fraud is not protected. The certificates may be filed with the clerk of the court, awaiting the retransfer of the land. Ormsby *v.* Budd, 72 Iowa, 80 (1887). The vendee of stock cannot rescind or collect damages on the ground that the corporation was not legally incorporated. If it is a *de facto* corporation the vendor is not liable. Harter *v.* Eltzroth, 111 Ind. 159 (1887). The vendee of stock for which he gave real estate may have a reconveyance of the real estate decreed, where the sale of stock was induced by fraudulent representations. Gray *v.* Robbins, 11 Atl. Rep. 860 (N. J. 1887). A managing director who buys stock on credit, and then aids in levying an attachment on the stock against the vendor and conceals the same from the vendor, and buys in the stock at a low price, and then repudiates his debt to the vendor, is guilty of fraud. Young *v.* Fox, 37 Fed. Rep. 385 (1888). Where the president in selling stock makes false representations, the vendee is not bound to investigate them. He may defeat a note given in payment. Wannell *v.* Kem, 57 Mo. 478 (1874). A representation that a bond is an "A No. 1" bond is not a material representation. Deming *v.* Darling, 148 Mass. 504 (1889). See also instances in § 334, *supra.* The vendee fails in his suit for damages if he does not contradict the defendant's testimony that the plaintiff vendee knew all the facts at the time of the sale. Nelson *v.* Luling, 62 N. Y. 645 (1875), aff'g 36 N. Y. Super. Ct. 544.

A statement on April 10 that the last semi-annual dividend was seven per cent., and that the fiscal year ended on June 1, is a fraudulent suppression of the truth where but one dividend had been declared, and that twenty-two months before the date of the statement. Tyler *v.* Savage, 143 U. S. 79 (1892). Where the contract of sale contains express warranties, parol representations as warranties are not admitted to prove false representations. Humphrey *v.* Merriam, 46 Minn. 413 (1891). The fact that statements as to the affairs of the company are not filed as required by statute does not amount to fraud in the sale of stock; nor do representations that the stock will pay twenty per cent. dividends amount to fraud. The question as to the validity of stock having once been litigated cannot be again raised in an action for deceit in the sale of the stock. The mere act of conspiracy is not sufficient to sustain the action unless damage is shown. Robertson *v.* Parks, 76 Md. 118 (1892). A representation, in a transaction involving water-company stock, as to the amount of water that can be obtained is material. A tender of the certificate is sufficient where there has been no transfer on the books. Hill *v.* Wilson, 88 Cal. 92 (1891). Expressions of opinion as to the future, although

much larger price than they gave for the property. The promoters act in a fiduciary capacity. Hence, when they have made a profit

exaggerated, are not representations. Columbia Electric Co. *v.* Dixon, 46 Minn. 463 (1891). Notes given in the purchase of stock in a corporation whose sole business is to carry on an infringing telephone business are without consideration and void. Clemshire *v.* Boone County Bank, 53 Ark. 512 (1890). Under the New York statute it may be legal for an insurance company to transfer its business and liquidate its affairs by dissolution proceedings, in accordance with the statute, and hence a purchaser of the business may maintain a suit for false representations as to the condition of the company. L. D. Garrett Co. *v.* Morton, 65 N. Y. App. Div. 366 (1901).

Where stock is issued to several persons for a patent, and they return part of it to a trustee for the company to sell for working capital, and a subscriber to the company's stock gives his note to the company, and the company indorses the note to one of the first-named parties, who turns out his own stock to fill the subscription, the latter may recover on the note, and is not liable for false representations of one of his associates and an agent of the company. King *v.* Doane, 139 U. S. 166 (1891). A sale of stock will not be set aside on the ground of inadequacy of price unless so gross as to shock the conscience and give decisive evidence of fraud. Perry *v.* Pearson, 135 Ill. 218 (1890). It is not sufficient to prove that defendants managed the manufacturing business of the company, to sustain an action for fraud in stating that the company was doing a good business and making ten per cent., it appearing that the business was new, and defendants did not state that they knew of the financial condition. Hatch *v.* Spooner, 13 N. Y. Supp. 642 (1891). A statement that drill-holes in coal-fields showed certain results are material, and not matters of opinion. Martin *v.* Hill, 41 Minn. 337 (1889). Where a banker sells stock to a lawyer and informs the latter that the company, the owner of land in Mexico, had a right, though an alien to Mexico, to own land therein, as the banker had been informed by his attorney, a note of the vendee in payment of the stock cannot be defeated on the ground that such corporation could not legally hold the land. Daly *v.* Brennan, 87 Wis. 36 (1894). It is not fraud on the vendee that his vendor took the stock from the corporation and paid for it with funds embezzled from another party. The corporation is not liable for the fraud of the president in selling his own stock. Dunn *v.* State Bank, 59 Minn. 221 (1894). A sale of bonds is not revocable even though bonds are invalid and the vendor innocently stated that they were valid. Ruohs *v.* Third Nat. Bank, 94 Tenn. 57 (1894). *Cf.* § 296, *supra.* False statements as to the condition of the company constitute fraud. Carruth *v.* Harris, 41 Neb. 789 (1894). In Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and

at the expense of the company, they may be compelled to turn over that profit to the company, or, if they have sold stock of the

what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations. The purchasers of stock which they suppose is the original stock, but which is really increased capital stock, cannot sustain a bill to cancel the original capital stock, even though the latter is held by the parties who issued the increased stock without amending the charter as required by statute. Byers *v.* Rollins, 13 Colo. 22 (1889). The fact that the company has not paid dividends does not prove that a representation that it was making ten per cent. profit was false. Hatch *v.* Spooner, 1 N. Y. App. Div. 408 (1896). In Kountze *v.* Kennedy, 147 N. Y. 124 (1895), an action was brought by a vendee of stock and bonds against an officer of the company, who upon the application of the vendee, before the purchase was made, made a false statement of the liabilities of the company. The suit, being at law, failed, because no fraudulent intent was proved. Where two parties exchange securities of various kinds, and in the contract to that effect place a value upon the same, there is no fraud arising from the fact that the value given to particular stocks is greater than their actual value, the transaction really being one of barter. Rockefeller *v.* Merritt, 76 Fed. Rep. 909 (1896). Where an agent or broker is employed to buy stock for a "pool," and agrees to do so for a compensation consisting of a part of the profits, he is liable in damages for fraud if he charges the "pool" more than the stock cost him. Manville *v.* Lawton, 19 N. Y. Supp. 587 (1892). The purchaser of bank stock may rely upon the statement of its president as to the bank's condition, and, the purchase having been from the bank itself, it may be rescinded. Merrill *v.* Florida, etc. Co., 60 Fed. Rep. 17 (1893). An action for fraud in inducing plaintiff to buy stock of defendant is defeated by proof that the stock was sold by the corporation itself. Hubbard *v.* Long, 105 Mich. 442 (1895). Misrepresentations as to the value of stock as investment and relating chiefly to the future will not sustain an action of deceit. Lynch *v.* Murphy, 171 Mass. 307 (1898). No fraud is proved by showing that the certificate of stock recited the capital stock as being $25,000 when it was claimed to be $50,000, nor by a general statement that the company's affairs were in good shape and that it was making money, such statement being practically correct. Hoeft *v.* Koch, 119 Mich. 458 (1899). It is no defense to notes given in payment for stock that the agent of the vendor stated that he would not sell the notes and that they could be paid out of future dividends. State Bank *v.* Gates, 114 Iowa, 323 (1901). A stockholder cannot prevent other stockholders from selling their stock on the ground that the purchaser may manage the company to the detriment of minority stockholders, and the fact that the plaintiff's stock was on deposit with the trust company and that he cannot get the stock and thus accept the order to purchase his stock also is no ground for an injunction. Ingraham *v.* National Salt Co., 72 N. Y. App. Div. 582 (1902). A purchaser of stock who makes a partial payment and gives back the stock as collateral security cannot abandon the contract and claim such part of the stock as the payment already made would pay for, on the ground that the seller has again obtained control of the corporation and is guilty of a breach of trust. The fact that the seller as pledgee has sold the stock and bought it in himself is immaterial, inasmuch

company, the purchasers of the stock from them may rescind the purchase and hold them personally liable therefor.[1]

It may be fraudulent for the directors to issue to themselves shares of the company's unissued stock in order to control elections or to make a profit.[2]

An agent is not liable for misrepresentations made by his principal, but it may be a question of fact whether the vendor is a principal or agent.[3] A contract in regard to stock may be illegal in itself, as, for instance, a contract to use stock to rob a railroad and bribe a judge.[4] Where a stockholder receives an offer for his stock, and is persuaded not to sell by fraudulent representations of a director, he may hold the latter liable in damages.[5] False representations made by a committee of the directors inducing parties to purchase a majority of the stock are not binding on stockholders and directors who knew nothing about such representations. Representations of an agent do not bind the seller unless the agent was authorized to make representations.[6] A misrepresentation by an agent of a corporation as to the property held by it, made to a purchaser of stock, not from the corporation but from a stockholder, does not render the vendor of the stock personally liable.[7]

as such a sale is illegal. Reid *v.* Caldwell, 110 Ga. 481 (1900); 189 U. S. 260.

[1] See § 651, *infra.* Thus where a person purchases property for the sole purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named, who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus the fact that he had formed the corporation and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Non-disclosure in such a case is a misfeasance in the nature of a breach of trust. *Re* Leeds, etc. Co., 87 L. T. Rep. 488 (1902).

[2] See § 70, *supra.*

[3] See § 334, *supra.*

[4] Tobey *v.* Robinson, 99 Ill. 222 (1881). Although a stockholder has transferred certain stock to the president to be used to bribe governmental officials in obtaining a renewal of governmental contracts with the corporation, yet the stockholder may recover back the stock, it not having been used for that purpose. Mulvane *v.* O'Brien, 58 Kan. 463 (1897). See also § 39, *supra.* Although a person transfers stock to another in order to evade a statute which prohibits any one stockholder from voting on any more than one-eighth of the capital stock, yet the person to whom it is transferred may make a valid agreement to retransfer the same, and the court will enforce this agreement. Scott *v.* Scott, 68 N. H. 7 (1894).

[5] Rothmiller *v.* Stein, 143 N. Y. 581 (1894). See also § 355, *infra.* A party making a false representation may be liable even though the stock was purchased from another. Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902).

[6] Garrett Co. *v.* McComb, 58 N. Y. App. Div. 419 (1901).

[7] Boddy *v.* Henry, 113 Iowa, 462 (1901).

A director selling stock cannot be defeated in his action for the price by reason of fraudulent representations of the corporate treasurer inducing defendant to purchase.[1] Where the president of a bank is acting as the agent of a person and sells to the latter securities of the bank by means of false representations, the bank is liable, even though the purchaser did not know that the sale was in behalf of the bank.[2] Misrepresentations made to others to induce them to buy the stock are immaterial where no sale had resulted therefrom and no fraud actually perpetrated.[3] Where the vendor making fraudulent representations as to the financial condition of the company is secretary and treasurer, he cannot claim that he was ignorant of the facts.[4] A vendee who is in the employ of the company and has opportunity to know all about it cannot claim that he was deceived as to the value of the stock.[5] Misrepresentations as to matters which did not affect the purchaser's judgment are immaterial, especially where the purchaser is invited to look at all the books and papers.[6] Although a statement is made that a certain amount of money had been paid in, yet where other statements show clearly that this was not so, no cause of complaint exists.[7]

Misrepresentations as to the amount of ore in sight, and its value, where the party has full opportunity afterwards to inspect the mine and visits the mine and buys more stock, and, after knowing all the facts, negotiates for machinery for the company, are no defense.[8] A purchaser is not bound to investigate the truth of a representation where it is shown that even if he had investigated he would not have become aware of the facts.[9] A provision in a contract of subscription to the stock of the company, whereby the subscriber waives notice of all contracts between the promoters and the company, is not binding on the stockholder, if such waiver is tricky and fraudulent.[10] Where the various stockholders of a corporation join in a contract for the sale of their stock, but secretly one of them receives a bonus from the purchaser, the others may compel him to account therefor proportionately.[11]

1 Doane *v.* King, 30 Fed. Rep. 106 (1887).

2 Carr *v.* National Bank & L. Co., 167 N. Y. 375 (1901). A bank may be liable for falsely representing the condition of a company, thereby inducing a party to purchase stock in the latter. Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902).

3 Darling *v.* Klock, 33 N. Y. App. Div. 270 (1898).

4 Drake *v.* Holbrook, 66 S. W. Rep. 512 (Ky. 1902).

5 Weaver *v.* Shriver, 79 Md. 530 (1894).

6 Garrison *v.* Technic, etc. Works, 59 N. J. Eq. 440 (1900).

7 McEacheran *v.* Western Transp. etc. Co., 97 Mich. 479 (1893).

8 Eldridge *v.* Young America, etc. Co., 67 Pac. Rep. 703 (Wash. 1902).

9 Dow *v.* Swain, 125 Cal. 674 (1899).

10 Greenwood *v.* Leather, etc. Co., Ltd., [1900] 1 Ch. 421.

11 Synnott *v.* Cummings, 116 Fed. Rep. 40 (1902).

§ 351. *Fraudulent sale by agent, etc., in breach of trust.*— A *bona fide* purchaser for value and without notice of stock from a vendor who delivers the certificates therefor indorsed in blank by another, or indorsed by the vendor himself, is protected and entitled to the stock, although it afterwards transpires that the agent was selling as agent of another and had been guilty of a breach of trust.[1] But the transferee is not protected where he is not a *bona fide* pur-

[1] McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871). This is not only the leading case on the estoppel of a principal from repudiating the sale or pledge of his stock by his agent, whom he intrusted with the certificates indorsed in blank, but it is one of the leading cases on the law of the quasi-negotiability of stock. See also Honold *v.* Meyer, 36 La. Ann. 585 (1884); Strange *v.* Houston, etc. R. R., 53 Tex. 162 (1880); Dovey's Appeal, 97 Pa. St. 153 (1881). A *bona fide* pledgee of fraudulently issued warehouse receipts can enforce them only to the extent of the loan and interest. Corn, etc. Bank *v.* American, etc. Co., 163 N. Y. 332 (1900). A bill in equity filed by a partner to hold his copartners and third persons liable for a misappropriation of stock owned by the firm cannot be sustained where it is not alleged that the third persons knew of such misappropriation at the time of such misappropriation. Wall *v.* Old Colony, etc. Trust Co., 174 Mass. 340 (1899). Even though the agent of a corporation represents to it that a party owns certain property and will sell it to the corporation for $7,500 in bonds and $30,000 in stock, and the purchase is made on those terms, and the vendor keeps the bonds and gives the stock to such agent, and the agent sells a portion of the stock to a *bona fide* purchaser, yet the latter cannot rescind the sale on the ground of fraud. Foushee *v.* Snyder, 54 S. W. Rep. 730 (Ky. 1900). Where four shares of stock are transferred to a person by the corporation to qualify him as a director, and he agrees to return the same to the corporation when ceasing to be a director, but thereafter and before he ceases to be a director he agrees with the indorsers of his note that they shall have the stock as collateral security, they are protected, even though the stock was actually delivered to them after they had notice of the first agreement, it being shown, however, that they had no notice of such agreement at the time they became sureties. Dueber, etc. Co. *v.* Daugherty, 62 Ohio St. 589 (1900). Where a stockholder indorses a certificate of stock in blank and delivers it to an agent, and the agent pledges it for his own purposes, the pledgee, if he took without notice of the breach of trust, is protected. The court held also that the statute of 1884 applied to such a case. Russell *v.* American, etc. Co., 62 N. E. Rep. 751 (Mass. 1902). The *bona fide* purchaser of stock from an agent without knowledge of the agency is protected. Garvin *v.* Pettee, 88 N. W. 573 (So. Dak. 1901). Where certificates of stock are deposited with the broker, duly transferred in blank, a *bona fide* holder of such certificates from the broker is not protected as against the real owner, where the facts were sufficient to give him notice. Ryman *v.* Gerlach, 153 Pa. St. 197 (1893); and see many cases in chapter XXV, *infra*, where this principle of law is often involved. The books are full of cases wherein an agent has committed a breach of trust in the sale of stock. For many instances of this kind of fraud and the various principles of law applicable thereto, see ch. XIX, *supra*, and chs. XXII and XXIV, *infra*. An assignee in insolvency of the agent does not take the stock. See § 320, *supra*.

chaser.[1] Where forgery is involved the purchaser takes nothing.[2] A person buying stock from an agent, with knowledge that the latter is acting as agent, is bound to inquire into the scope of his authority, and if the agent is authorized only to sell for cash his agreement to sell on time cannot be enforced by the purchaser.[3] Where the same person acts as agent for both the transferrer and the transferee, and absconds with the purchase price after the certificates have been delivered, but before registry on the corporate books, the transferee is protected.[4] Where the corporation knows that the vendor is selling as the agent of the stockholder,

Moodie *v.* Seventh Nat. Bank, 3 W. N. Cas. 118 (1876), holds that if the purchase takes partly for an antecedent debt he is not a *bona fide* holder to that extent. See also Dovey's Appeal, 97 Pa. St. 153 (1881). An agent to collect dividends who loans the stock at a profit is liable for its loss, even though he informed the owner of the loan and she did not object. Persch *v.* Quiggle, 57 Pa. St. 247 (1868). A *bona fide* purchaser from the agent is protected. State Bank *v.* Cox, 11 Rich. Eq. (S. C.) 344 (1860); West Branch, etc. Co.'s Appeal, *81 Pa. St. 19 (1870); Otis *v.* Gardner, 105 Ill. 436 (1883); Zulick *v.* Markham, 6 Daly, 129 (1875); Martin *v.* Sedgwick, 9 Beav. 333 (1846); Linnard's Appeal, 6 East. Rep. 877 (Pa. 1886).) In England certificates of stock are not negotiable in any sense, and hence the English decisions on the point now under consideration have no weight in America. See §§ 377, 412, *infra*, and § 325, *supra*.

[1] Talmage *v.* Third Nat. Bank, 91 N. Y. 531 (1883); Crocker *v.* Crocker, 31 N. Y. 507 (1865); Weaver *v.* Barden, 49 N. Y. 286 (1872), where the agent fraudulently bought in his own name and then fraudulently sold; Williamson *v.* Mason, 12 Hun, 97 (1877). A purchaser from an agent with notice of the fact that he held as agent, and that he had sold to himself, is not protected. Bank of Louisville *v.* Gray, 84 Ky. 565 (1886). Where a person holds stock under an agreement with another that after the profits have repaid the cost of the stock the further profits should be divided equally between them, such agreement is binding upon a person who buys such stock with notice of the agreement. Morris *v.* Shepard, 53 Atl. Rep. 172 (N. J. 1902). Where a street railway company employs a person as its agent to purchase a majority of the stock of another street railway company, and he does so, and the former pays him for the stock and for his services, he cannot refuse to deliver the stock on the ground that the company had no power to purchase, or on the ground that it had passed no resolutions authorizing him to purchase, and the former may recover the stock from a transferee with notice from the agent. Manchester St. Ry. *v.* Williams, 52 Atl. Rep. 461 (N. H. 1902).

[2] See §§ 365–370, *infra*. Where an agent of a stockholder forges his name to the certificates of stock and pledges them with a party to secure a loan to the agent's principal, such loan cannot be collected, even though the proceeds went to the credit of the principal and were afterwards embezzled by the agent under a power of attorney to check out the principal's money, the party loaning the money on the certificates of stock not having any knowledge of such power of attorney at the time. Fay *v.* Slaughter, 194 Ill. 157 (1901).

[3] Norton *v.* Nevills, 174 Mass. 243 (1899).

[4] *Ex parte* Shaw, L. R. 2 Q. B. D. 463 (1877).

who has given to the agent the certificates indorsed in blank, it must see to it that the agent has full power to sell the stock, and is liable for allowing a registry where the agent has not such power.[1] A stockholder whose stock has been wrongfully pledged may enjoin the corporation from allowing a transfer by the pledgee who has applied for the same.[2] If the principal authorized the sale or ratified it, he of course cannot afterwards complain.[3] Where an agent to sell is able to sell for more than he accounts for to his principal, the latter cannot recover the difference unless the sale was actually made.[4] Even though the seller's broker divides a secret profit with the purchaser's broker without the purchaser knowing thereof, yet the purchaser cannot hold the seller's broker liable for his profits. The remedy is rescission.[5] Where a stockholder in an insolvent corporation turns over his stock to another person to deposit under a reorganization agreement, the latter agreeing to pay the assessment on the stock and to deliver to the stockholder the new securities upon repayment of such assessment, and he refuses so to do thereafter, he is guilty of a conversion and of a fraud upon the stockholder.[6] Where a customer may rescind a purchase of stock made for him by his broker, upon discovering that the broker sold him stock owned by such broker, the customer, if he has exchanged such stock for reorganization stock, may tender back old stock which he borrows for that purpose.[7] In England the courts do not protect a purchaser of certificates of stock unless the latter has not only purchased, but has obtained a registry on the corporate books.[8]

An agent's power to sell stock does not authorize him to pledge it.[9] A person who knows, or has the means of knowing, that an-

[1] Woodhouse *v.* Crescent Mut. Ins. Co., 35 La. Ann. 238 (1883), holding that the transferee who is charged with receiving with notice may be joined as a party defendant. St. Romes *v.* Levee, etc. Co., 127 U. S. 614 (1888).

[2] The pledgor need not allege that the pledgee took with notice. It is for the pledgee to intervene and prove that the pledge was *bona fide*. Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236 (1901).

[3] As to the admissibility in evidence of a receipt showing that the agent was authorized to sell by order of the principal's brother, see Dwyer *v.* Fuller, 144 Mass. 420 (1887). A pledge of stock by an agent is not a conversion, where the principal received without objection and retains a receipt from the agent setting forth such pledge. Metcalf *v.* Williams, 144 Mass. 452 (1887).

[4] Edison *v.* Gilliland, 42 Fed. Rep. 205 (1890). An agent may of course be held liable for misrepresenting the price which he received on the sale of stock and for retaining the difference. Horner *v.* Perry, 112 Fed. Rep. 906 (1901).

[5] Illingworth *v.* De Mott, 59 N. J. Eq. 8 (1900). *Cf.* 120 Fed. 84; 93 N. W. 722.

[6] Miller *v.* Miles, 58 N. Y. App. Div. 103 (1901).

[7] Mayo *v.* Knowlton, 134 N. Y. 250 (1892).

[8] See § 412, *infra*.

[9] Merchants' Bank *v.* Livingston, 74 N. Y. 223 (1878). See §§ 321, 326, *supra*.

other person holds stock as an agent to sell only, cannot take such stock in pledge from the agent, although the latter represents that the money is to be used for his principal. The principal may recover the stock if he has not authorized the pledge.[1] A *bona fide* purchaser of certificates of stock from a pledgee is protected.[2] Where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected.[3]

§ 352. *Fraud may be by corporate reports or prospectus.*— A report of corporate officers to the stockholders, setting forth the condition of the affairs of the corporation, is deemed to be a statement to the public also, and it may be relied upon by any one in purchasing shares. This principle of law was first clearly established in England in 1860, in the case of Davidson *v.* Tulloch.[4] It was there held that there need be no privity between the officers issuing the report and the person purchasing shares of stock from third persons. If such purchaser made his purchase relying upon material statements in corporate reports which were false, he has his remedy against all persons who knowingly made or issued the report.[5] The

[1] Fisher *v.* Brown, 104 Mass. 259 (1870). A *bona fide* pledgee of a certificate of stock from an agent having power to pledge, but who had so pledged the stock for purposes not authorized by the owner, is nevertheless protected, and even though such pledgee sells the stock at private sale without notice he cannot be held liable if the stock was not worth more than the debt secured. Brittan *v.* Oakdale, etc., 124 Cal. 282 (1899).

[2] See § 473, *infra.* A bank taking a pledge of negotiable bonds in good faith may hold them, though it turn out that the pledger was not the owner of them, but held them as security that a mortgage would be canceled. Saloy *v.* Hibernia Nat. Bank, 39 La. Ann. 90 (1887). Where the pledgee of stock transfers it into his own name on the books of the company and takes out new certificates, a *bona fide* purchaser or pledgee from him is protected. Westinghouse *v.* German, etc. Bank, 196 Pa. St. 249 (1900). As to sales by trustees, etc., see ch. XIX, *supra.*

[3] Manchester St. Ry. *v.* Williams, 52 Atl. Rep. 461 (N. H. 1902). *Cf.* § 373, *infra.*

[4] 6 Jur. (N. S.) 543; S. C., 3 Macq. (H. L.) 783.

[5] Scott *v.* Dixon, 29 L. J. (Exch.) 62, n. (1859), explained in Peek *v.* Gurney, L. R. 6 H. L. 398 (1873), as follows: "The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares; and the representation must be regarded as having been made not indirectly, but directly to each person who obtained the report from the bank where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director;" Gerhard *v.* Bates, 20 Eng. L. & Eq. 129 (1853); Cullen *v.* Thomson, 6 L. T. Rep. 870 (1862), holding that, where directors of a joint-stock company issue false and fraudulent reports to the public, and the manager, secretary, and other officers of the bank supply the detailed statements for such report, knowing them to be false and that they are to be used for purposes of deceit, and a third party, acting on such reports, purchases shares in the company and suffers loss thereby, each of the officers

leading case in this country on the liability of corporate directors for fraudulent representation as to the condition of the company, not made to a purchaser of stock personally, but to the public generally, is Cross *v.* Sackett,[1] decided in 1858, where fraudulent

of the company who knowingly assisted in the fraud is personally liable to such third party for the loss caused by such misrepresentation in the report, though the report was signed only by the directors and not by the subordinate officers.

[1] 2 Bosw. 617; 6 Abb. Pr. 247; 16 How. Pr. 62, the court saying: "When an instrument is made to deceive the public generally, and is adapted, as well as intended, to deceive some portion of the public, and as well one person as another, and is used as it was designed it should be, and fraudulently induces some one to act to his prejudice by acting in the mode it was intended to influence them to act who might be deceived by it, the person who made the instrument and caused it to be thus fraudulently used is liable to the person who has been defrauded by it. In such a case the person injured has been subjected to damage by his fraudulent acts, and the fraudulent wrong-doer is liable for the consequences." In Cazeaux *v.* Mali, 25 Barb. 578 (1857), the court said: "It is not essential that the representation should be addressed directly to the plaintiff; if it were made with the intent of its influencing every one to whom it might be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated, but they must have come to a knowledge of it before their purchase." In Morse *v.* Swits, 19 How. Pr. 275 (1859), a bank officer was held liable for false statements in a report published in accordance with the requirements of a statute, the court saying: "Being published, the public, or any individual of the public, has a right to believe it. . . . And if, believing it, any one of the public acts on that belief, the makers and publishers of this falsehood are to be held liable for the consequences they have caused." (See cases cited in Reporter's note to the foregoing.) See also Salmon *v.* Richardson, 30 Conn. 360 (1862); Fenn *v.* Curtis, 23 Hun, 384 (1881), holding the secretary liable to a purchaser of shares from an individual, the secretary having signed the certificate of stock and also a circular stating that the corporation was a corporation, when in fact it was not. And see §§ 40, 48, *supra*. A person buying stock in what was supposed to be a corporation, but is a partnership, cannot recover back his money from all of the participants. Perry *v.* Hale, 143 Mass. 540 (1887). A corporation is not liable for misrepresentations of the president in selling stock belonging to himself. Prosser *v.* First Nat. Bank, 106 N. Y. 677 (1887). Where stockholders in an apartment-house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal. The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the by-law. Compton *v.* Chelsea, 128 N. Y. 537 (1891). The fact that the false statements as to the condition of the corporation are made to a director, who is acting as agent for the vendee, is not fatal to the suit for fraud. Trimble *v.* Ward, 97 Ky. 748 (1895). A person loaning money to an individual and taking bank stock as collateral security cannot hold the bank liable in an action for damages for deceit, on the ground that its published statements were false and fraudulent, and that he relied on those statements. Merchants' Nat. Bank *v.* Armstrong, 65 Fed. Rep. 932 (1895). A vendor who sells know-

dividends and representations based thereon were made. A corporation may be held liable for false representations in a prospectus issued by it to sell stock of another corporation.[1] A purchaser of stock in an insurance company, however, cannot hold a bank liable on a misstatement by the bank to the insurance commissioner as to the cash which the insurance company has on deposit with it.[2] An officer of a bank is personally liable to a purchaser of its stock who relied on the published statement signed by the officers in which overdrafts are described as loans and discounts.[3] Although a corporate creditor may hold the incorporators liable for a false statement in their sworn statement obtaining incorporation in regard to the amount of capital stock that has been paid in, yet the action is in tort and an assignee of the claim cannot maintain it.[4] The president is liable in an action of deceit where he sells stock after referring the purchaser to a published statement of the corporation signed by him, which statement was false. Where, however, the sale is to a director, such a director is bound to show that he did not know the statement was untrue, and he may show that fact although he also signed the statement.[5]

ing that the corporation has issued a false report that it was earning two per cent. a month, and that the vendee relied on this report, is guilty of fraud, and the sale may be rescinded. Foley *v.* Holtry, 43 Neb. 133 (1894). A person who purchases bank stock from the bank itself may hold the bank liable for damages where the public statement of the bank which he relied on in purchasing was false. The measure of damages is the difference between the value of the stock if the statement had been true and its actual value. Exchange Bank *v.* Gaitskill, 37 S. W. Rep. 160 (Ky. 1896). A stockholder sued by a corporation on an ordinary debt, and who sets up in defense that he was induced to buy stock from outside parties by fraudulent statements made by the company, cannot have a *mandamus* to compel the company to allow him to examine its books. His application in such a case is as a creditor and not as a stockholder. Investment Co. *v.* Eldridge, 2 Pa. Dist. 394 (1893).

1 Such a cause of action is assignable under the New York statute. Benedict *v.* Guardian T. Co., 58 N. Y. App. Div. 302 (1901).

2 Hindman *v.* First Nat. Bank, 86 Fed. Rep. 1013 (1898).

3 Gerner *v.* Yates, 61 Neb. 100 (1900). A person who buys stock in a national bank relying on a report of the condition of the bank signed by directors, in accordance with the acts of congress, may hold the directors so signing the report personally liable in damages if it transpire that the report was absolutely false and that the stock was worthless, but he cannot hold liable the directors who did not sign the report. Gerner *v.* Mosher, 58 Neb. 135 (1899). See also Stuart *v.* Bank of Staplehurst, 57 Neb. 569 (1899). Directors of a bank are not liable in an action for deceit to a purchaser of stock, although they signed the cashier's annual statement, which was false, there being proof that they believed it to be true. Foster *v.* Gibson, 38 S. W. Rep. 144 (Ky. 1896).

4 Haines *v.* Franklin, 87 Fed. Rep. 139 (1898).

5 Ward *v.* Trimble, 44 S. W. Rep. 450 (Ky. 1898). The president is liable in

§ 353. A somewhat different rule prevails in England as to false statements contained in a prospectus of a corporation. A prospectus is issued for the purpose of inducing persons to subscribe for stock. Its object is not to promote the sale of that stock. Accordingly it was decided in Peek *v.* Gurney,[1] in 1873, that "the purchaser of shares in the market, upon the faith of a prospectus which he has not received from those who are answerable for it, cannot, by action upon it, so connect himself with them as to render them liable to him for the misrepresentation contained in it, as if it had been addressed personally to himself." In New York a directly opposite rule prevails. In the case of Morgan *v.* Skiddy,[2] in 1875, the court of appeals held that, "if the plaintiff purchased his stock relying upon the truth of the prospectus, he has a right of action for deceit against the persons who, with knowledge of the fraud and with intent to deceive, put it in circulation. The representation was made to each person comprehended within the class of persons who were designed to be influenced by the prospectus; and when a prospectus of this character has been issued, no other relation or privity between the parties need be shown except that created by the wrongful and fraudulent act of the defendants in issuing or circulating the prospectus, and the resulting injury to the plaintiff." It has recently been held in England that where a person purchases stock in the open market, being induced to do so by a prospectus and published telegram, both of which are fraudulent, he may hold the promoters personally responsible, although the stock was not purchased from them nor from the corporation.[3]

an action for deceit where he sells stock of the bank of which he is president, and which has published a false statement of its condition by order of the president and others. Trimble *v.* Reid, 41 S. W. Rep. 319 (Ky. 1897). In an action at law the directors are not liable to a person who purchases stock, relying on the directors' report, unless fraudulent intent is proved. Parker *v.* McQuesten, 32 Q. B. Rep. (Can.) 273 (1872).

[1] L. R. 6 H. L. 377, overruling Bagshaw *v.* Seymour, 18 C. B. 903 (1856), and Bedford *v.* Bagshaw, 4 H. & N. 538 (1859); explaining Scott *v.* Dixon, 29 L. J. (Exch.) 62, n. (1859), and Gerhard *v.* Bates, 2 El. & Bl. 476 (1853), and itself explained in Cargill *v.* Bower, L. R. 10 Ch. D. 502 (1878). In Bellairs *v.* Tucker, L. R. 13 Q. B. D. 563 (1884), the court seems to have assumed a different position, and to have treated the prospectus the same as any other method of misrepresentation.

[2] 62 N. Y. 319. In Kountze *v.* Kennedy, 147 N. Y. 124 (1895), it was held that the fact that an officer, in a statement of the liabilities of the company omitted a claim which was afterwards established, was not guilty of such fraud as would sustain a suit at law for damages for deceit.

[3] Andrews *v.* Mockford, 73 L. T. Rep. 726 (1896). Where a party purchases stock, relying on a prospectus which states that reports had been "prepared for the directors" by the engineers,

§ 354. *Remedies for the fraud.*— There are three methods by which a person who has been fraudulently induced to buy or sell stock may remedy the wrong.[1] He may bring an action at law for the consideration, or an action at law for damages for the deceit, or he may file a bill in equity to have the transaction set aside. The second remedy is the most difficult and the last the most easy to maintain. At common law an action to recover back the whole of the purchase-money upon a rescission for fraud is virtually a suit for money had and received.[2]

In special cases other remedies are open to the purchaser. He may compel the defrauding party to abide by the statements that were made. Thus, where the vendor represented that the corporate property was unincumbered, equity may, at the instance of the purchaser of stock, enjoin the vendor from enforcing a lien which he has on such property.[3] If the contract is executory it may be

and giving extracts therefrom, the directors are not personally liable in an action for deceit, even if it is shown that the reports were prepared on instructions not from the directors, but from the vendors of the property to the company. It is necessary to prove that the reports were untrue. Angus *v.* Clifford, [1891] 2 Ch. 449.

[1] "A person who has been induced by fraudulent representations to become the purchaser of property has, upon discovery of the fraud, three remedies open to him, either of which he may elect. He may rescind the contract absolutely and sue in an action at law to recover the consideration parted with upon the fraudulent contract. To maintain such action he must first restore, or offer to restore, to the other party, whatever may have been received by him by virtue of the contract. He may bring an action in equity to rescind the contract, and in that action have full relief. Such an action is not founded upon a rescission, but is maintained *for* a rescission, and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial. Lastly, he may retain what he has received and bring an action at law to recover the damages sustained. This action proceeds upon an affirmance of the contract, and the measure of the plaintiff's recovery is the difference between the article sold and what it should be according to the representations." Vail *v.* Reynolds, 118 N. Y. 297 (1890). Where the sale of stock has been induced by fraud, the vendee may follow the money paid by him and recover it back if the identity of the fund can be shown. Moore *v.* Williams, 62 Hun 55 (1891).

[2] Gassett *v.* Glazier, 165 Mass. 473 (1896).

[3] Jones *v.* Bolles, 9 Wall. 364 (1869). See also §§ 334, 354 and 771. Where a person organizes a railroad corporation and takes a contract for its construction, and causes all the stock and a large quantity of bonds to be issued to himself, and then sells these stocks and bonds and has knowledge of representations made by corporate officers to his vendee that the company owes nothing except the bonds, he cannot afterwards enforce a claim for doing extra work under a contract, where such contract did not appear on the books of the company. The transaction is a fraud on his part. Chicago, etc. Ry. *v.* Miller, 91 Mich. 166 (1892). Where the vendor of a majority of the stock of a corporation agrees that the company owes no

canceled by mutual agreement.[1] A purchaser of national bank stock from the bank itself cannot, after the bank has passed into the hands of a receiver, defend against the statutory liability on the ground of fraud inducing him to purchase, unless he proves acts of diligence which negative any charge of negligence, and also proves that no debt was created nor credit given the bank after he became such stockholder.[2] The pleadings in enforcing the remedies which the vendee has, vary, of course, according to the remedy which is pursued.[3]

§ 355. *Action for deceit.*— In order to sustain an action for damages for deceit, whereby plaintiff was induced to buy or sell shares of stock, it is necessary for the plaintiff to prove that statements

debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. Chicago, etc. Ry. *v.* Hoyt, 89 Wis. 314 (1895). See German State Bank *v.* Northwestern, etc. Co., 104 Iowa, 717 (1898). Although a purchaser of stock cannot rescind, he having been guilty of delay, yet he may sue the vendor upon a warranty that the stock will be worth more than what it was sold for. Maxted *v.* Fowler, 94 Mich. 106 (1892). Stockholders cannot defeat a vendor's lien on the ground that the vendor, before they bought their stock, represented that he had no lien, where they do not set up that defense in a suit by him to establish his lien. Wilson *v.* Seymour, 76 Fed. Rep. 678 (1896). Where a person owning all the stock of a corporation sells it under circumstances which induces the purchaser to believe that the former has no claim against the corporation, he may be enjoined from enforcing any such claim. Given *v.* Times-Republican, etc. Co., 114 Fed. Rep. 92 (1902). Where the stockholders in a power company sell their stock and then obtain control of water rights on which the company had an option, which option has expired, the party purchasing the stock may by a suit in equity compel them to turn over such water rights. Valentine *v.* Berrien, etc. Co., 87 N. W. Rep. 370 (Mich. 1901).

[1] A subscription may be canceled by and with the consent of the directors when fraud is involved. Four years afterwards corporate creditors cannot attack it. McDermott *v.* Harrison, 9 N. Y. Supp. 184 (1890). See ch. X, *supra.* If there has been a mutual mistake in regard to what the stock really represented in property, an action for money had and received or a suit to cancel the sale will lie. Norton *v.* Bohart, 105 Mo. 615 (1891).

[2] Wallace *v.* Hood, 89 Fed. Rep. 11 (1898). See also § 163, *supra.* A subscriber to the stock of a national bank cannot, after the bank has become insolvent, avoid his statutory liability on the stock by the defense that he was induced by fraudulent representations of the bank and its officers to become a stockholder. Scott *v.* Deweese, 181 U. S. 202 (1901). In a suit at law brought by the receiver of a national bank against a stockholder on his statutory liability, he cannot set up fraud on the part of the bank in inducing him to subscribe. That defense, if good at all, is available only by a suit in equity. Neither can the defendant set up a counterclaim for the money so paid by him for the stock. Lantry *v.* Wallace, 182 U. S. 536 (1901).

[3] In the case of Smith *v.* Tracy, 36 N.

were made or acts done which were fraudulent, that the person guilty of them knew that they were fraudulent, and that the plaintiff acted on such statements or acts in buying or selling the stock.[1] In England a statement made recklessly, or without regard as to whether it is true or untrue, may constitute a fraudulent intent.[2]

Y. 79 (1867), the vendee sued the vendor for a breach of warranty, alleging that the vendor's agent made certain representations as to the condition of the corporation. The action failed on the ground that the vendor did not authorize the agent to make a warranty. In Ayres *v.* French, 41 Conn. 142 (1874), the court held that fraud, inducing the owner of stock to part with it, may be remedied by the action of trover, with a count in case for a fraudulent procurement and conversion of the stock. In National Exch. Co. *v.* Drew, 2 Macq. (H. L.) 103 (1855), it was held that where a person is induced by the fraudulent reports and representations of corporate officers to purchase stock, and the corporation loans him money to do so, it cannot recover back the money loaned. See Lightfoot *v.* Creed, 8 Taunt. 268 (1818), holding that the vendee should declare, not for money paid, but specially on the contract. Fraud in the purchase of stock is not a good defense to a note given for such stock for the purchase price, unless it is averred that the purchase was induced by the fraud and that the purchaser was ignorant of the truth of the misrepresentations made. Spencer *v.* Johnston, 58 Neb. 44 (1899).

[1] Quoted and approved in Trimble *v.* Reid, 97 Ky. 713 (1895); aff'd, 41 S. W. Rep. 319 (1897), where a vendee sued the president for publishing a false statement as to the condition of a bank.

[2] In the important case of Derry *v.* Peek, L. R. 14 App. Cas. 337 (1889), the House of Lords decided that in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Fraud is proved when it is shown that a false statement has been made (1) knowingly; (2) without belief in its truth; (3) recklessly. But if a man make a false statement honestly believing it to be true it is not sufficient, to support an action of deceit, to show that he had no reasonable grounds for his belief. The directors of a tramway company issued a prospectus in which they stated that they were authorized to use steam power, and that by this means a great saving in working would be affected. The special act incorporating the company conferred this authority subject to the consent of the board of trade, but at the time of making the statement they had not in fact obtained consent to use steam power, although they honestly believed that they would obtain it as a matter of course. *Held* (reversing the judgment of the court below), that they were not liable in an action of deceit brought by a shareholder who had been induced to apply for shares by the statement in the prospectus. In an action for deceit by a misrepresentation in a prospectus as to the net profit on the capital employed, the action being against one who was a promoter and also one of the vendors, and whose name appeared in the prospectus and who became a director, the plaintiff must prove (1) that the defendant's statement was untrue; (2) that it was dishonest; (3) that he believed it to be untrue. See also Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889), following the House of Lords in Derry *v.* Peek, L. R. 14 App. Cas. 337. In Peek *v.* Gurney, L. R. 6 H. L. 377, 391 (1873), the court said: "It is said that the prospectus is true as far as it goes, but half a truth will sometimes amount to a real falsehood." See also ch. IX, § 148, *supra.* In Bellairs *v.* Tucker, L. R. 13 Q. B. D. 562, 579 (1884),

In New York the rule is more stringent. The case of Wakeman *v.* Dalley[1] applies to this class of cases the rule that "an action founded upon the deceit and fraud of the defendant cannot be maintained in the absence of proof that he believed, or had reason to believe, at the time he made them, that the representations made by him were false, and that they were for that reason fraudulently made, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge." This case held that a director is not liable for false representations on the company's printed business cards, of which he was ignorant, even though his name was attached thereto. The same rule has been applied in other jurisdictions.[2] In New York a vendee of stock and bonds

however, the court said: "The action is one for deceit. It is necessary . . . not only to prove that the statements in a prospectus or any other document are not true, but it must be proved that they are fraudulently put forward with intent to deceive."

[1] 51 N. Y. 27, 35 (1872); Nelson *v.* Luling, 36 N. Y. Super. Ct. 544 (1873); aff'd, 62 N. Y. 645; Schwenck *v.* Naylor, 102 N. Y. 683 (1886). The case of Holmes *v.* Moffat, 120 N. Y. 159 (1890), was an action for false representations and deceit in the sale of stock, but the decision turned upon technical rules relative to the trial. The action for deceit does not lie against the corporation, at least where no fraudulent intent is proved. Pinedo *v.* Germania, etc. Co., N. Y. D. Reg., July 29, 1885 (Supreme Ct.). See also § 157, *supra.*

[2] In an action of tort for deceit against a director for inducing a person to purchase stock, "the plaintiff must prove representations of material facts which are false, and which induce him to act; and either that the defendant knew them to be false, or that, the facts being facts susceptible of knowledge, he represented as of his own knowledge that they were true, when in fact he had no such knowledge." Cole *v.* Cassidy, 138 Mass. 437 (1885). In an action for fraud inducing the purchase of stock scienter must be proved. It is sufficient that the defendant has no good reason to believe that material representations made by him were true. A statement that $1,500,000 worth of ore was lying on the ground around the mine is a material representation. Barndt *v.* Frederick, 78 Wis. 1 (1890). In Wisconsin, in a suit by a vendee of stock against the vendor for damages for obtaining money and property by false and fraudulent representations, the defendant may be arrested. Warner *v.* Bates, 75 Wis. 278 (1889), giving the complaint and affidavit. See also Clark *v.* Edgar, 84 Mo. 106 (1884); Gee *v.* Moss, 68 Iowa, 318 (1886).

An allegation that the plaintiff was induced by the false and fraudulent misrepresentations of the defendant to buy from the latter certain stock which was valueless, and that the defendant knew that the statements were untrue, and that the plaintiff relied on the statements and bought the stock, constitutes a cause of action in tort. Freeman *v.* Trickett, 6 Kan. App. 83 (1897). A person who makes false statements in regard to a corporation, and then advises the party to whom the statements are made to buy the stock, is liable, in an action for deceit to such party. Heintz *v.* Mueller, 19 Ind. App. 240 (1898); Arkwright *v.* Newbold, L. R. 17 Ch. D. 301 (1881); Arthur *v.* Griswold, 55 N. Y. 400, 410 (1874), the court say-

who sues at law to recover damages for fraud and deceit inducing the purchase of the stock, the fraud and deceit consisting of a misstatement by an officer of the liabilities of the company, must prove that the officer did not believe the statement to be a true exhibit of the company's affairs and was guilty of dishonesty. It is insufficient to prove that the statement was grossly inaccurate, and largely understated the actual liabilities of the company. Actual fraud must be proved. It must be shown that the representation was not only false and material, but was known by the defendant when he made it to be false, or, not knowing whether it was true or false, and not caring what the fact might be, that the defendant made it recklessly, paying no heed to the injury which might ensue. "Misjudgment however gross, or want of caution however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit."[1] When a stockholder receives an offer for his stock, and is persuaded not to sell by fraudulent representations of a director, he may hold the latter liable in damages.[2] So also where the principal gives an order to the broker to sell certain stock, which the principal owns, and the broker, by fraudulent representations, dissuades him from selling, the principal may hold the broker liable

ing: "The rules of law require a reasonable degree of certainty as to each requisite necessary to constitute the cause of action, viz., representations, falsity, scienter, deception, and injury."

In a sale of stock by a director, a misstatement made by him in good faith, as to the property owned by the corporation, does not render him liable in an action for deceit. Boddy *v.* Henry, 113 Iowa. 462 (1901). To sustain an action for deceit it must be proved that the representation was false and that the party making it knew it to be false, but if such party had means of knowledge, but actually had no knowledge, this is sufficient to hold him liable. Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902). A bank, which, as pledgee, causes by its statements a party to purchase the stock held in pledge, may be held liable in damages if such statements were false. Hindman *v.* First Nat. Bank, etc., 98 Fed. Rep. 562 (1899). Where a purchaser of goods misrepresents the value of stock which is to be given as a pledge for the purchase price and refers the vendor to a bank, which bank repeats the misrepresentations, the pledgee may sue the bank for damages and may show that the bank at that time held such stock in pledge and that the goods so purchased were substituted for the stock of the bank upon the transaction being closed. Am. Nat. Bank, etc. *v.* Hammond, 25 Colo. 367 (1898). In an action for deceit it is not necessary to allege that the plaintiffs would not have purchased but for the false representations. Drake *v.* Holbrook, 66 S. W. Rep. 512 (Ky. 1902). In a suit by a subscriber against persons inducing him to subscribe by fraudulent misrepresentations, the corporation is not a necessary party defendant. Austin *v.* Murdock, 127 N. C. 454 (1900).

[1] Kountze *v.* Kennedy, 147 N. Y. 124 (1895).

[2] Rothmiller *v.* Stein, 143 N. Y. 581 (1894).

in damages.[1] The vendee of stock may sue for damages for deceit where the vendor fraudulently misrepresented the dividends that had been paid on the stock.[2] Where a person owns a majority of the stock of a corporation, and sells it, and agrees with the purchaser to obtain the stock held by others at as low a figure as possible, and misstates to such persons the price which he obtained for his own stock, he is liable in an action for deceit to parties who sell their stock relying on such statements.[3]

The purchaser of stock who has given a note in payment cannot defeat an action on the note by setting up that the purchase was induced by fraud. He must first disaffirm the contract and return the certificate, and such return must be made before the trial.[4] But where the purchaser brings an action for deceit he need not return the consideration nor rescind the contract.[5] His injury is to be duly measured, and credit may be given for the real value of the stock.[6] A director is not liable for the misrepresentations and frauds of his co-directors, unless he has expressly authorized or tacitly permitted commission thereof.[7] The mere fact of being a director "is not *per se* sufficient to hold a party liable for the frauds and misrepresentations of the active managers of a corporation. Some knowledge of and participation in the act claimed to be fraudulent must be brought home to the person charged."[8] Where, however, proof is given tending to show that the defendants were jointly engaged in a common scheme to defraud the plaintiff, the acts and declarations of one are admissible in proof against all;[9] and frauds of a similar nature, at or near the same time as the one complained of, may be shown.[10] The fraud practiced need not have been the sole inducement to the purchase.[11] A

[1] Fottler *v.* Moseley, 179 Mass. 295 (1901).

[2] Handy *v.* Waldron, 18 R. I. 567 (1894).

[3] Weaver *v.* Cone, 174 Pa. St. 104 (1896).

[4] Gifford *v.* Carvill, 29 Cal. 589 (1866). A transferee claiming to be defrauded is nevertheless liable on the statutory liability where he brought a suit for damages for the fraud and recovered judgment. Such a suit is a ratification of the transfer. Stuart *v.* Hayden, 72 Fed. Rep. 402 (1895).

[5] Miller *v.* Barber, 66 N. Y. 558, 564 (1876); Newbery *v.* Garland, 31 Barb. 121 (1860). See Parsons *v.* Johnson, 28 N. Y. App. Div. 1.

[6] See § 586, *infra.* In an action for false representations inducing the purchase of stock, the defendant may show that the stock was worth as much as it would have been had the representations been true. Doran *v.* Eaton, 40 Minn. 35 (1889).

[7] Weir *v.* Barnett, L. R. 3 Exch. D. 32 (1877).

[8] Arthur *v.* Griswold, 55 N. Y. 400, 406 (1874); Morgan *v.* Skiddy, 62 N. Y. 319 (1875).

[9] Miller *v.* Barber, 66 N. Y. 558, 567 (1876).

[10] Miller *v.* Barber, 66 N. Y. 558, 568 (1876). See also note 6, p. 340, and note 1, p. 811.

[11] Morgan *v.* Skiddy, 62 N. Y. 319, 328 (1875); *Ex parte* Carling, 56 L. T. Rep. 115 (1887). Plaintiff need not prove

party may be liable herein although he was neither a corporate officer nor the vendor of the stock. If, with intent to cheat and defraud the vendee, he induces him, by fraudulent means, to purchase for value stock which he knows to be worthless, he is liable for the damage sustained, although the purchase is actually made from another.[1] A person who purchases stock induced by misrepresentations may recover full damages in an action for deceit, even though he causes a portion of the stock to be transferred to members of his family.[2] A sale of stock does not transfer a right of action for damages caused by false representations made to the vendor by the party from whom the vendor purchased.[3] In an action by a purchaser of stock against the company and two directors for deceit, the verdict may be against one or more of the defendants, and may be sustained by one or more of the misrepresentations alleged.[4] A suit to hold the directors liable for declaring a dividend out of the capital stock, and thereby inducing the plaintiff to purchase the stock, cannot at the same time seek to hold the directors liable to the corporation for the dividend so declared.[5] Several persons defrauded of their contract whereby they were to receive stock cannot sue jointly. Each must sue separately.[6] In a suit for damages for fraud inducing the sale of stock the court will be liberal in admitting evidence showing the full nature of the transaction, and it is for the jury to decide whether the fraud was intentional and whether there was any fraud.[7] The measure of damages for fraud inducing the purchase of stock "is the difference between the value of the stock at the time it was purchased and the price paid for it."[8] An agreement by which a suit for

that he relied solely upon the misrepresentations. Hatch *v.* Spooner, 13 N. Y. Supp. 642 (1891); Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902).

[1] Hubbell *v.* Meigs, 50 N. Y. 480, 490 (1872). Concerning the effect of false and fraudulent representations on an action for damages, see Tockerson *v.* Chapin, 52 N. Y. Super. Ct. 16 (1885). It is no defense to such an action that the original conversion was by some one else. Kuhn *v.* McAllister, 1 Utah, 273 (1875); s. c. *sub nom.* McAllister *v.* Kuhn, 96 U. S. 87 (1877). See also § 350, *supra.*

[2] Boddy *v.* Henry, 113 Iowa, 462 (1901).

[3] Kenedy *v.* Benson, 54 Fed. Rep. 836 (1893). Where fraudulent representations are made inducing a party to sell his stock, and then the purchaser wrecks the corporation, the vendor may hold the latter liable for damages. The assignee of the cause of action may sue in trover for conversion, but cannot sue for damages for fraudulent representations, inasmuch as the latter cause of action is not assignable. Smith *v.* Thompson, 94 Mich. 381 (1892).

[4] Lare *v.* Westmoreland Specialty Co., 155 Pa. St. 33 (1893), holding also that the party purchasing the stock may rescind or may retain the stock and sue for damages.

[5] Stroud *v.* Lawson, [1898] 2 Q. B. 44.

[6] Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890).

[7] Townsend *v.* Felthousen, 156 N. Y. 618 (1898).

[8] See § 586, *infra.*

damages for fraud inducing the purchase of stock is discontinued does not prevent a subsequent suit on the same cause of action.[1]

§ 356. *Remedy in equity.*— A court of equity has concurrent jurisdiction with a court of law in enabling a purchaser of stock to recover back money paid, where the purchase was induced by fraud chargeable to the vendor.[2] The remedy in equity, for a sale or

[1] Jacobs *v.* Marks, 182 U. S. 583 (1901).

[2] See § 155, *supra*. Where a person is induced to subscribe for stock on the fraudulent representations of the president that the company is in a prosperous condition, the person may file a bill in equity to recover back the money, and equity has jurisdiction on the grounds of discovery, account, fraud, misrepresentation, and concealment. Both the company and the president individually were made defendants and held liable. Tyler *v.* Savage, 143 U. S. 79 (1892). See also Hill *v.* Lane, L. R. 11 Eq. 215 (1870), where the court said: "It is so well settled that this court will entertain jurisdiction in such cases that it would be a misfortune indeed to the public if there were any sufficient ground for considering that the jurisdiction is doubtful. . . . Although courts of common law may have jurisdiction in some such cases, there is clearly concurrent jurisdiction in this court," doubting Ogilvie *v.* Currie, 37 L. J. (Ch.) 541 (1868); Campbell *v.* Fleming, 1 Ad. & El. 40 (1834). A bill in equity is a proper remedy for fraud inducing a sale of stock. Andriessen's Appeal, 123 Pa. St. 303 (1889). A bill in equity does not lie at the instance of a purchaser of stock, who has paid for the stock, to rescind on the ground that he was defrauded. The remedy is at law. Moreover, such a bill is multifarious if it asks also for a discovery. Price *v.* Hurley, 51 Atl. Rep. 339 (Pa. 1902). Where a corporation organized to do a jewelry business is really a scheme to carry on an illegal and fraudulent investment business, a person defrauded may file a bill in equity to hold the corporation and its officers and stockholders personally liable and enjoin them from disposing of the assets and for discovery. Edwards *v.* Michigan, etc. Co., 92 N. W. Rep. 491 (Mich. 1902). Where the president of a national bank induces a person who lives several hundred miles away from the bank to purchase stock in the bank by fraudulent representations, and within thirty-six days the bank is closed, the purchaser may have the sale rescinded. Stufflebeam *v.* De Lashmutt, 101 Fed. Rep. 367 (1900).

Where the president sells stock for $120 per share after he has indorsed a false statement of the company's affairs, the stock being really worth but $70 per share, the vendee may have the sale rescinded. Prewitt *v.* Trimble, 92 Ky. 176 (1891). In a suit to rescind for fraud the plaintiff must prove that the stock was not worth what he paid for it or could not be sold for that sum. Aron *v.* De Castro, 13 N. Y. Supp. 372 (1891); affirmed, 131 N. Y. 648. In an action in equity to rescind a sale of stock for fraud the corporation is not a necessary party. The value of the stock need not be shown, and the amount paid with interest may be recovered. But six years' delay after discovering the fraud is a bar. Higgins *v.* Crouse, 63 Hun, 134 (1892). In an action to rescind for fraud the defrauded subscribers need not join as plaintiffs, although they all purchased at the same time and on the same terms. Moore *v.* Robertson, 11 N. Y. Supp. 798 (1890). Where the vendors represent that the money will be used to buy a secret process, and the purchasers pay over the money to the company for that purpose, and it is mingled with other funds and is not used to purchase the process because the process is a fraud,

purchase of stock induced by fraud, is by a bill to set aside the whole transaction. This remedy follows the rules usually prescribed in such suits. It is not necessary for the complainant to prove a fraudulent intent. Innocent acts or misrepresentations

the vendees may rescind as to the vendors, but cannot make the receiver of the company pay over the money. Moore *v.* Robertson, 11 N. Y. Supp. 798 (1890). The vendor may tender back the stock and file a bill in equity to cancel the sale on the ground that he was induced to purchase by false statements that the corporation owned the secret process; that a patent had been applied for; that it was ready to commence business, and that complainant would be made president and manager. Benton *v.* Ward, 47 Fed. Rep. 253 (1891). To same effect, Stainbank *v.* Fernley, 9 Sim. 556 (1839), where a sale by a director who has issued false reports and declared illegal dividends was set aside. The corporation is a proper party to such actions, if a registry has been obtained by the person who has obtained the stock by fraud, since a retransfer on the corporate books is asked for. See also Bradley *v.* Luce, 99 Ill. 234 (1881). A judgment creditor of a foreign corporation cannot enjoin it from transferring stock and bonds owned by it. The remedy sought must be something in addition to the injunction. Rogers *v.* Michigan, etc. R. R., 28 Barb. 539 (1858). An equitable suit does not lie to rescind a sale of worthless bonds. A suit at law is the proper remedy. U. S. Bank *v.* Lyon County, 48 Fed. Rep. 632 (1892). A purchaser of stock who was induced to purchase by fraud cannot maintain a suit in equity when he fails to show more than a right to pecuniary damages for misrepresentations. Whitney *v.* Fairbanks, 54 Fed. Rep. 985 (1893). A contract between the owner of property and a promoter by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. Brehm *v.* Sperry, 92 Md. 378 (1901). Where both the purchaser and seller of stock in a mining company know at the time that there is a report that the mine has been "salted," the sale cannot be rescinded, inasmuch as neither party has clean hands. Bearden *v.* Jones, 48 S. W. Rep. 88 (Tenn. 1897). A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false representations and also claim that the company was not duly incorporated; and further bring in a subsequent corporation that took all the assets of the first, and also bring in those persons who finally obtained such assets,— all in one bill brought to collect the debt. Jefferson Nat. Bank *v.* Texas Inv. Co., 74 Tex. 421 (1889). See to the effect that a court of equity has jurisdiction, City, etc. Corp. *v.* Central Trust Co. (N. Y. L. J., June 12, 1891). Where bank stock is sold by fraudulent and false representations, the bank being aware thereof and receiving indirectly the money paid for the stock, the sale may be rescinded and the money recovered back from it, even though it is insolvent. Florida, etc. Co. *v.* Merrill, 52 Fed. Rep. 77 (1892). Several subscribers who have been induced by the same misrepresentations contained in a prospectus to subscribe for stock may join in a suit in equity for the benefit of themselves and others

suffice for this purpose, although they would be insufficient to sustain an action for deceit. A vendee may often have relief in equity by reason of misrepresentation based upon mistake or innocent misstatements, where the common-law action of deceit would require much more stringent proof.[1] Actual fraud need not be proved

similarly deceived to set aside their subscriptions. Bosher *v.* Richmond, etc. Co., 89 Va. 455 (1892). See also § 156, *supra*. A bill in equity lies to rescind a fraudulent sale of stock. Merrill *v.* Florida, etc. Co., 60 Fed. Rep. 17 (1893). A stockholder in a national bank who transfers his stock in order to avoid the statutory liability may be held liable, and this liability may be enforced by the receiver of the bank. In such a suit a transferee cannot be held liable also, nor can the transferee's claim that he was defrauded be tried in that suit. Stuart *v.* Hayden, 72 Fed. Rep. 402 (1895). If the suit is in equity and the money went to the corporation, an officer cannot be held personally liable, inasmuch as rescission is the essence of the suit. Zimmele *v.* American, etc. Co., 1 N. Y. App. Div. 327 (1896). A promoter who has taken a contract to purchase a property at a certain price, based upon reports and representations that the business had not decreased since the reports, may, upon discovering that the business has largely decreased, refuse to carry out the contract, and may hold the party liable for his disbursements, but not for profits which he would have made if his plans had been carried out. Loewer *v.* Harris, 57 Fed. Rep. 368 (1893). Where a person turns over stock and bonds to another in order that the latter may act for the former in carrying out a reorganization, the former may file a bill against the latter for an account and need not resort to an action at law. Benedict *v.* Moore, 76 Fed. Rep. 472 (1896). See also § 321, *supra*. The vendee may rescind where false and material representations were made and the plaintiff relied upon them and was injured, even though he might have made investigations which would have shown their falsity. Olcott *v.* Bolton, 50 Neb. 779 (1897). Several purchasers of stock may contribute to the bringing of a test case to decide whether representations inducing the purchase were fraudulent. Davies *v.* Stowell, 78 Wis. 334 (1890).

Where negotiable bonds are stolen from the owners and they pass into *bona fide* hands, and then the thief obtains them by fraud from such *bona fide* hands and returns them to the first owners, the latter are entitled to keep them. London, etc. Co. *v.* London, etc. Bank, L. R. 21 Q. B. D. 535 (1888). In England this remedy by bill in equity is held to be "precisely analogous to the common-law action for deceit," in that damages may be awarded. See also Peek *v.* Gurney, L. R. 6 H. L. 377, 390 (1873), the court saying: "There can be no doubt that equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at law and in equity."

[1] Kountze *v.* Kennedy, 147 N. Y. 124 (1895); Arkwright *v.* Newbold, L. R. 17 Ch. D. 301 (1881). See also Boggs *v.* Wann, 58 Fed. Rep. 681 (1893). A suit in equity lies to rescind a sale of stock induced by fraudulent representations. Intent to defraud need not be proved. Martin *v.* Hill, 41 Minn. 337 (1889); Freer *v.* Denton, 61 N. Y. 492 (1875). Actual intent to defraud need not be shown in a suit in equity to rescind. In such a suit similar frauds practiced on others cannot be shown in evidence. Johnson *v.* Gulick, 46 Neb. 817 (1896). The rule in New York is otherwise. Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134 (1902). *Cf.* § 165, note. A court of equity will not entertain a

in an action for rescission where the falsity of material representations is clearly proved.[1] Moreover, the contract of sale may be canceled by a court of equity on the ground of a mutual mistake where the misrepresentations were innocently made.[2]

Although the buyer of stock purchased it at a small nominal price by reason of fraudulent misrepresentations, yet the seller cannot maintain a bill in equity to rescind, where the stock has no special value other than its money value, and the latter can readily be shown.[3] The fraud may be waived by the acts of the vendee.[4] The right to rescind the contract for fraud is waived by taking a bond of indemnity against liability on the stock, such bond being taken upon discovery of the fraud.[5] A party cannot rescind a purchase of stock on the ground of false representations as to the company's having a secret process, where he learned about the process before completing his purchase, and had held the stock a year, and endeavored to sell the process.[6] A person cannot rescind for fraud a purchase of stock from the corporation itself, where, subsequently to discovering the fraud, he attended a stockholders' meeting, and voted to assess the stock, and afterwards attended another stockholders' meeting and paid the assessment.[7]

suit to enforce the statutory liability of directors for paying dividends in violation of the statute, even though there is no other remedy in any other court, where the money is not needed to pay the company's debts and a judgment would not promote justice, but would produce inequitable results. A stockholder cannot maintain such a suit in behalf of himself or other stockholders, even though he was induced to purchase his stock by reason of such dividends. In this case the court carefully reviewed many precedents. Siegman *v.* Maloney, 51 Atl. Rep. 1003 (N. J. 1902).

[1] Carr *v.* Nat. Bank, etc. Co., 167 N. Y. 375 (1901). If rescission is sought not on the ground of mistake, but of fraudulent representations, it must be shown that such representations were made with knowledge of their falsity and with intent to deceive, and that they had that effect; in other words, scienter must be proved. Jones *v.* Allan, 35 N. Y. Supp. 527 (1895); Mason *v.* Wheeler, 24 N. Y. Supp. 879 (1893). In a suit by a vendee to rescind a sale of stock on the ground of fraud, it must be alleged that the misrepresentations were known to the vendor to be false. Garrett Co. *v.* Astor, 67 N. Y. App. Div. 595 (1902).

[2] Garrett Co. *v.* Halsey, 38 N. Y. Misc. Rep. 438 (1902).

[3] Edelman *v.* Latshaw, 159 Pa. St. 644 (1894), holding also that the bill will not lie where the defendant purchaser has already sold the stock to a *bona fide* purchaser. An action for deceit was afterwards sustained. See 180 Pa. St. 419 (1897).

[4] Kingman & Co. *v.* Stoddard, 85 Fed. Rep. 740 (1898).

[5] Bridge *v.* Penniman, 51 N. Y. Super. Ct. 183 (1885).

[6] Benton *v.* Ward, 59 Fed. Rep. 411 (1894).

[7] Marten *v.* Paul, etc. Co., 99 Cal. 355 (1893). Acting as a shareholder is a waiver of the right to rescind for promoter's misrepresentations. Petrie *v.* Guelph, etc. Co., 11 S. C. Rep. (Can.) 450 (1885). Where a corporation issues

Where a party has a right to return the stock and receive back his money, he may, after making a tender, do any acts in regard to the stock reasonably necessary to protect his interest, and yet not lose his right to rescind. But where he directs a sale of the stock and gives a proxy thereon and attends meetings, he waives his right to rescind.[1] Where the vendee sues to obtain the stock after he knows of the fraud, he ratifies the sale.[2]

Laches is a bar. And yet where a person buys stock in 1865 on the faith of false representations, and discovers in 1871 that the stock is worthless, and is told by one of the conspirators in 1889 that the representations were false, he may file a bill in equity for rescission of the sale and for recovery of the money paid.[3] Ordinarily, however, delay is fatal.[4]

stock and thereafter permits a transfer of the stock and sale thereof to another person, it cannot get the stock back on the ground of fraud on the part of the party to whom it first issued the stock. Tecumseh, etc. Bank *v.* Russell, 50 Neb. 277 (1897). Delay in rescinding, in hopes that the stock will be more valuable, is fatal. Weisiger *v.* Richmond Ice Mach. Co., 90 Va. 795 (1894). Where the vendee of stock becomes a director and has access to the books, and complains of fraud in the sale, and then takes a sum of money from the vendor in settlement, he cannot again complain upon the failure of the company. Powell *v.* Adams, 98 Mo. 598 (1889). A vendee who, after the purchase, becomes a director and signs statements similar to the representations made to him, and waits two years before repudiating the stock, cannot repudiate. Anderson *v.* Black, 32 S. W. Rep. 468 (Ky. 1895). A person may defeat notes given for stock which he was induced fraudulently to purchase from the corporation, even though he became and remained cashier for the corporation for over a year after the sale and before he set up the defense, and was a director and voted the stock. He did not necessarily learn the facts from occupying these positions, nor from the fact that he made official reports of the condition of the company. He was not bound to investigate. He tendered the stock back as soon as he discovered the facts. Especially do these rules apply where no creditors' or other stockholders' rights have intervened. Nat. Bank *v.* Taylor, 5 S. D. 99 (1894).

[1] Jessop *v.* Ivory, 158 Pa. St. 71 (1893). A payment after repudiating the subscription for fraud is not a waiver if made expressly to save money already paid. Fear *v.* Bartlett, 81 Md. 435 (1895).

[2] Anderson *v.* Chicago, etc. Bank, 63 N. E. Rep. 203 (Ill. 1902).

[3] Higgins *v.* Crouse, 147 N. Y. 411 (1895), rev'g 71 Hun, 615.

[4] A year's delay by the vendor of stock after being advised by his attorney that he had a good case of fraud is fatal. Perry *v.* Pearson, 135 Ill. 218 (1890). A delay of six years after knowledge of the fraud inducing a purchase of stock is fatal. Andriessen's Appeal, 123 Pa. St. 303 (1889). Three years' delay in tendering back the bonds is not fatal, nor is the fact that the vendee resold the bonds on the same terms, and the sub-vendee returned them to the first vendee. Wooster *v.* Sage, 67 N. Y. 67 (1876), aff'g 6 Hun, 285. The question of laches may be submitted to a jury. Mayo *v.* Knowlton, 134 N. Y. 250 (1892). See also §§ 160–162, *supra*. Silence, delay, vacillation, acquiescence, or the retention

A bill in equity to rescind a fraudulent sale of stock by a corporation lies, even against the receiver of the corporation.[1] In order to rescind a fraudulent sale of stock, the stock and also all other

and use of any of the fruits of a fraudulent sale or trade that are capable of restoration, for any considerable length of time after the discovery of the fraud, are fatal to the right to rescind the same. Stuart *v.* Hayden, 72 Fed. Rep. 402 (1895). Where, six months after the fraud, the purchaser has every opportunity to investigate the truth of the statements and fails to do so, he cannot, after seventeen years' delay, complain, even though he alleges concealment, no dividends having been paid in the meantime. McEacheran *v.* Western Transp. etc. Co., 97 Mich. 479 (1893). Two years' delay in disaffirming is fatal. Zimmele *v.* American, etc. Co., 1 N. Y. App. Div. 327 (1896). A delay of three years after discovery of the false statements, and one year after full knowledge of all the facts, is fatal. Byrd *v.* Rautman, 85 Md. 414 (1897). In the case of Krueger *v.* Armitage, 58 N. J. Eq. 357 (1899), the court of chancery held that the remedy of a stockholder for fraud inducing him to buy stock was at law alone, where the vendee after discovering the fraud instituted insolvency proceedings against the corporation as a stockholder and also delayed in filing his bill for rescission. Where a creditor of an insolvent corporation reorganizes it, and then by fraudulent representations induces another company to sell its property to the reorganized company in exchange for stock of the latter, and a mortgage is at the same time placed upon the combined properties and default takes place and foreclosure is commenced, the parties so selling the property in the said mortgage may still rescind unless innocent bondholders' rights have intervened, in which case money damages may be had against the parties bringing about the reorganization and making the misrepresentations. Such misrepresentations may consist of statements as to what will be done in the way of improvements out of the bonds, as well as statements as to the current net profits. Old Colony Trust Co. *v.* Dubuque, etc. Co., 89 Fed. Rep. 794 (1898). The question of what constitutes promptness in tendering back the stock for fraud may be a question of fact depending on the circumstances and conditions, especially where the stock was worthless. Heintz *v.* Mueller, 59 N. E. Rep. 414 (Ind. 1901). A suit by one signer of a reorganization agreement to enforce it prevents laches being charged against other signers who do not commence suit until a long time subsequently. Cox *v.* Stokes, 156 N. Y. 491 (1898). In a suit by a stockholder to hold a corporation liable for his stock and dividends, by reason of its allowing a transfer by an unauthorized agent of the stockholder, the subsequent owners of the stock are not necessary parties. The defense of prescription may prevail. St. Romes *v.* Levee, etc. Co., 127 U. S. 614 (1888).

[1] Merrill *v.* Florida, etc. Co., 60 Fed. Rep. 17 (1893). Even after the corporation has passed into the hands of a receiver, a subscriber for stock may rescind and sue for money paid, fraudulent representations having been made as to the condition of the company, the subscription being for increased stock, and the increase not having been made until some time after the subscription. Newbegin *v.* Newton Nat. Bank, 66 Fed. Rep. 701 (1895); aff'd, Newton Nat. Bank *v.* Newbegin, 74 Fed. Rep. 135 (1896). A stockholder in a national bank who was induced to become such by fraud may have his name taken from the list of stockholders, except as against creditors of the bank who became such after he became a stock-

property received must be tendered back.[1] In a suit in equity by a purchaser of stock to cancel a sale for fraud and to recover money paid back on account, no tender prior to the suit need be

holder and without notice of the fraud. Stufflebeam *v.* De Lashmutt, 83 Fed. Rep. 449 (1897). Eleven months after an insolvent bank issues new stock, concealing the facts, a subscriber or purchaser cannot repudiate for fraud, a receiver having gone in, even though the subscriber had just ascertained the facts. Dunn *v.* State Bank, 59 Minn. 221 (1894). Even after the appointment of a receiver of a bank, a person who was induced to buy stock of the bank by fraudulent statements that the stock was worth par can rescind by suit. Robinson *v.* Dickey, 14 Tex. Civ. App. 70 (1896). See § 164, *supra*, and Wallace *v.* Bacon, 86 Fed. Rep. 553 (1898). No rescission can be had after the corporation becomes insolvent. Deppen *v.* German-American, etc. Co., 70 S. W. Rep. 868 (Ky. 1902).

[1] Wainwright *v.* Weske, 82 Cal. 193 (1889); Francis *v.* New York, etc. R. R., 108 N. Y. 93 (1888); 17 Abb. N. Cas. 1, holding also that where the vendee has transferred said stock to another his action fails. The defrauded vendee must tender back the stock unconditionally. If he has used the stock in another transaction, even with the vendor, his right to rescind for fraudulent representations is barred. Bridge *v.* Penniman, 105 N. Y. 642 (1887). But where the vendee has sold part of the stock, he cannot maintain a suit in equity to collect money damages for loss occasioned by misrepresentations inducing him to purchase. His remedy is at law. No cancellation of the contract is involved. White *v.* Boyce, 21 Fed. Rep. 228 (1884). Selling some of the stock before repudiating for fraud is no bar to repudiation. 1 Ry. & Corp. L. J. 434. Rescission is not barred although the vendee has lost the stock by forfeiture, the vendor having knowledge thereof. Maturin *v.* Tredinnick, 4 New Rep. 15 (1864). If the party selling the stock states that he is selling stock owned by the corporation, when as a matter of fact he is selling his own stock, the vendee, upon discovering the fraud, may rescind the sale, and recover back the purchase price paid. He need not tender the same stock which he received, inasmuch as stock has no "ear-mark." If he has exchanged the stock for the stock of another company into which his company has been merged, he may borrow stock of the first company and make a tender of that. He must, however, rescind promptly upon the discovery of the fraud. Although he does not discover the fraud for four years he may then rescind. Mayo *v.* Knowlton, 134 N. Y. 250 (1892). A suit to cancel a sale of stocks and bonds, on the ground of fraud on the part of the purchaser, will not lie where the money paid at the sale has not been returned or tendered, even though the seller spent the money before he discovered the alleged fraud, and is unable to obtain the amount of money necessary for a tender. Such is the rule even though the amount to be distributed will be due to the plaintiff in case he succeeds in the suit. Rigdon *v.* Walcott, 141 Ill. 649 (1892). A stockholder who has been induced to purchase stock by fraudulent representations, the stock remaining in the hands of the vendor, may file a bill in equity to rescind. The vendee's offer to surrender all claim on the stock, together with a demand for the return of the money, is sufficient. Zimmele *v.* American, etc. Co., 21 N. Y. Supp. 846 (1893). Where part of the consideration in the sale of stock is that the vendor resign an office in the company and the vendee be elected in his place, and this has been carried out, the vendee cannot rescind for fraud unless he resigns the position

made, if the plaintiff in his complaint offers to return the stock, and the decree requires a deposit of it with the clerk of the court for the benefit of the defendants.[1] The vendee must allege that he was damaged by the misrepresentations and was ignorant of the falsity of the same when made, and if he wishes to rescind must offer to return the stock, or must allege that it is worthless, especially where he is sued upon a note given in payment.[2] After the purchaser of stock has instituted an action for deceit he can no longer rescind.[3] Two vendors of stock may join in a suit to rescind the sale for fraud where false representations were made to one of them with the view of influencing both, and had that effect.[4] The bill is not multifarious, even though it asks for rescission and also for damages against the guilty parties.[5] But a suit by a stockholder

or does something towards restoring the vendor to his former position. Gassett *v.* Glazier, 165 Mass. 473 (1896). In rescinding for fraud the vendee of stock must return or tender the dividends back to the vendor, but cannot demand repayment of assessments paid after discovery of the fraud. Marten *v.* Paul, etc. Co., 99 Cal. 355 (1893). Where a party has given a note in purchase of stock in two corporations he cannot rescind unless he tenders back the stock in both. Rohrbacher *v.* Kleebauer, 119 Cal. 260 (1897). Where, according to contract, stock sold to the corporation is appraised by the corporation and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 170 Mass. 315 (1898).

[1] Chisholm *v.* Eisenhuth, 69 N. Y. App. Div. 134 (1902), holding also that even though the misrepresentations were made by the husband in selling the wife's stock, yet this is sufficient. Rescission can only be had where an offer to return the property has been made and kept good and the offer is repeated on the trial. Currier *v.* Poor, 84 Hun, 45 (1895). See also § 335, *supra*.

[2] Long *v.* Johnson, 15 Ind. App. 498 (1896). Where the vendee has disposed of some of the stock before he discovered the fraud, he need not tender back all the stock, but he must allege that he sold it before he discovered the fraud, and set forth the price and other facts. Hill *v.* Harriman, 95 Tenn. 300 (1895). A misrepresentation that large dividends and profits are being made by a coal company, whereas in fact they were made by fraud practiced upon a railroad company, is good ground for a rescission of the sale. No tender back of the stock need be made, if the property is worthless. If there was a partial failure of consideration, the defendant could reduce the recovery *pro tanto.* A court of equity may set aside the sale on grounds which would not be sufficient at law. The court so held in an action at law for the purchase price, the answer setting up fraud as a defense. Boggs *v.* Wann, 58 Fed. Rep. 681 (1893). Where a corporation sells its property through misrepresentations, and in deeding the property causes all its outstanding capital stock to be delivered to the vendee, the vendee in suing to recover back the money need not allege that the stock was valueless, there being an allegation that the property was valueless. Keener *v.* Baker, 93 Fed. Rep. 377 (1899).

[3] Hanrahan *v.* National, etc. Assoc., 48 Atl. Rep. 517 (N. J. 1901).

[4] Bradley *v.* Bradley, 165 N. Y. 183 (1900).

[5] Subscribers to stock may rescind the same on the ground that promoters

against a promoter in behalf of the corporation, to require him to pay for his stock, and also to recover damages for false representations inducing the plaintiff to purchase stock, and also to enjoin a proposed sale of plaintiff's stock, in order to pay an assessment, is multifarious.[1] If the person fraudulently obtaining stock has transferred it to another party, or is about to transfer it, an injunction may be obtained.[2] The corporation should then be made a party.[3]

A purchaser of "watered" stock has various remedies if he has actually been defrauded.[4] The remedy against promoters who have absorbed the corporate property is considered elsewhere.[5]

Where the fraud is chargeable to the corporate officers or third persons, and the vendor of the stock is innocent, the vendee cannot rescind the sale unless such corporate officers or third persons acted as agents for the vendor.[6]

who sold property to the company had misrepresented the character of the property. This suit may be in equity and is not multifarious, although the relief demanded is a cancellation of the sale of the property and for damages against the vendors and co-conspirators and also for rescission of the subscription. Such a suit lies, although the subscribers paid in only $150,000 of cash for $450,000 of stock. Rule 94 of the federal courts does not apply to such a case. Barcus *v.* Gates, 89 Fed. Rep. 783 (1898).

[1] Pietsch *v.* Krause, 93 N. W. Rep. 9 (Wis. 1903).

[2] See §§ 363, 364, *infra.*

[3] Although the party seeking the stock of which he has been deprived by fraud makes the party complained of and the corporation itself parties defendant, yet if the certificates are not obtained from the party holding them the court will not order the corporation to issue new certificates. The outstanding certificates may pass into the hands of a *bona fide* purchaser. Joslyn *v.* St. Paul Distilling Co., 44 Minn. 183 (1890). Where a citizen of Wisconsin claims stock in a Wisconsin corporation as against a citizen of Illinois, in whose name the stock stands on the corporate books, the corporation is a necessary party defendant, and the case cannot be removed to the federal courts. Rogers *v.* Van Nortwick, 45 Fed. Rep. 513 (1891). See also § 338, *supra,* and § 579, *infra.* Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American L. & T. Co., 122 N. Y. 622 (1890).

[4] See ch. III, *supra.*

[5] See § 651, *infra.* Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up, and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. Du Puy *v.* Transportation, etc. Co., 82 Md. 408 (1896).

[6] Moffat *v.* Winslow, 7 Paige, 124 (1838). Benjamin on Sales (Bennett's ed., 1888),

Equity will sometimes compel the vendor to make good his representations.[1]

§ 357. *Fraud in selling stock may amount to a conspiracy.*— A combination of persons to fraudulently raise the price of a stock by misrepresentations and fraudulent practices may amount to a criminal conspiracy. In England, in 1858, the directors of a joint-stock bank were found guilty of a conspiracy to defraud, where, knowing the bank to be insolvent, they issued a balance sheet showing a profit, and declared a dividend, and issued advertisements inviting the public to invest on such representations.[2] Under the New York statutes, a person who sells stock on misrepresentations may be guilty of grand larceny.[3]

§ 467*a*, says "the only remedy of a shareholder in a joint-stock company, who has been induced to purchase shares by the fraud of the agent of the company, is rescission of his contract and *restitutio in integrum.*"

[1] See § 354, *supra.*

[2] Regina *v.* Brown, 7 Cox, Cr. Cas. 442 (1858); Regina *v.* Esdaile, 1 F. & F. 213 (1858); Regina *v.* Gurney, 11 Cox, Cr. Cas. 414. See Hurrell & Hyde on Directors and Officers, 3d (Eng.) ed., pp. 176–182, citing cases; Burnes *v.* Pennell, 2 H. L. Cas. 497 (1849). There cannot be such an offense against the United States by the directors of a national bank, since the offense is not recognized by statute. United States *v.* Britton, 108 U. S. 199 (1883). By the National Bank Act false reports by national banks constitute a criminal offense punishable by fine and imprisonment. It is difficult for a corporate creditor to seek collection by making out a conspiracy. Brackett *v.* Griswold, 13 N. Y. Supp. 192 (1891).

[3] People *v.* Garrahan, 19 N. Y. App. Div. 347 (1897); aff'd, 154 N. Y. 769. See 88 L. T. Rep. 194 (1903).

CHAPTER XXI.

SALES OF STOCK—SALES WHILE SUITS ARE PENDING AFFECTING THAT STOCK; FORGERY; LOST AND STOLEN CERTIFICATES OF STOCK; CONFISCATION OF STOCK.

A. STOLEN AND LOST CERTIFICATES, AND PURCHASES WITHOUT A CERTIFICATE OF THE STOCK.

§ 358. *Stolen or lost certificates of stock indorsed in blank.*— One of the most important elements of the negotiability of promissory notes is that, if the holder of such note loses it or it is stolen from him when it is indorsed in blank, a subsequent *bona fide* purchaser of such note is protected as against the person who lost it. A different rule seems to prevail as regards certificates of stock indorsed in blank and then lost or stolen. In this respect certificates of stock are not negotiable. It has been clearly held that a purchaser from a thief of certificates of stock indorsed in blank is not protected, nor is any subsequent purchaser of that identical *certificate* allowed to claim the stock, unless the owner has been guilty of negligence. The real owner of the certificate may compel the corporation, which has refused to recognize the thief's transferee's title, to register the stock as his, or he may have damages against a *bona fide* transferee of the thief where such transferee has sold

the stock.[1] Where stock in a bank stands in the name of a person for sixty-five years without the identity of the stockholder being known and without dividends being claimed by him, although the bank annually advertised the unclaimed dividends, clear proof of the identity of such stockholder must be given by his alleged descendants, who do not produce the certificate of stock.[2] Where certificates of stock indorsed in blank are deposited in a bank, and the cashier fraudulently abstracts and disposes of them, he is guilty of embezzlement at common law, and there can be no *bona fide* purchaser of such stock.[3] In Nevada it is held that the purchaser and vendor of the stolen certificate is liable in damages to its real owner, although the former acted as a broker and without notice.[4]

[1] Anderson *v.* Nicholas, 28 N. Y. 600 (1864), where the purchaser of the stolen certificate was not a *bona fide* purchaser. The court said that even if he had been a *bona fide* purchaser he would not be protected. Barstow *v.* Savage Min. Co., 64 Cal. 388 (1883), substantially overruling Winter *v.* Belmont Min. Co., 53 Cal. 428 (1879). *Cf.* Aull *v.* Colket, 33 Leg. Int. 44 (Pa. 1876), where the question of negligence was submitted to the jury. The mere fact of losing it is no proof of negligence. Biddle *v.* Bayard, 13 Pa. St. 150 (1850). The purchaser of a certificate indorsed in blank and stolen is not protected. Given's Appeal, 16 Atl. Rep. 75 (Pa. 1888). The *bona fide* purchaser of a certificate of stock indorsed in blank, but which was stolen from the owner, is not protected. East Birmingham Land Co. *v.* Dennis, 85 Ala. 565 (1888). A stock broker is liable to the owner for the value of mining shares received for sale from one who had stolen them, although he acted in good faith, without notice, and paid the proceeds to the thief, relying on his representations of ownership. Swim *v.* Wilson, 90 Cal. 126 (1891). *Cf.* § 452, *infra.* In Knox *v.* Eden Musée, etc. Co., 148 N. Y. 441, 456 (1896), the court said that there was "no case entitled to be regarded as authority which denies to the owner of a stock certificate which has been lost without his negligence, or stolen, the right to reclaim it from the hands of any person in whose possession it subsequently comes, although the holder may have taken it in good faith and for value." . . . "The title of the true owner of a lost or stolen certificate may be asserted against any one subsequently obtaining its possession, although the holder may be a *bona fide* purchaser." Even though a stockholder loses two certificates of stock and another person finds two of the same amount, nevertheless it is for a jury to decide whether it is the same stock. McFadden *v.* Goettert, 131 Cal. 333 (1901). In a suit against a corporation for refusing to transfer stock, the fact that the certificates had been lost since the refusal need not be alleged. Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

[2] Moss *v.* Manhattan Co., 48 N. Y. App. Div. 561 (1900).

[3] O'Herron *v.* Gray, 168 Mass. 573 (1897).

[4] Bercich *v.* Marye, 9 Nev. 312 (1874); Barstow *v.* Savage Min. Co., 64 Cal. 388 (1883). According to the California decisions the same rule would be applied to negotiable instruments. In another case, where a broker innocently sold for a principal a stolen negotiable government bond, the broker was held liable to the true owner. Kimball *v.* Billings, 55 Me. 147 (1867). The court expressly refused, in this case, to place the broker in the same position as an innocent purchaser for value. In Zulick *v.* Markham, 6 Daly, 129 (1875), it

The *bona fide* purchaser of a stolen certificate of stock indorsed in blank cannot compel the corporation to register him as a stockholder.[1] The person stealing certificates of stock is guilty of larceny, and may be convicted for the same.[2] The corporation cannot obtain an injunction against a possible action by the purchaser of stolen certificates who has applied for registry and been refused it,[3] although doubtless it may interplead when sued for refusing a transfer.[4] Where an agent fraudulently sells stock which has been intrusted to him, the purchaser, if *bona fide*, is protected, inasmuch as this is not a theft, but a breach of trust.[5]

Where certificates of stock indorsed in blank have been stolen, and the thief or his transferee has obtained a registry on the corporate books and obtained new certificates of stock, and these new certificates have been sold, the purchaser is protected in his possession of the stock.[6] In Michigan' this is held to be the rule, even though such purchaser took the stock with full knowledge of all the facts.[7] This decision may have gone too far, but it is in ac-

was sought to extend this doctrine to the sale of certificates of stock which had only been misapplied. Here defendant, a broker, had innocently sold for a fraudulent principal indorsed certificates of stock, which had not been stolen from the owner, but had been delivered by him to defendant's fraudulent principal, who had sold the certificates to defendant through another innocent broker. The New York court held the broker in this case to stand on the same footing as an innocent purchaser and not liable to the owner for the proceeds; but no opinion was expressed as to the rule of liability if the stock had been stolen instead of misapplied.

[1] Sherwood *v.* Meadow Valley Min. Co., 50 Cal. 412 (1875). Although two persons have a safety-deposit box in common, and one of them steals therefrom a certificate of stock owned by the other and indorsed in blank by the latter, yet a purchaser even in good faith of such stolen certificate is not protected. Bangor, etc. Co. *v.* Robinson, 52 Fed. Rep. 520 (1892). See also Knox *v.* Eden Musée, etc. Co., 148 N. Y. 441 (1896), where certificates of stock which had been returned to the corporation were stolen before they had been canceled. This case came before the court again in 17 N. Y. App. Div. 365.

[2] People *v.* Griffin, 38 How. Pr. 475 (1869). A criminal statute against fraudulently issuing stock does not apply to a transaction where the treasurer obtained a certificate which he as an individual had pledged, and after obtaining it canceled it as treasurer and issued a new certificate to himself in place thereof. State *v.* Moore, 69 N. H. 99 (1896).

[3] Buffalo Grape Sugar Co. *v.* Alberger, 22 Hun, 349 (1880).

[4] See § 387, *infra*.

[5] See § 351, *supra*.

[6] Approved in Scarlett *v.* Ward, 52 N. J. Eq. 197 (1893); Mandlebaum *v.* North Am. Min. Co., 4 Mich. 465 (1857). A purchaser of certificates of stock need not look back of the last registry of transfer on the corporate books. A breach of trust back of that does not invalidate his title. Winter *v.* Montgomery Gaslight Co., 89 Ala. 544 (1889). See also note 9, p. 839, and § 387, *infra*.

[7] Mandlebaum *v.* North Am. Min. Co., 4 Mich. 465 (1857).

cordance with the general rule that the rights and equities of all holders of stock back of the registry and issue of the certificates in existence are not allowed to affect the stockholdership or rights of purchasers of these new certificates.

§ 359. *Owner of a lost certificate of stock may obtain a new certificate.*— An owner of a certificate of stock who has lost it or had it stolen from him may, by taking proper proceedings or by giving proper security to the corporation, have new certificates issued to him. In Louisiana it is held that, upon satisfactory proof of the loss of certificates of stock, a writ of *mandamus* will issue to compel the corporation to issue new certificates, and that no bond of indemnity need be given.[1] But the better rule is that, except in cases of the clearest proof of loss, the corporation shall not be required to issue new certificates unless a bond of indemnity against its liability to possible legal holders of the lost certificate be given.[2] In New York, by statute, security may be required in all such cases.[3] A stockholder may file a bill in equity to compel the corporation to issue to him a new certificate of stock in place of one

[1] State *v.* New Orleans Gas Light Co., 25 La. Ann. 413 (1873). Where sixteen years have elapsed since a stockholder lost his certificate of stock and gave notice to that effect to the corporation, the court may grant *mandamus* for the issue of a new certificate in lieu thereof without security being given. State *v.* New Orleans, etc. R. R., 51 La. Ann. 909 (1899).

[2] Galveston City Co. *v.* Sibley, 56 Tex. 269 (1882), where one who became a stockholder in 1841 died in 1865, and his heirs applied for a new certificate in 1878. Société Générale *v.* Walker, L. R. 11 App. Cas. (H. L.) 20 (1885), affirming Société Générale *v.* Tramways Union Co., L. R. 14 Q. B. D. 424; Butler *v.* Glen Cove Starch Co., 18 Hun, 47 (1879). A corporation need not issue new certificates of stock in place of those which are lost unless a bond of indemnity be given. Guilford *v.* Western U. Tel. Co., 43 Minn. 434 (1890). No bond of indemnity will be required where twelve years have elapsed since the certificate of stock was lost. A citizen of Minnesota may sue in its courts to compel a foreign corporation to issue a new certificate if proper service can be had. The fact that two prior judgments in New York and Minnesota required an indemnity bond to be given is no bar to a third suit five years later. Guilford *v.* Western U. Tel. Co., 59 Minn. 332 (1894). Where a person buys stock at a bankrupt sale, but does not get the certificates, and ten years elapse, such purchaser is entitled to a *mandamus* requiring the corporation to issue new certificates to him. State *v.* Southern, etc. Co., 32 S. Rep. 174 (La. 1902).

[3] Laws 1892, ch. 688, §§ 50 *et seq.* Where an application is made under the New York statute for a new certificate, in place of one that has been lost or destroyed, and there is no direct proof of the destruction, the court should require publication of the notice of the proceeding, and where the value of the stock is $20,000, although the par value is but $5,000, a bond in the sum of $25,000 is reasonable. Matter of Speir, 69 N. Y. App. Div. 149 (1902). Before proceedings under the New York statute to obtain a new certificate for a lost certificate of stock may be instituted, a demand on the corporation must be made. The court may require

that is lost, even though the statute gives an additional remedy.[1] It would seem reasonable that a bond of indemnity should be given to the corporation, since, in case the old certificate has not been lost, but has been sold by its owner, the corporation is liable in damages to the purchaser for issuing new certificates without a surrender of the old.[2] Where certificates of stock have been lost, and a party turns up with them and applies for transfer on the corporate books, the real owner may enjoin a transfer of the certificate, and also any transfer by the corporation on its books, *pendente lite.*[3] In North Carolina there is a statute to the effect that an indemnity bond must be given in order to obtain a new certificate for one that has been lost, and the company's treasurer is entitled to retain the new certificate for five years.[4]

§ 360. *Rights of a purchaser of a certificate of stock where the corporation has registered a transfer to another without a surrender of the certificate.*— It sometimes happens that an owner of stock, after selling his stock and delivering to the vendee the certificate therefor indorsed in blank, has gone to the corporation before such transfer is registered, and by misrepresentation or other fraudulent means induced the corporation to issue to another purchaser a new certificate of stock without a surrender of the old one. It is the

publication of the application and also the giving of notice to the stockholder of record. Matter of Coats, 75 N. Y. App. Div. 469 (1902). This statute does not give a remedy to a purchaser of stock at a receiver's sale. If he is unable to obtain the outstanding certificates his remedy is different. *Re* Biglin *v.* Friendship Assoc., 46 Hun, 223 (1887).

[1] Kinnan *v.* Forty-second, etc. Ry., 140 N. Y. 183 (1893).

[2] See §§ 360–362, *infra.* Persons receiving a duplicate certificate on the ground of loss of the original may be compelled by the company to return it where the original turns up in another person's hands, the certificate having been sold to the latter by the former owner. New York Central, etc. R. R. *v.* Stokes, N. Y. L. J., Nov. 16, 1888, p. 1091. In Keller *v.* Eureka, etc. Co., 43 Mo. App. 84 (1890), the court held that the corporation need not issue an ordinary certificate in place of one that was lost, but might write upon the new certificate the word "duplicate." The issue by a corporation of new certificates of stock in place of lost certificates does not constitute an overissue of stock. Kinnan *v.* Forty-second, etc. R. R., 21 N. Y. Supp. 789 (1893); aff'd, 140 N. Y. 183.

[3] Sierra Nevada, etc. Co. *v.* Sears, 10 Nev. 346 (1875). Where the treasurer of a corporation is in debt to it and pledges his stock as security therefor, and the president puts it away, and afterwards the president buys the stock from the treasurer, but the certificate cannot be found, and a new certificate is issued for it and delivered to the president, and two years thereafter the treasurer finds the old certificate of stock and pledges it, the president is protected in his purchase, there having been no culpable negligence on his part. Farmers' Bank *v.* Diebold, etc. Co., 64 N. E. Rep. 518 (Ohio, 1902).

[4] Hendon *v.* North Carolina R. R., 125 N. C. 124 (1899). See s. c., 127 N. C. 110 (1900).

duty of the corporation to refuse to register a transfer unless the old certificate is delivered up. The outstanding certificate is a continuing affirmation by the corporation that no registry of a transfer of the stock represented by that certificate will be allowed until the certificate itself is presented and surrendered. This affirmation is sometimes declared in a by-law,[1] and sometimes it is printed on the face of the certificate itself.[2] The obligation of the corporation, however, to require a surrender of the old certificate upon obtaining a registry is the same whether there is a by-law or a statement on the certificate, or neither of these. It exists without any express declaration.[3] Where stock is transferred without a transfer of the certificate, and the transferrer afterwards transfers the certificate to another party, the former is liable to the first transferee.[4] So also if the vendor afterwards obtains the certificates and sells them again to others, he is liable to the first person to whom he sold his interest.[5] Where the treasurer of a corporation is in debt to it and pledges his stock as security therefor, and the president puts it away, and afterwards the president buys the stock from the treasurer, but the certificate cannot be found, and a new certificate is issued for it and delivered to the president, and two years thereafter the treasurer finds the old certificate of stock and pledges it, the president is protected in his purchase, there having been no culpable negligence on his part.[6]

§ 361. *Liability of the corporation herein.*—It is the duty and right of a corporation to refuse to allow a registry of a transfer of stock unless the outstanding certificate representing the stock is delivered up and canceled. If it allows a transfer to be registered without the old certificate being produced and surrendered, it is liable to any person who, without notice, purchases or has purchased the outstanding certificate,[7] except where the old certificate of stock

[1] Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231 (1861); Strange *v.* Houston, etc. R. R., 53 Tex. 162 (1880); New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30 (1865).

[2] Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879).

[3] Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879). As regards the English rule herein, see 2 Ry. & Corp. L. J. 577 and 625.

[4] Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897).

[5] Beckitt *v.* Bilbrough, 8 Hare, 188 (1850). But the latter is not liable to take the shares nor to indemnify his vendor even if the company is formed. Jackson *v.* Cocker, 4 Beav. 59 (1841).

[6] Farmers' Bank *v.* Diebold, etc. Co., 64 N. E. Rep. 518 (Ohio, 1902).

[7] Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879), where a pledgee recovered damages against the corporation for issuing new certificates without a surrender of the one which the plaintiff held; Smith *v.* American Coal Co., 7 Lans. 317 (1873), where an unrecorded transferee recovered damages against a corporation for issuing a certificate to a purchaser at execution sale on an attachment against the transferrer. See also § 486 *et seq.*, *infra;*

was stolen or lost. This rule is well established, and is based on the usages and requirements of trade, and on public policy, which favors the protection of those who invest their money in certificates of stock, relying upon the corporation to protect the holder

Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879); Bank *v.* Lanier, 11 Wall. 369 (1870), the court saying: "It is equally clear that the bank, in allowing this stock to be transferred to other parties while the certificates were outstanding in the hands of *bona fide* holders, was guilty of a breach of corporate duty," and is liable; New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30, 81 (1865); Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (1874), the court saying: "It cannot be denied that, if a corporation having power to issue stock certificates does in fact issue such a certificate, in which it affirms that a designated person is entitled to a certain number of shares of stock, it thereby holds out to persons who may deal in good faith with the person named in the certificate that he is an owner and has capacity to transfer the shares. This proposition does not rest on any view of the negotiability of stock, but on general principles appertaining to the law of estoppel;" Moores *v.* Citizens' Nat. Bank, 111 U. S. 156 (1883), where the court seemed to hold that the person receiving new certificates without requiring a surrender of the old ones is not such a *bona fide* transferee of stock as may hold the corporation liable; Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883), aff'g 25 Hun, 438, and holding that, until the purchaser of the outstanding certificates presents them, the corporation is protected in paying dividends to the transferee without the certificates. If no certificate has been issued the rule does not apply. First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877). The unregistered holder of the certificates is protected, since, if he were obliged to notify the corporation at the time he purchases the stock, "the value of these certificates as a basis of credit would be greatly impaired, particularly where the pledge is made at a distance from the domicile of the corporation." Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878). See also Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231 (1861), the court saying: "The *bona fide* holders of such certificates had a right to rely upon the certificates, under the circumstances, as securing to them the stock which they represented, against all transfers to other parties." Strange *v.* Houston, etc. R. R., 53 Tex. 162 (1880), to the same effect, on the ground that the non-production of the original certificate "is notice to the company that a superior title may be in a third party." In Cady *v.* Potter, 55 Barb. 463 (1869), a corporation sustained its bill of interpleader as between a person to whom it had issued stock on a transfer without a surrender of the old certificate and a person to whom it afterwards issued the stock on a surrender of the old certificate. If a corporation allows a transfer to be made on its books without the transfer on the old certificate being signed, it is liable to the owner of the old certificate, even though the old certificate is delivered up and the attorney in fact of the owner shows his power of attorney at the time of the transfer on the books. Tafft *v.* Presidio, etc. R. R., 84 Cal. 131 (1890); Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298 (1872), holding that the holder of the old certificates is entitled to have the illegal registry canceled. In England there seems to be no decision directly in point. A dictum, however, in Shropshire Union, etc. Co. *v.* Queen, L. R. 7 H. L. 496, 509 (1875), does not support the rule which prevails in this country. The court said: Whether a transfer of shares in a company can or cannot be made without

of such certificates.[1] Thus, the corporation has been held liable even though seventeen years have elapsed since a new certificate was obtained, the latter having been obtained on the ground that the outstanding certificate had been lost.[2] The corporation need not assume any risk, but may refuse to permit a registry on its books of the transfer unless the old certificate is produced and surrendered.[3] Where, however, the corporation is compelled to

the production of the certificates of the shares is "entirely within the discretion of the directors. They were not bound to permit a transfer without the production of the certificates; but, though not bound to permit a transfer, I apprehend they would not be in any way answerable if the transfer should be in any case made without the production of the certificates of the shares." The case of Hart *v.* Frontino, etc. Min. Co., L. R. 5 Exch. 111 (1870), holds, however, that where the corporation cancels the stockholdership of one who purchased after registry without a surrender of the old certificates having been obtained, he may hold it liable in damages. As between two unrecorded transfers, one having the certificate, and the other — a subsequent purchaser — not having it, the former prevails. Société Générale *v.* Tramways Union Co., L. R. 14 Q. B. D. 424 (1884). See also cases in § 412, *infra*. In Canada the outstanding certificate of stock need not be surrenderd in order to transfer the stock on the corporate books; and hence, where the registered holder makes two transfers to different persons, the company is not liable for allowing transfer to the one who first presents his transfer, even though he has not the old certificate. Smith *v.* Walkerville, etc. Co., 23 App. Rep. (Can.) 95 (1896).

[1] Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879), the court saying: "We think that, by thus making stocks transferable by mere delivery of the certificate, the law has intended to interdict corporations from transferring stocks on their books, except upon surrender of the certificate or upon proof of its loss or destruction. These certificates of stock have become such important factors in trade and credit that the law has intended to surround those who take them with the safeguards it accords to the holders of the other great agencies of commerce—bills, notes, bills of lading, etc."

[2] Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880). But the corporation is not liable for dividends paid in the meantime. It was held, further, that a by-law allowing such issue of new certificates in case of loss had no effect as regards the plaintiff, and that the statute of limitations ran against the plaintiff only from the time he had notice of the new certificate. As to subrogation by the owner of a certificate of stock to a bond given to the corporation, see Greenleaf *v.* Ludington, 15 Wis. 558 (1862).

[3] The corporation may refuse to issue stock to the heirs of a stockholder unless they surrender the old certificates. State *v.* New Orleans, etc. R. R., 30 La. Ann. 308 (1878); New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221 (1871), where the corporation refused to allow registry by a purchaser at an execution sale, although it was quite plain that the judgment debtor's sale of the certificates had been in fraud of creditors. As between two unregistered transferees, the one with the certificate is entitled to the stock, especially where he purchased first. Maybin *v.* Kirby, 4 Rich. Eq. (S. C.) 105 (1851); Société Générale *v.* Walker, L. R. 11 App. 20 (1885), aff'g L. R. 14 Q. B. D. 424. So, also, as between a *bona fide*

make the registry by legal proceedings, it cannot be held liable to the holder of the outstanding certificate.[1] And where the certificate which is surrendered to the corporation is stolen from the corporation before its cancellation, the purchaser thereof is not protected.[2]

§ 362. *Rights of purchaser of stock without certificates.*— A purchaser of stock who does not receive the certificates of the stock he has purchased, but who nevertheless obtains a registry on the corporate books, and receives new certificates without a surrender of the old, and who sells the new certificates, is not liable in damages to the holder of the old certificates,[3] unless he obtained registry with knowledge that his vendor had already sold the old certificates to another.[4] The remedy of the latter is against the corporation, or he may sue the corporate officer who allowed the transfer.[5] The purchaser of the stock may insist on the old certificate being produced and surrendered at the time of registration, but if he waives this right, and a registry is made, he cannot afterwards refuse to accept the stock on that account.[6] The corporation is not liable to

purchaser, to whom the certificates are transferred, and a third party, to whom the vendor had given the stock previous to the sale, the vendee with the certificates is protected. Crawford *v.* Dox, 5 Hun, 507 (1875). In Wilson *v.* Atlantic, etc. R. R., 2 Fed. Rep. 459 (1880), where an assignee in bankruptcy applied for registry, the bankrupt having fled with the certificates, it was held that the corporation was bound to allow transfer and to issue new certificates upon a bond of indemnity being given. However, a sale of a certificate of stock to a *bona fide* purchaser is to be upheld, even as against a receiver who has been appointed and been given legal ownership of the stock. Dudley *v.* Gould, 6 Hun, 97 (1875).

[1] Friedlander *v.* Slaughter-house Co., 31 La. Ann. 523 (1879). See also ch. XXII, § 388, *infra.* Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890). But see § 330, *supra.*

[2] In Knox *v.* Eden Musée, etc. Co., 148 N. Y. 441 (1896), certificates of stock had been delivered to the corporation for transfer and the new certificates had been duly issued. The old certificates were put in a safe uncanceled, and were illegally abstracted by an employee and sold. The court held that the company was not liable on such certificates to a person who took them in pledge from such employee. The court, however, based its decision, not on the fact that the pledgee took with notice, but on the principle of law that no one could acquire title to stolen certificates of stock. A transferee who receives new certificates of stock is not affected by the fact that the old certificates are fraudulently re-issued by a corporate officer. See § 292, *supra.*

[3] Baker *v.* Wasson, 53 Tex. 150 (1880).

[4] Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (1871).

[5] Baker *v.* Wasson, 59 Tex. 140 (1883).

[6] Boatmen's Ins. etc. Co. *v.* Able, 48 Mo. 136 (1871). A bank cashier may transfer

the person who is registered as a stockholder without the surrender of the old certificate, at least not where the registry is by the secretary, without special authority from the board of directors.[1] Where, however, the purchaser of stock, without the certificates, obtained registry on the corporate book, the corporation cannot afterwards remove his name in favor of the purchaser of the old certificate. The former may compel the corporation to replace his name.[2] Where the company by mistake allows a transfer and issues new stock to a party after the vendor has already sold the stock to another party, and after the latter has obtained a transfer, the company is liable to the second purchaser.[3] It has been held that a pledge made by a separate written assignment of the stock, the certificates remaining in the pledgor's possession and continuing to stand in his name on the corporate books, is not good as against the pledgor's receiver who takes possession of the certificates.[4] Where no certificates of stock are issued and a stockholder delivers an assignment of her stock for a specified sum, delay in paying the sum does not enable the vendor to sell the stock in the meantime to some one else.[5]

B. SALES OF STOCK WHILE SUITS ARE PENDING AFFECTING THAT STOCK.

§ 363. *Legal proceedings as affecting sales of outstanding certificates of stock.*— It is a well established principle of law that shares of stock may, for certain purposes, have a *situs* at two separate

bank stock standing in his name in the stock register, even though he does not turn back the certificates. Finn *v.* Brown, 142 U. S. 56 (1891). In Indiana, where an administrator cannot sell personal property except in a certain way, the corporation is liable to the estate if it allows a transfer of stock on its books under a sale by the administrator, who has not complied with the law. The purchaser, however, who does not see the old certificates, but takes new certificates issued by the corporation, is protected. Citizens' St. Ry. *v.* Robbins, 128 Ind. 449 (1891).

1 Hall *v.* Rose Hill, etc. Co., 70 Ill. 673 (1873); Houston Ry. *v.* Van Alstyne, 56 Tex. 439 (1882), holding that the corporation is not bound to recognize as a stockholder one who obtains registry without a surrender of the old certificates, a regular registry with a surrender of such certificates having previously been obtained by another. *Cf.* Hart *v.* Frontino, etc. Co., L. R. 5 Exch. 111 (1870).

2 Cady *v.* Potter, 55 Barb. 463 (1869). In Platt *v.* Birmingham Axle Co., 41 Conn. 255 (1874), the corporation was protected by its lien, and the fact that it bought the stock without the certificates was not the essential point of the case. The corporation cannot interplead after it has allowed the transfer, but it may interplead if it has refused to transfer to any one. See also § 387, *infra.*

3 Balkis Consol. Co. *v.* Tomkinson, [1893] A. C. 396.

4 Atkinson *v.* Foster, 134 Ill. 472 (1890).

5 Judson *v.* Stonnington Min. Co., 87 N. W. Rep. 108 (Mich. 1901).

places at the same time. For the purposes of suits concerning rights to its title, for taxation, and for a few other purposes, shares of stock follow the domicile of the stockholder.[1] On the other hand, it has at the same time a *situs* where the corporation exists, and this *situs* may be for the purposes of suits concerning the title to the stock, for attachment and execution, and for various other similar purposes. Great difficulty arises in many instances of legal proceedings affecting the title to stock, by reason of the fact that, where the defendant has in his possession the certificates of stock, and is not enjoined from transferring them, he may transfer them, either before or after suit has been commenced against him to obtain possession of the stock represented by such certificates, or to subject it to his debts. The question then arises whether the *bona fide* transferee of such certificate is to be allowed to retain the stock, or whether the successful plaintiff in the suit against the defendant who has transferred the stock may follow such stock and take it from the transferee. This conflict of right between the purchaser of the outstanding certificates and the purchaser whose title is based on judicial proceedings arises most often in cases of attachment or execution issued against shares of stock at the domicile of the corporation. In such cases the better rule seems to be that transferees of the certificate held by the defendant are protected and entitled to protection at the hands of the corporation, if their purchase was made before the attachment or execution was levied; but that transfers made after the levy are not binding so far as the corporation and the plaintiffs to the suit are concerned, provided the suit itself is successful.[2] The same difficulty and conflict of rights arise in suits to reclaim stock which has been taken from the plaintiff by fraud, or by the torts of an agent or pledgee, or by the breach of trust of an executor, administrator, guardian, or trustee.[3] The plaintiff seeking to recover his stock, certificates for which are in the hands of the defendant, seems to have but two modes of procedure whereby he may prevent the defendant from transferring the certificates.

[1] It is important here to distinguish shares of stock from the certificates for those shares. The stock itself is not the same as the certificate representing it. Winslow *v.* Fletcher, 53 Conn. 390 (1886). Though prevented by injunction from transferring, the corporation must preserve the rights of a party who notifies it of his rights. Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164 (1865). As regards the rights and duties of the corporation herein when stock is sold under an execution or is attached, see § 489, *infra*.

[2] Smith *v.* American Coal Co., 7 Lans. 317 (1873); Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878); and ch. XXVII, *infra*.

[3] Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (1874); Leitch *v.* Wells, 48 N. Y. 585 (1872).

The suit should be brought in the state of the domicile of the corporation and attachment against the stock issued,[1] or an injunction obtained against any transfer.[2] The court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration.[3] A stockholder whose stock has been wrongfully pledged may enjoin the corporation from allowing a transfer by the pledgee who has applied for the same, and the pledgor need not allege that the pledgee took with notice. It is for the pledgee to intervene and prove that the pledge was *bona fide*.[4] It is true that, after judgment has been obtained and the decree of the court executed, any subsequent transfer of the certificates by the defendant is null and may be disregarded by the plaintiff and by the corporation.[5] But while the suit is pending the defendant may transfer the certificates, and the *bona fide* transferee takes a good title to the stock. The latter is not affected by or bound to take notice of a *lis pendens* in that suit. If no temporary injunction is obtained, a transfer made on the corporate books pending suit is good, and the corporation cannot be made liable, although a party defendant.[6] Where the real owner of stock brings suit against a transferee of that stock who has obtained a new certificate therefor and succeeds in the suit, and in the meantime the defendant has assigned the stock to a third party, the corporation may institute

[1] Quarl *v.* Abbett, 102 Ind. 233 (1885). By a statute in Rhode Island in suits in equity a writ of attachment may be levied upon stock the same as in suits at law. Ladd *v.* Franklin, etc. Co., 53 Atl. Rep. 59 (R. I. 1902); 44 S. E. Rep. 20.

[2] See Sierra Nevada, etc. Co. *v.* Sears, 10 Nev. 346 (1875).

[3] Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899).

[4] Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236 (1901).

[5] Sprague *v.* Cocheco Mfg. Co., 10 Blatchf. 173 (1872); s. c., 22 Fed. Cas. 960.

[6] Hawes *v.* Gas Consumers' Ben. Co., 12 N. Y. Supp. 924 (1891). See also editorial N. Y. L. J., March 29, 1890. *Cf.* § 387, *infra*. In the case of Lamb, etc. Co. *v.* Lamb, 119 Mich. 568 (1899), where a party claiming to be the real owner of stock filed a bill to compel the holder of such stock to deliver up the same, but it appeared that the defendant had already disposed of the stock before the commencement of the suit, the court refused to grant relief, even though it further appeared that the defendant had other stock in the same corporation equal in amount to the stock in issue. A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit. Ingraham *v.* National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 N. Y. App. Div. 582.

suit and interplead between the successful claimant of the stock and the transferee of the stock from the defendant. The defendant in the former suit need not be joined as a party in the latter suit. The purchaser of the certificate may be enjoined from transferring the same, and may be compelled to deposit the certificate with the clerk of the court.[1] The purchaser must prove that he is a *bona fide* purchaser.[2] Although the party seeking the stock of which he has been deprived by fraud makes the party complained of and the corporation itself parties defendant, yet, if the certificates are not obtained from the party holding them, the court will not order the corporation to issue new certificates. The outstanding certificates may pass into the hands of a *bona fide* purchaser.[3] A claimant of stock in a corporation may institute suit at the place where the company is incorporated for the purpose of obtaining possession of the stock, even though the holders of the stock are non-residents and are brought into the case only by publication and substituted service. The court acquires jurisdiction over the defendants.[4] Especially if the certificates of stock are within the jurisdiction, the court may obtain jurisdiction over non-resident defendants by publication.[5] A citizen of Alabama cannot maintain in the courts of Alabama a suit to enjoin non-residents from transferring stock in a non-resident corporation where the defendants are not personally served within the state.[6] Where a decree directs the transfer of certain stock in the distribution of an estate, and the corporation

[1] American, etc. Assoc. *v.* Brantingham, 57 N. Y. App. Div. 399 (1901). Where, by order of the court, the corporation has interpleaded between two claimants to stock, the court will retain jurisdiction and determine the defendants' rights, and where in another action one of the defendants has been decreed to be the owner of the stock, the other defendant, although not a party to that action, but who claims to be a *bona fide* purchaser of the certificates, must establish such *bona fide* ownership and has the burden of proof to that extent. American, etc. Assoc. *v.* Brantingham, 37 N. Y. Misc. Rep. 426 (1902).

[2] Where a claimant of stock has brought suit against the holder of the stock and obtains judgment that the stock be transferred to such claimant, a person claiming to have purchased the stock in the meantime must prove that he is a *bona fide* purchaser and that he purchased before final judgment. American Press Assoc. *v.* Brantingham, 75 N. Y. App. Div. 435 (1902).

Where the title to stock has been litigated, and pending the litigation a third person buys the stock, such third person is not a *bona fide* purchaser, she having been a witness in the suit. Printing, etc. Co. *v.* Brantingham, 77 N. Y. App. Div. 280 (1902).

[3] Joslyn *v.* St. Paul Dist. Co., 44 Minn. 183 (1890); Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890).

[4] Jellenik *v.* Huron, etc. Co., 177 U. S. 1 (1900), rev'g 82 Fed. Rep. 778.

[5] Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897); Merritt *v.* American, etc. Co., 79 Fed. Rep. 228 (1897). See also §§ 12, 13, *supra;* §§ 475, 766c, *infra.*

[6] Rucker *v.* Morgan, 122 Ala. 308 (1899). As to injunctions, see also § 391, *infra.*

makes such transfer and thereafter the decree is reversed on appeal, the executors may bring suit to have the transfer canceled. The suit is properly in equity.[1] Where stock is tied up by an injunction which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the enjoining party if the stocks could and would have been sold before the depreciation if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up, no damages can be recovered.[2] Under the statutes of California, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock, and it is transferred on the books of the company, nevertheless if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties.[3]

§ 364. *Lis pendens as affecting a purchase of stock.*— A purchaser of certificates of stock is not chargeable with constructive notice that a suit is pending in which his vendor is defendant, and that the plaintiff is endeavoring to obtain possession and title to the stock which the purchaser is buying. The doctrine of *lis pendens* has no application to sales of shares of stock. The purchaser is bound to know that a judgment or decree has been rendered and executed affecting the certificates he is buying, if such a judgment or decree exists; but he is not bound to know that a suit is pending in which judgment has not yet been rendered. That a *lis pendens* in a suit involving shares of stock does not affect a purchaser of the certificate representing those shares, the purchase being made while the suit is pending, was clearly established by the court of appeals of New York in the case of Holbrook *v.* New Jersey Zinc Company.[4]

C. FORGERY.

§ 365. *Forgery as affecting a sale of stock.*— An owner of shares of stock cannot be deprived of his property by a forgery, through

[1] Ashton *v.* Heggerty, 130 Cal. 516 (1900).

[2] Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897). See also § 579, *infra*.

[3] Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901).

[4] 57 N. Y. 616 (1874), following Leitch *v.* Wells, 48 N. Y. 586 (1872). See Dovey's Appeal, 97 Pa. St. 153 (1881), where the court refused to pass upon this question; also Bank of Virginia *v.* Craig, 6 Leigh (Va.), 399, 435 (1835), holding that a *lis pendens* in a suit by sureties to restrain guardian from selling stock is not notice to the corporation to refuse to allow him to register a transfer. The equitable doctrine of notice by *lis pendens* does not apply to certificates of stock. American Press Assoc. *v.* Brantingham, 75 N. Y. App. Div. 435 (1902).

which his certificates of stock pass into the hands of innocent purchasers. He may be deprived of his stock, but has in lieu thereof the right to collect the value of that stock, either from the corporation, if it has permitted a transfer, or from parties who have held the stock. The rights and remedies of the stockholder who has lost possession of certificates of stock by forgery vary according to the extent to which his certificate has been transferred. His remedy may be against the transferees of the certificate before a registry has been obtained, or it may be against the corporation for allowing a registry, or it may be against the person obtaining the registry. The forgery itself may consist of any writing on the certificate of stock, whereby, with intent to defraud, it is falsely and materially so made or altered as to have an apparent legality.[1] Generally the forgery is of the name of the stockholder to the transfer on the back of the certificate.[2] The forgery may, however, be committed by changing the number of shares of stock which the transferrer has written out in the transfer,[3] or by inserting the numbers of shares of stock of one corporation in a blank transfer duly signed by the stockholder, but signed for the purpose of transferring shares of stock in another and different corporation.[4]

The subject of forgery by one or more corporate officers, whereby spurious and overissued stock is issued, there being no old certificates returned to the company at that time, is considered elsewhere.[5]

The subject now under consideration is where the name of a stockholder is forged to an assignment of the certificate, or the certificate itself is modified.

§ 366. ***Rights and liabilities of transferees of forged certificates of stock, there being no intervening registry on corporate books.***— The position of a transferee of a certificate of stock which is invalid by reason of forgery depends largely on whether there has been an intervening registry of transfer on the corporate books after the

[1] See 1 Bouvier's L. Dict., p. 679; 2 Bish. Cr. L., § 523.

[2] Nearly all of the cases in the several following sections are cases of a forgery of the stockholder's name to a transfer. It is forgery for one trustee to write in the names of the other trustees without authority. Cottam *v.* Eastern Counties Ry., 1 J. & H. 243 (1860); Sloman *v.* Bank of England, 14 Sim. 475 (1845). Or for one partner to write in the name of the other partner without authority, where the stock stood in their joint names. Midland Ry. *v.* Taylor, 8 H. L. Cas. 751 (1862), aff'g Taylor *v.* Midland Ry., 29 L. J. (Ch.) 731 (1860).

[3] Matthews *v.* Massachusetts Nat. Bank, Holmes, 396 (1874); s. c., 16 Fed. Cas. 1113; Sewall *v.* Boston Water-power Co., 86 Mass. 277 (1862), where the alteration was treated as a forgery so far as legal rights were concerned, although the alteration was due to an innocent misunderstanding of a clerk.

[4] Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862), practically overruling *Ex parte* Swan, 7 C. B. (N. S.) 400 (1859).

[5] See §§ 291–298, *supra*.

former owner was deprived of his stock by the forgery. The forger himself is of course liable, not only to the real stockholder, but also to any other person who has been injured by the forgery. If the purchaser of stock from one who has forged a transfer of the same sells the same after being notified by the real owner that the latter claims the stock and has been deprived of it by forgery, the real owner may recover damages in trover for the value of the stock from the person who so sells, although the latter purchased in good faith and without notice of the forgery.[1] Where an agent of a stockholder forges his name to the certificates of stock and pledges them with a party to secure a loan to the agent's principal, such loan cannot be collected, even though the proceeds went to the credit of the principal and were afterwards embezzled by the agent under a power of attorney to check out the principal's money, the party loaning the money on the certificates of stock not having any knowledge of such power of attorney at the time.[2] If the forgery is committed by a member of a firm, the real owner may sue the firm for money had and received, and may recover the value of the stock and dividends.[3] Where the forger has sold the stock to a purchaser without notice, and the latter has sold to another purchaser without notice, and the latter is deprived of his apparent ownership on account of the forgery, the second transferee may hold the first transferee liable.[4] This principle grows out of the well-established rule of law that, in a sale of chattels, there is an implied warranty of title, unless the circumstances are such as to give rise to a contrary presumption. A person who signs as a witness a forged transfer of stock is personally liable, even though he did so without knowledge of the fraud.[5] The broker and auctioneer of stock which passes through their hands cannot, it seems, be held liable, though it turns out that on account of a forgery there was

[1] Monk *v.* Graham, 8 Mod. 9 (1721).

[2] Fay *v.* Slaughter, 194 Ill. 157 (1901).

[3] Marsh *v.* Keating, 1 Bing. N. Cas. 198 (1834); Stone *v.* Marsh, 6 B. & C. 551 (1827).

[4] Matthews *v.* Massachusetts Nat. Bank, Holmes, 396 (1874); s. c., 16 Fed. Cas. 1113. This was an extremely harsh case, involving a rigid application of the principle, since the defendant's name appeared on the back of the certificate of stock as a transferrer when in fact it had only been a pledgee, and on payment of the pledge had retransferred the stock. As to the liability of brokers for the forgery of their employee in delivering spurious stock to a customer, see Andrews *v.* Clark, 72 Md. 396 (1890). See § 452, *infra.* Compare, however, §§ 296 and 358, notes, *supra.* A purchaser without notice of a forged bond may recover back the price paid by him to the vendor, even though the vendor was himself a *bona fide* purchaser and without notice of the illegality of the bond. There is an implied warranty of identity of the thing sold. Meyer *v.* Richards, 163 U. S. 385 (1896). See also § 764, *infra.*

[5] Second Nat. Bank *v.* Curtiss, 2 N. Y. App. Div. 508 (1896); aff'd, 153 N. Y. 681.

no title to the stock in the party whom they represented.[1] The transferee whose title is based on a forgery has no rights as against the corporation, where there has been no registry on the corporate books after the forgery. He cannot compel the corporation to allow him to register his transfer. If the corporation has already registered him as transferee, it may repudiate its registry so far as *he* is concerned, and refuse to recognize him as a stockholder or as having the right to transfer the stock.[2] Such a registered transferee has no right of action against the corporation by reason of its rescission of his registry,[3] although the rule may be different if he purchased by reason of the fact that he was allowed such registry on the corporate books.[4] The person who first obtains a registry after a forgery has deprived the real owner of his stock cannot retain the new certificates as against the real owner of the old ones.[5] A transferee of stock, the transfer of which has been forged, is liable to the corporation upon the corporation being held liable, even though such transferee acted in good faith.[6]

[1] Machinists' Nat. Bank *v.* Field, 126 Mass. 345 (1879). See also Isham *v.* Post, 141 N. Y. 100 (1894), as to the liability of a trustee. Where stock stands in the name of two trustees and one signs a transfer and the signature of the other trustee is forged thereto, a stock broker who causes the corporation to make a transfer thereunder is liable to the corporation, even though he acted in good faith. Oliver *v.* Governor & Co., 86 L. T. Rep. 248 (1902).

[2] Simm *v.* Anglo-American Tel. Co., L. R. 5 Q. B. D. 188 (1879); Whitewright *v.* American Tel. etc. Co., N. Y. Daily Reg., Aug. 6, 1886 (Superior Ct.); Waterhouse *v.* London, etc. Ry., 41 L. T. Rep. 553 (1879); Hambleton *v.* Central Ohio R. R., 44 Md. 551 (1876); Brown *v.* Howard F. Ins. Co., 42 Md. 384 (1875); Hildyard *v.* South Sea Co., 2 P. Wms. 76 (1722). *Cf.* Ashby *v.* Blackwell, 2 Eden, 299 (1765), holding the corporation liable not only to the real owner, but also to the transferee obtaining registry. See § 358, *supra*, as to the rights of the transferee of the first registered holder. A forged transfer conveys no title to stock. Richardson *v.* Emmett, 61 N. Y. App. Div. 205 (1901).

[3] See § 358, *supra.*

[4] Metropolitan Sav. Bank *v.* Baltimore, 63 Md. 6 (1884). In this case the plaintiff took the forged certificates in pledge from the forger. Afterwards, upon the forger's applying for a further loan on the same pledge of stock, the corporation refused unless the stock was registered in its name, which was accordingly done. Held, that the bank lost the first loan, but had recourse to the corporation for the second loan.

[5] Johnston *v.* Renton, L. R. 9 Eq. 181 (1870). In Scarlett *v.* Ward, 52 N. J. Eq. 197, 210 (1893), the court said, in regard to the exception as to one who applies *bona fide* for a transfer of stock that has been forged: "This exception, I take it, is founded on the fact that the person who so obtains registry has had possession of the certificate and forged indorsement, and has thus been put on inquiry as to whether it is genuine, and has used it without such inquiry, and still holds the fruit of the fraud affected by the forgery."

[6] Corporation of Sheffield *v.* Barclay, 87 L. T. Rep. 479 (1902).

§ 367. *Liability of corporation to real owner of stock for allowing registry of forged transfer — Rights of the corporation in such cases.*— It is the duty of a corporation to prevent and refuse a registry of transfer of stock where that transfer has been forged. If the corporation fails to detect the forgery it is liable to the real owner of the stock who has been deprived of it by the forgery.[1] The owner of the stock may compel the corporation to cancel the illegal registry and restore the name of the plaintiff.[2] Inasmuch,

[1] Pratt *v.* Taunton Copper Mfg. Co., 123 Mass. 110 (1877); Sewell *v.* Boston Water-power Co., 86 Mass. 277 (1862); Pratt *v.* Boston, etc. R. R., 126 Mass. 443 (1879); Johnston *v.* Renton, L. R. 9 Eq. 181 (1870); Cottam *v.* Eastern Counties Ry., 1 J. & H. 243 (1860); Midland Ry. *v.* Taylor, 8 H. L. Cas. 751 (1862), aff'g Taylor *v.* Midland Ry., 29 L. J. (Ch.) 731 (1860); Davis *v.* Bank of England, 2 Bing. 393 (1824); Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862), substantially overruling same case in court of law, *Ex parte* Swan, 7 C. B. (N. S.) 400 (1859); Pollock *v.* National Bank, 7 N. Y. 274 (1852); American Tel. etc. Co. *v.* Day, 52 N. Y. Super. Ct. 128 (1885); Dalton *v.* Midland Ry., 12 C. B. 458 (1852); Baltimore *v* Ketchum, 57 Md. 23 (1881); Coates *v.* London, etc. Ry., 41 L. T. Rep. 553 (1879); Blaisdell *v.* Bohr, 68 Ga. 56 (1881); Sloman *v.* Bank of England, 14 Sim. 475 (1845). For a careful analysis of the English cases to the effect that the corporation is liable to a person who actually pays money or loses money in reliance upon the "certification" or act of the corporation directly with the purchaser of a certificate, even though there has been no intervening transfer, see 6 Judicial Review (Eng.), 58. See also Telegraph Co. *v.* Davenport, 97 U. S. 369 (1878), where the court said: "Upon the facts stated there ought to be no question as to the right of the plaintiffs to have their shares replaced on the books of the company and proper certificates issued to them, and to recover the dividends accrued on the shares after the unauthorized transfer; or to have alternative judgments for the value of the shares and the dividends. Forgery can confer no power nor transfer any rights. The officers of the company are the custodians of its stock-books, and it is their duty to see that all transfers of shares are properly made, either by the stockholders themselves or persons having authority from them. If upon the presentation of a certificate for transfer they are at all doubtful of the identity of the party offering it with its owner, or if not satisfied of the genuineness of a power of attorney produced, they can require the identity of the party in the one case, and the genuineness of the document in the other, to be satisfactorily established before allowing the transfer to be made. In either case they must act upon their own responsibility. . . . Neither the absence of blame on the part of the officers of the company in allowing an unauthorized transfer of stock, nor the good faith of the purchaser of stolen property, will avail as an answer to the demand of the true owner." A corporation is liable to the owner of stock if it allows a transfer of the stock to be made to a transferee who forged the owner's name to the transfer on the back of the certificate of stock. Pennsylvania Co. *v.* Philadelphia, etc. R. R., 153 Pa. St. 160 (1893).

[2] Johnston *v.* Renton, L. R. 9 Eq. 181 (1870); Cottam *v.* Eastern Counties Ry., 1 J. & H. 243 (1860); Sloman *v.* Bank of England, 14 Sim. 475 (1845). Where a person's stock has been transferred on the corporate books on a forged power of attorney, he may file a bill to com-

however, as a *bona fide* transferee of the illegally *registered* transferrer is entitled to retain the stock, the former owner of the stock, in suing the corporation, should demand relief in the alternative, that the stock be restored to him, or that he be given damages in lieu thereof.[1] Or he may demand that the corporation replace the stock by going into the market, if necessary, and purchasing similar stock.[2] If the stockholder sues the corporation for a dividend on stock which by a forged assignment has been registered in the name of another person, the corporation cannot interplead.[3] A court of equity has concurrent jurisdiction with law in remedying a forged transfer of stock.[4] The corporation, the co-conspirators, and the transferees of the forged certificate are all proper parties to the suit;[5] but the only necessary party is the corporation itself.[6] On the other hand, it is the transferee obtaining registry who warrants the validity of his title and right to transfer; and if the corporation is compelled to pay damages to the real owner on account of allowing such registry, it may have recourse to and collect the same damages from the transferee who obtained the registry, however innocent the latter may have been.[7] Where stock stands in the name of two trustees, and one of them signs a transfer and

pel the corporation to cancel the transfer and re-issue the stock to him, or else to pay him the value thereof. The court also held in this case that the fact that the stockholder gave a person access to the safe-deposit box containing such certificates of stock was no defense to the corporation. and also the fact that the stockholder had authorized such person to sign the stockholder's name to other certificates of stock was no defense to the corporation. Pennsylvania Co. *v.* Franklin Ins. Co., 181 Pa. St. 40 (1897). A corporation canceling a certificate of stock and issuing another certificate to the assignee under a forged assignment will be required to re-issue to the original owner a certificate in lieu of the one canceled. The holder of the certificate which was illegally issued is not a necessary party to the suit unless it is shown that the plaintiff is insolvent, or that there will be an overissue by the corporation if the certificate is issued to the plaintiff. Chicago Edison Co. *v.* Fay, 164 Ill. 323 (1896).

[1] This is the usual prayer for relief in this country.

[2] Pratt *v.* Boston, etc. R. R., 126 Mass. 443 (1879). See also § 284, *supra.*

[3] Dalton *v.* Midland Ry., 12 C. B. 458 (1852).

[4] Blaisdell *v.* Bohr, 68 Ga. 56 (1881).

[5] Blaisdell *v.* Bohr, 68 Ga. 56 (1881). As to a statutory criminal liability of an officer forging and issuing stock, see State *v.* Haven, 59 Vt. 399 (1887).

[6] Chicago Edison Co. *v.* Fay, 164 Ill. 323 (1896); Baltimore *v.* Ketchum, 57 Md. 23 (1881); Pratt *v.* Boston, etc. R. R., 126 Mass. 443 (1879). In a stockholders' action to compel the corporation to re-transfer stock to them which has been transferred on the corporate books by forgery, the holders of the new certificates are not allowed to come in and defend. Barton *v.* London, etc. Ry., L. R. 38 Ch. D. 144 (1888).

[7] Boston, etc. R. R. *v.* Richardson, 135 Mass. 473 (1883), the court saying also in a dictum that the defendant has a remedy over against the parties that sold to him.

forges the name of the other trustee and sells the stock through a broker, the other trustee whose name was forged may hold the corporation liable for the stock, if it has allowed a transfer, and the corporation may hold the broker liable.[1] Where a person forges the power of attorney on a certificate of stock and transfers the stock to himself, and the corporation issues to him a new certificate in his name, and he pledges the same to a *bona fide* pledgee, and such pledgee afterwards transfers the loan and stock as collateral to the corporation itself, the corporation cannot hold the pledgee liable in regard to the forgery.[2] Where the corporation is sued by the real owner of the stock for allowing the registry of a transfer based on forgery, it cannot institute an independent action bringing in all the parties interested and enjoining the action of the owner of the stock.[3] The liability of the corporation on stock which was forged by corporate officers or fraudulently issued by them is considered elsewhere.[4] Where a trust company, as registrar of stock, allows a transfer on a forged assignment, it is liable to the owner for the value of the stock, less any amount which he may have recovered from other parties.[5]

§§ 368, 369. The right of the rightful owner of the stock to complain of the forgery whereby his certificate has passed into the possession of another may be barred by estoppel or ratification. Formerly it was held that the negligence of the owner of the stock would be a bar to his remedy.[6] Later decisions, however, have firmly established the rule that "there must be either something that amounts to an estoppel, or something that amounts to a ratification, in order to make the negligence a good answer." [7] Accordingly, the rightful owner of the stock is held not to be barred of

[1] Oliver *v.* Governor, etc., [1901] 1 Ch. 652; aff'd, 86 L. T. Rep. 248 (1902).

[2] Philadelphia Nat. Bank *v.* Smith, 195 Pa. St. 38 (1900).

[3] American Tel. etc. Co. *v.* Day, 52 N. Y. Super. Ct. 128 (1885).

[4] See § 293, *supra.*

[5] Wiechers *v.* Central Trust Co., 80 Hun, 576 (1894). Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900).

[6] Coles *v.* Bank of England, 10 Ad. & E. 437 (1839), where the continuous receipt of dividends on a less quantity of stock than she was entitled to was held a bar, though the stockholder was old and infirm.

[7] Bank of Ireland *v.* Evans Charities, 5 H. L. Cas. 389 (1855).

his remedy by the fact that the stockholder, a corporation, allowed its corporate seal to be in the possession of its secretary, whereby he sold the stock owned by the corporation,[1] or by the fact that the owner delayed several months, during which time the forger escaped,[2] or that he transferred on the back of the certificate only part of the shares specified in the certificate;[3] or that he gave his address wrong, and thereby a letter of inquiry did not reach him;[4] or that he allowed his clerk, the forger, to have access to his papers, and gave him blank transfers duly signed to use in transferring other stock;[5] or that the guardian of the plaintiff was negligent.[6] The statute of limitations in behalf of the corporation begins to run against a cause of action for forged transfer only from the time when the corporation denies its liability therefor.[7]

§ 370. *Rights of transferees who purchase after a registry has been obtained.*— It has already been shown that the transferees of a certificate of stock which has been put in circulation by forgery are not allowed to retain such stock where there has not been, at some time subsequent to the forgery, a transfer registered on the corporate books. It has also been shown that he who applies to the corporation for a registry of transfer, such registry being the first one since the forgery was committed, is not allowed to retain the stock. An entirely different rule prevails as regards all subsequent *bona fide* holders of the new certificate obtained by the first registry. The person who obtains the first registry has no rights except as against his transferrer. But all subsequent purchasers without notice are fully protected. They cannot be compelled to give up the stock, either to the corporation or to the person who lost it by forgery.[8] This rule arises, not from the law of negligence, but from the law of estoppel operating against the corporation. It is in accord with the demands of trade and the constant tendency of the law to protect *bona fide* purchasers of certificates of stock.

[1] Bank of Ireland *v.* Evans Charities, 5 H. L. Cas. 389 (1855); and Merchants of the Staple *v.* Bank of England, 56 L. T. Rep. 665 (1887), where the preceding case was reluctantly followed.

[2] Davis *v.* Bank of England, 2 Bing. 393 (1824).

[3] Sewall *v.* Boston Water-power Co., 86 Mass. 277 (1862).

[4] Johnston *v.* Renton, L. R. 9 Eq. 181 (1870).

[5] Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862), substantially overruling *Ex parte* Swan, 7 C. B. (N. S.) 400 (1859).

[6] Telegraph Co. *v.* Davenport, 97 U. S. 369 (1878).

[7] Barton *v.* North Staffordshire Ry., L. R. 38 Ch. D. 458 (1888).

[8] Machinists' Nat. Bank *v.* Field, 126 Mass. 345 (1879); *Re* Bahia, etc. Ry., L. R. 3 Q. B. 584 (1868), where, however, the corporation, having canceled all the registries made subsequent to the forgery, was held liable in damages to a purchaser subsequent to the first registry. The court said that the giving of a certificate "is a declaration by the company to all the world that the

D. CONFISCATION OF STOCK.

§ 371. During the late Rebellion, acts of confiscation were passed both by the United States government and by the Confederate government, and shares of stock owned by parties in one section of the country in corporations domiciled in the other section were confiscated. The result of the war having established that the Confederate government was an illegal one, all its acts of confiscation became null and void, and all transfers and registers of stock thereunder were held to be void utterly. The whole line of transactions based on the confiscation fell with the confiscation itself.[1] The corporation was held not liable to purchasers whose title was based on the confiscation, since it acted under compulsion of a power temporarily greater than the law itself.[2] If the corporation neglects to remedy the confusion and claims growing out of the illegal confiscation of stock, any stockholder may institute an action in its behalf for that purpose.[3] The stock is to be restored to the owner against whom the confiscation proceedings were had: and if the corporation, during the Rebellion, voluntarily paid dividends to the illegal holders of the stock, it must pay the same to the plaintiff, even though it would have been compelled to pay such dividends to the Southern holder if it had not done so voluntarily.[4] On the other hand, proceedings for the confiscation of stock under the confiscation acts of the United States government, passed by reason of

person in whose name the certificate is made out and to whom it is given is a shareholder in the company, and it is given by the company with the intention that it shall be so used by the person to whom it is given, and acted upon in the sale and transfers of shares." A purchaser of certificates of stock need not look back of the last registry of transfer on the corporate books. A breach of trust back of that does not invalidate his title. Winter *v.* Montgomery Gaslight Co., 89 Ala. 544 (1889). See also § 358, *supra.* A corporation cannot refuse to transfer stock on the ground that the vendor fraudulently induced the company to issue the stock to him, where the company had been guilty of laches in not seeking a remedy before the transfer. The vendee in this case was a director. American Wire Nail Co. *v.* Bayless, 91 Ky. 94 (1891). "A secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." Hence a receipt by the secretary that certificates of stock had been actually lodged in the corporate office for transfer does not bind the corporation where they were not actually lodged, and the receipt was a part of a fraud. George Whitechurch, Ltd. *v.* Cavanagh, 85 L. T. Rep. 349 (1901).

[1] Dewing *v.* Perdicaries, 96 U. S. 193 (1877).

[2] Dewing *v.* Perdicaries, 96 U. S. 193 (1877); also Central R. R. etc. Co. *v.* Ward, 37 Ga. 515 (1868).

[3] Perdicaris *v.* Charleston Gas-light Co., Chase's Dec. 435 (1869); s. c., 19 Fed. Cas. 217; affirmed *sub nom.* Dewing *v.* Perdicaries, 96 U. S. 193 (1877).

[4] Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357.

the late Rebellion, are held to have been effective if in accordance with established rules of procedure. Where, however, no notice of the proceedings was given to the defendant, and her name and the stock were not accurately described, the proceedings were void; and the corporation, having obeyed the illegal judgment of confiscation, was held liable in damages to the Southern owner of the stock.[1] Under the confiscation acts of the United States of 1861 and 1862, stock owned by a rebel in a Michigan railroad could be condemned by giving notice of seizure to the railroad corporation. This amounted to an attachment or garnishment.[2]

[1] Chapman *v.* Phœnix Nat. Bank, 85 N. Y. 437 (1881), reversing s. c., 44 N. Y. Super. Ct. 340. See also Avil *v.* Alexandria Water Co., 1 Hughes, 408 (1877); s. c., 2 Fed. Cas. 254.

[2] Miller *v.* U. S., 11 Wall. 268 (1870).

CHAPTER XXII.

SALES OF STOCK—FORMAL METHOD OF TRANSFERRING CERTIFICATES AND REGISTRY THEREOF.

§ 372. *Subject treated herein.*— Having considered the competency of parties to enter into a contract of sale of stock;[1] the legality, enforceability, and character of that contract;[2] and the rights of third parties as affecting the contract between the transferrer and transferee,[3]— it is now necessary to discuss certain formalities whereby the title to stock is transferred. These formalities are peculiar to sales of stock. The only analogy to them is perhaps that arising from the making of a deed of real estate, and a registry of the same at a recorder's office. In many respects, however, this analogy does not apply. Thus, the corporation itself has many rights and duties herein which a register of deeds has not. The

[1] Ch. XIX, *supra*. [2] See ch. XX, *supra*. [3] Ch. XXI, *supra*.

rules given herein have arisen for the most part out of the necessities and usages of business as sanctioned by the courts.

§ 373. *The two usual steps in perfecting a transfer of stock.*— To transfer a share of stock there are generally two distinct steps to be taken: First, the certificate is assigned by the transferrer to the transferee; and second, that assignment and transfer are perfected and completed by delivering the assigned certificate to the corporation, obtaining an entry on the corporate transfer book to the effect that the transferee has acquired the stock of the transferrer, and taking from the corporation a new certificate of stock certifying that the newly-recorded stockholder owns a specified amount of stock. The corporation then cancels the old certificate of stock[1] and posts the transfer into the stock ledger.[2]

§ 374. *Omission of either or both steps.*— Either and even both of these two steps in the complete transfer of stock may be omitted; and yet, where the facts estop the various parties from denying that a transfer has been made, it will be held to be complete. Thus, it has been held that an owner of stock may transfer his stock to another by a delivery of the certificate without any assignment.[3] This happens when a registry of transfer is made without any surrender of the old certificate.[4] So far as the transferrer is concerned such a method of transfer is effectual. Such cases also arise where the corporation has never issued certificates of stock. The stockholder may then transfer his stock without assigning a certificate.[5] A subscription of stock may be assigned, even though only a part of the subscription has been called for and paid, and even though no certificate of stock has ever been issued. Such assignment may be oral.[6] No certificate of stock is necessary in order

[1] In Knox *v.* Eden Musée, etc. Co., 148 N. Y. 441 (1896), certificates of stock had been delivered to the corporation for transfer, and the new certificates had been duly issued. The old certificates were put in a safe uncanceled, and were illegally abstracted by an employee and sold. The court held that the company was not liable on such certificates to a person who took them in pledge from such employee. The court, however, based its decision, not on the fact that the pledgee took with notice, but on the principle of law that no one could acquire title to stolen certificates of stock.

[2] The purposes of the stock-ledger are explained in § 14, *supra.*

[3] See §§ 308, 465.

[4] See § 361, *supra.*

[5] Brigham *v.* Mead, 92 Mass. 245 (1865); First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877). See also § 382, *infra.* Although the charter prescribes that stock shall be transferred in such manner as the by-laws direct, yet, if the by-laws do not provide for transfers, a common-law transfer is sufficient. An oral transfer is sufficient where no certificates have been issued, and where such transferee is entered on the corporate books as a stockholder. Kiely *v.* Smyth, 27 Grant's Ch. (Can.) 220 (1879).

[6] Manchester St. Ry. *v.* Williams, 52 Atl. Rep. 461 (N. H. 1902).

to transfer title to the stock.[1] But, where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected.[2] Where the certificates for unpaid stock are never issued, and the stockholder disposes of his interest to another person, and the corporation recognizes that person as such stockholder, the original subscriber is no longer liable.[3]

A. METHOD OF TRANSFERRING THE CERTIFICATE.

§ 375. *Usual forms of assignment and powers of attorney whereby the transferrer assigns the certificate of stock to his transferee.*— A certificate of stock is a paper issued by the corporation to a stockholder, stating that the person specified therein is the owner of a certain number of shares of its capital stock. The assignment of this certificate is made, it seems, in three different ways: First, it has been held that it may be made by a simple delivery of the certificate without any writing.[4] Where a deed of trust refers to certain stock and transfers the same to the trustee and authorizes him to transfer the stock to himself on the books, an indorsement of the certificates is unnecessary to pass title to the trustee.[5] Again, it may be made by a formal instrument of assignment duly signed by the transferrer. This instrument may be separate from the certificate of stock or may be printed in blank on the back of it. In either case, in order to make the transfer complete by a registry of it on the corporate books, it is necessary for the transferrer to go to

[1] May *v.* McQuillan, 89 N. W. Rep. 45 (Mich. 1902).

[2] Manchester St. Ry. *v.* Williams, 52 Atl. Rep. 461 (N. H. 1902).

[3] Dain, etc. Co. *v.* Trumbull, etc. Co., 68 S. W. Rep. 951 (Mo. 1902).

[4] See § 308, *supra*, where a delivery of a certificate of stock *causa mortis* was held good, without any writing assigning the certificate; and § 465, note, *infra*. See also Masury *v.* Arkansas National Bank, 93 Fed. Rep. 603 (1899); Fraser *v.* Charleston, 11 S. C. 486 (1878). *Cf.* Sitgreaves *v.* Farmers', etc. Bank, 49 Pa. St. 359 (1865); Davis *v.* Bank of England, 2 Bing. 393 (1824); Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878); Dunn *v.* Commercial Bank, 11 Barb. 580 (1852). A deed of release of shares of stock is a sufficient transfer. Hastings *v.* Blue Hill Turnp. Corp., 26 Mass. 80 (1829). If a corporation allows a transfer to be made on its books without the transfer on the old certificate being signed, it is liable to the owner of the old certificate, even though the old certificate is delivered up and the attorney in fact of the owner shows his power of attorney at the time of the transfer on the books. Tafft *v.* Presidio, etc. Co., 84 Cal. 131 (1890). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson *v.* Davis, 170 U. S. 36 (1898).

[5] Curtis *v.* Crossley, 59 N. J. Eq. 358 (1900).

the office of the corporation and sign the transfer in the corporate transfer book, whereby the transfer is recorded. The third and most usual method of assigning a certificate of stock is by a formal instrument of assignment, similar to the one explained above, united with a power of attorney authorizing a person, whose name is generally left blank, to be subsequently filled in, to sign the corporate transfer book, whereby the transfer is recorded. This instrument of transfer and the power of attorney are generally printed in blank on the back of the certificate of stock. It enables the transferee to obtain a registry without the presence of the transferrer, provided the corporate registry agent is satisfied with the signature and intent of the transferrer to assign the stock. Although a transfer is on a separate piece of paper, and is not acknowledged as required by a rule of the stock exchange, nevertheless a pledgee may be a *bona fide* holder.[1] A person who signs as a witness a forged transfer of stock is personally liable, even though he did so without knowledge of the fraud.[2] The blank power of attorney is generally filled in by the transfer clerk, who inserts his own name and thereby becomes the attorney.[3] This power of attorney is not revoked by the death of the transferrer before it is used.[4] A general power of attorney to sell land and build houses does not justify a sale of stock.[5] A general power of attorney authorizing an agent to sell and transfer stocks, etc., authorizes him to sign the stockholder's name to a transfer, but not a transfer to himself.[6] Permitting, without inquiry, a transfer under a power of attorney thirteen years old is not proper vigilance on the part of a corporation.[7] An agent's written authority to transfer stock is revoked by death.[8] A transferee who receives new certificates of stock is not

[1] Smith *v.* Savin, 141 N. Y. 315 (1894).

[2] Second, etc. Bank *v.* Curtiss, 2 N. Y. App. Div. 508 (1896); aff'd, 153 N. Y. 681.

[3] The fact that the officer of the corporation fills in his own name as agent to transfer does not make him the agent of the stockholder as regards notice of the agent's frauds. Allen *v.* South Boston R. R., 150 Mass. 200 (1889). See also § 382, *infra.*

[4] Fraser *v.* Charleston, 11 S. C. 486 (1878); Leavitt *v.* Fisher, 4 Duer (N. Y.), 1 (1854); United States *v.* Cutts, 1 Sumn. 133 (1832); s. c., 25 Fed. Cas. 745.

[5] Camden F. Ins. Assoc. *v.* Jones, 53 N. J. L. 189 (1890), holding also that the corporation is liable for allowing a transfer of stock where the stockholder did not sign the transfer nor authorize another to transfer it.

[6] Tafft *v.* Presidio, etc. Co., 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). A stockholder's power of attorney to his agent "to exchange old issues or certificates [of stock], and receive new issues or certificates in lieu thereof," does not authorize the agent to sell or pledge the stock. The corporation is liable for allowing a transfer to a third person on such authority. Quay *v.* Presidio, etc. R. R., 82 Cal. 1 (1889).

[7] Pennsylvania R. R.'s Appeal, 86 Pa. St. 80 (1878).

[8] *In re* Kern's Estate, 176 Pa. St. 373 (1896).

affected by the fact that the old certificates have been fraudulently reissued by a corporate officer.[1]

§ 376. *Questions which arise herein.*— The assignment of a certificate of stock by the transferrer to the transferee, considered apart from the actual registry of such assignment on the corporate books, involves the question whether such an assignment should be under seal; whether, after the assignment and the delivery thereof, the transferrer can claim any rights of ownership as against the transferee, even though there be no registry of the transfer; and whether a transfer and power of attorney duly signed by the transferrer, but left in blank as to the name of the transferee and attorney, are legal and may pass from hand to hand until some holder cares to fill up the blanks. These and incidental questions are discussed in the following sections.

§ 377. *A seal is not necessary to a transfer of stock.*— In America an assignment or transfer of a certificate of stock need not be under seal.[2] Formerly it was the custom to have all such transfers made by deed, duly sealed. As the nature of stock and certificates of stock, however, came to be understood more clearly, it became a rule of law that a transfer of the certificate, like the transfer of choses in action, did not require a seal. Not even the presence of the seal gives the transfer the character of a sealed instrument. The seal is a superfluity and is disregarded.[3]

In England, on the other hand, transfers of railway stocks are generally required by charter to be under seal. This is held to give the instrument the character of a deed; and hence, in accordance with the ancient technical rule of law that a deed must be filled out as to the grantee and other essential particulars before it is sealed in order to be valid, it has been held in England that a transfer of a certificate of stock, duly signed and sealed, but with the name of the transferee in blank, is void absolutely.[4] In those English com-

[1] See § 292, *supra*. Where a person, as preliminary to making a loan with stock as collateral, indorses his stock over to the lender and leaves it with the corporate secretary, and then the loan is abandoned, the secretary is bound to deliver back the stock. Galvin *v.* Mac Mining, etc. Co., 14 Mont. 508 (1894).

[2] Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476 (1813); Atkinson *v.* Atkinson, 90 Mass. 15 (1864). If, however, the by-laws require it, the transfer must be under seal. Bishop *v.* Globe Co., 135 Mass. 132 (1883), holding also that the word "seal" is insufficient.

[3] German Union, etc. Assoc. *v.* Sendmeyer, 50 Pa. St. 67 (1865); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839); McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231, 274 (1861); Easton *v.* London J. S. Bank, L. R. 34 Ch. D. 95 (1886).

[4] Hibblewhite *v.* McMorine, 6 M. & W. 200 (1840), per Parke, B.; *Re* Balkis Consol. Co., 58 L. T. Rep. 300 (1888); Tayler *v.* Great Indian, etc. Ry., 4 De G. & J. 559 (1859); Société Générale *v.*

panies, however, whose charters do not require transfers to be sealed, the transfer may be by an ordinary instrument in writing, and the presence of a seal will be disregarded.[1]

§ 378. *The assignment of the certificate of stock estops the transferrer from claiming any further title in the stock as against subsequent bona fide transferees, although such assignment be not registered.*[2] — There is no case which denies this principle of law. On close examination of the cases which seem to militate against it, it will be found that the issue involved was whether the unregistered transferee was protected against third persons who claimed title back of the transferrer. The transferrer himself is not allowed to impeach his unregistered transferee's title. Even in Connecticut, where at an early day the court held that the registry was the origin of the title of the transferee, the court was considering the rights of third persons, and not the rights of the transferrer

Tramways Union Co., L. R. 14 Q. B. D. 424 (1884), where transfer was to be by deed; aff'd, Société Générale v. Walker, L. R. 11 App. 20 (1885). *Cf.* § 325, *supra*, and § 412, *infra*.

[1] *Re* Tees Bottle Co., 33 L. T. Rep. 834 (1876); Walker v. Bartlett, 36 Eng. L. & Eq. 369 (1856); *Re* Barned's Banking Co., L. R. 3 Ch. App. 105 (1867); *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); Ortigosa v. Brown, 47 L. J. (Ch.) 168 (1878). The American cases incline to the opinion that, even though a seal were required, the sealed transfer would not be void because of the blanks left in it. Bridgeport Bank v. New York, etc. R. R., 30 Conn. 231, 274 (1861); Commercial Bank v. Kortright, 22 Wend. 348 (1839); Matthews v. Massachusetts Nat. Bank, 1 Holmes, 396, 407 (1874); s. c., 16 Fed. Cas. 1113, 1118; McNeil v. Tenth Nat. Bank, 46 N. Y. 325 (1871).

[2] Masury v. Arkansas Nat. Bank, 93 Fed. Rep. 603 (1899); Scott v. Pequonnock Nat. Bank, 15 Fed. Rep. 494 (1883); Brown v. Smith, 122 Mass. 589 (1877); Fitchburg Sav. Bank v. Torrey, 134 Mass. 239 (1883); Duke v. Cahawba Nav. Co., 10 Ala. 82 (1846); Chouteau Spring Co. v. Harris, 20 Mo. 382 (1855); St. Louis P. Ins. Co. v. Goodfellow, 9 Mo. 149 (1845); Gilbert v. Manchester Iron Mfg. Co., 11 Wend. 627 (1834); Sargent v. Essex Marine Ry. Corp., 26 Mass. 202 (1829); Nesmith v. Washington Bank, 23 Mass. 324 (1828); Sargent v. Franklin Ins. Co., 25 Mass. 90 (1829); Conant v. Reed, 1 Ohio St. 298 (1853); Baltimore, etc. Ry. v. Sewell, 35 Md. 238 (1871); Bank of America v. McNeil, 10 Bush (Ky.), 54 (1873); U. S. v. Vaughan, 3 Binn. (Pa.) 394 (1811); Beckwith v. Burrough, 13 R. I. 294 (1881); Farmers', etc. Bank v. Wasson, 48 Iowa, 336 (1878); Carroll v. Mullanphy Sav. Bank, 8 Mo. App. 249 (1880); Broadway Bank v. McElrath, 13 N. J. Eq. 24 (1860); Smith v. Crescent City, etc. Co., 30 La. Ann. 1378 (1878); People's Bank v. Gridley, 91 Ill. 457 (1879). Nor can the transferrer avoid the assignment before registry on the ground that no consideration passed. Hall v. U. S. Ins. Co., 5 Gill (Md.), 484 (1847); Cushman v. Thayer Mfg. Co., 76 N. Y. 365 (1879). Such an assignment satisfies a contract to sell stock. White v. Salisbury, 33 Mo. 150 (1862); Merchants' Nat. Bank v. Richards, 6 Mo. App. 454 (1879). The fact that the corporation subsequently refuses to register the transfer does not prevent title passing, as between transferrer and transferee. Crawford v. Provincial Ins. Co., 8 Up. Can. C. P. 263 (1859).

himself.[1] That the transferrer cannot question the completeness of his transfer of title is a rule binding not only on himself, but also upon his assignees in bankruptcy or insolvency.[2] The transferee is estopped also from attacking the assignment of the certificate on the ground of informalities in the transfer.[3] A *bona fide* pledge of stock indorsed in blank on the back is protected.[4] In Maryland, however, a distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock, signed by the stockholder, with the name of the transferee left blank, does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities.[5] Where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected.[6] Where a person resident in England purchases certificates of stock in a French corporation and fails to have the certificates transferred on the books, an administration on such certificates may be taken out in England.[7]

§ 379. *Effect of charter provision requiring registry.*— The same rules prevail even though the certificate or by-laws, or charter itself, declares that a transfer shall not be legal or complete or effectual until it is registered on the corporate books.[8] As between

[1] Northrop *v.* Newtown, etc. Co., 3 Conn. 544, 552 (1821); Fisher *v.* Essex Bank, 71 Mass. 373 (1855), the rights of attaching creditors being involved.

[2] *Ex parte* Dobson, 2 Mont., D. & De G. 685 (1842); Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Morris *v.* Cannan, 4 De G., F. & J. 581 (1862); Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515 (1882).

[3] Holyoke Bank *v.* Goodman Paper Mfg. Co., 63 Mass. 576 (1852); Maguire's Case, 3 De G. & S. 31 (1849); Sheffield, etc. Ry. *v.* Woodcock, 7 M. & W. 574 (1841); Cheltenham, etc. Ry. *v.* Daniel, 2 Q. B. 281 (1841); Home Stock Ins. Co. *v.* Sherwood, 72 Mo. 461 (1880). The legal sufficiency of the instrument of transfer cannot be questioned by the transferrer. Chew *v.* Bank of Baltimore, 14 Md. 299 (1859).

[4] Gilbert *v.* Erie Bldg. Assoc., 184 Pa. St. 554 (1898).

[5] Under this decision it would seem to be necessary to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894), a case wherein a broker holding stock on a margin repledged it at a bank.

[6] Manchester St. Ry. *v.* Williams, 52 Atl. Rep. 461 (N. H. 1902).

[7] In the Goods of Agnese, [1900] P. 60.

[8] Johnston *v.* Laflin, 103 U. S. 800, 804 (1880), affirming 5 Dill. 65 (1878); s. c., 13 Fed. Cas. 758; Masury *v.* Arkansas Nat. Bank, 93 Fed. Rep. 603 (1899); Noyes *v.* Spaulding, 27 Vt. 420 (1855), where the court said: "That provision is similar to the statute in this state in relation to the transfer of real estate, under which it has uniformly been held that the title passes to the grantee as between the parties to the conveyance, though the deed is unrecorded. . . . The object of having the transfer recorded on the books of the corporation is notice, and that is the only object. For that reason the transfer,

the transferrer and transferee, the unregistered assignment is complete and effectual in contradiction of such declarations. The courts construe these provisions of the certificate or by-laws or charter to be intended, not to affect the rights of the transferee as against the transferrer, but to affect the rights of the transferee as against attaching creditors of his transferrer and other third parties claiming an interest in the stock, and also to affect his right to claim dividends, the privilege of voting, and other rights of a stockholder.[1]

§ 380. *Certificate of stock may be assigned with the name of the transferee left blank.*— By a commercial usage, which has been repeatedly recognized as valid by the courts, certificates of stock may be assigned by a transfer duly signed by the transferrer, but with the name of the transferee left blank.[2] Generally the combined instrument of transfer and power of attorney on the back of the certificate is signed by the stockholder and delivered to the

though unrecorded, is good against the party and all those who have notice in fact of the transfer." U. S. *v.* Cutts, 1 Sumn. 133 (1832); s. c., 25 Fed. Cas. 745; First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877). The same provision was involved in nearly all the cases cited in preceding sections. See also Johnson *v.* Underhill, 52 N. Y. 203 (1873); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Baldwin *v.* Canfield, 26 Minn. 43 (1879), where the court said that charter "provisions of this kind are intended solely for the protection and benefit of the corporation; they do not incapacitate a shareholder from transferring his stock without any entry upon the corporation books." 54 Atl. Rep. 785.

[1] Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. Rep. 369 (1881); Merchants', etc. Bank *v.* Richards, 6 Mo. App. 454 (1879); and cases cited *supra.* and § 465, *infra.* As between the transferrer and transferee, the transfer is complete even though not registered, and even though the charter requires registry. Bates-Farley, etc. Bank *v.* Dismukes, 107 Ga. 212 (1899).

[2] Walker *v.* Detroit Transit Ry., 47 Mich. 338 (1882); Pennsylvania R. R.'s Appeal, 86 Pa. St. 80 (1878); Cutting *v.* Damerel, 88 N. Y. 410 (1882); German Union, etc. Assoc. *v.* Sendmeyer, 50 Pa. St. 67 (1865). A power of attorney on the back of a certificate of stock signed in blank is sufficient to transfer shares of stock in a corporation. Andrews *v.* Worcester, etc. R. R., 159 Mass. 64 (1893). "Even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and a party to whom it is delivered is authorized to fill it up by writing a transfer and power of attorney over the signature." McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, 331 (1871). "There is no force in the suggestion that the power of attorney in the present case was incomplete, because there were blanks for the number of shares and for the name of the attorney. Any holder might fill up the blanks and constitute himself the attorney. These points are too well settled to need discussion." Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616, 623 (1874). A transfer of stock by signing the transfer on the back of the certificate need not be dated, nor need all the blanks be filled in to convey complete title at law and in equity. Aspell *v.* Campbell, 64 N. Y. App. Div. 393 (1901). As to the English rule, see § 325, *supra*, and § 412, *infra.*

purchaser, with the names of the transferee and the attorney left blank. Such a certificate of stock, transferred in blank, may be sold and passed from hand to hand. Any purchaser of the certificate, duly signed but transferred in blank, may fill up the blanks and insert his own name.[1] He may fill in his own name as transferee, and the name of an agent as the attorney to make the registry, or he may leave the latter blank and allow the registry clerk to fill in his own name, as is generally done.

B. METHOD OF REGISTERING A TRANSFER OF STOCK.

§ 381. *Registry an important part of a transfer of stock.*— The effect of obtaining a registry or neglecting to obtain a registry of the transfer on the corporate books, immediately after purchasing a certificate of stock, has given rise to much litigation and much apparent confusion. A registry of the transfer is important in two respects: First, as regards the rights of the purchaser in reference to the corporation; second, in regard to the rights of the purchaser as to third persons who are either creditors of the old registered stockholders or have claims upon the stock in question. So far as the corporation is concerned, it is bound to recognize only the registered stockholder.[2] To him is accorded the right to vote, draw dividends, and exercise the general right of stockholdership. The unregistered purchaser of stock cannot claim such rights. All the cases agree in this result of a neglect to register a transfer. As regards the rights of third persons, however, the courts of the different states vary widely in their opinions. Generally the question arises by reason of an attachment or execution levied by a creditor of the transferrer against the stock standing on the corporate books in the name of the transferrer, who has already sold and assigned the certificate of stock to another. As a general rule, it may be said that a purchaser of a certificate of stock is usually protected as fully without a registry on the corporate books as he would be by a registry, so far as subsequent attachments and most other possible equities against the stock are concerned.[3] This is the rule in

[1] Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); Matthews *v.* Massachusetts Nat. Bank, 1 Holmes, 396 (1874); s. c., 16 Fed. Cas. 1113; Bridgeport Bank *v.* New York & N. H. R. R., 30 Conn. 231 (1861); Kortright *v.* Buffalo Com. Bank, 20 Wend. 91 (1838); aff'd, Commercial Bank *v.* Kortright, 22 Wend. 348 (1839); Otis *v.* Gardner, 105 Ill. 436 (1883); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Prall *v.* Tilt, 28 N. J. Eq. 479 (1877); Leavitt *v.* Fisher, 4 Duer, 1, 20 (1854).

[2] Registry herein means not only an actual registry, but also a request to the corporation to allow registry, where improperly refused by it. See § 382, *infra.*

[3] These various questions are considered in chs. XXI, *supra*, and XXVII, *infra.*

New York and most of the states. In some other states a contrary rule prevails. In Massachusetts, Illinois, New Hampshire, and elsewhere, statutes have changed the old rule so that it now accords with that of New York.[1] It is to be borne in mind also that a lien in behalf of the corporation may attach after transfer of the certificate and before registration thereof.[2]

§ 382. *Formalities of making registry — Transfer book and stock ledger not necessary.*— The customary method of registering a transfer of stock on the corporate books is simple. The registered stockholder, or his attorney in fact, whose name is written in the blank power of attorney, applies to the corporate officer having charge of the transfer books, and requests a registry of the transfer to a person designated by a name written in the form of transfer. Books of transfer are kept for purposes of registering, and upon such an application and the surrender of the old certificate the old stockholder or his attorney makes the registry and a new certificate is issued.[3]

Any suitable registry or stock list, or formal entry on the corporate books, suffices. No special book need be kept for that purpose.[4] Where the stock book of the corporation is locked up and cannot be reached, the directors may adopt a new stock book and minute book, and make transfers of stock.[5] Where the company does not keep a transfer book, the transfer of stock is complete when the owner of stock transfers the certificate on the back and delivers it to the secretary in order that a new certificate may be issued to the transferee.[6] In fact the usefulness of a transfer

[1] This statute is referred to in § 488, *infra*.

[2] See ch. XXXI, *infra*. Inasmuch as by the laws of England an English corporation may amend its by-laws so as to give it a lien on stock which will be prior to any existing unregistered pledge or assignment of the certificates of stock, an American pledgee or holder of such certificates of stock is bound by such by-law. Hudson, etc. Co. *v.* Warner & Co., 99 Fed. Rep. 187 (1900).

[3] Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878); Green Mount, etc. Co. *v.* Bulla, 45 Ind. 1 (1873). See also § 375, *supra*.

[4] "All that is necessary, when the transfer is required by law to be made upon the books of the corporation, is that the fact should be appropriately recorded in some suitable register or stock list, or otherwise formally entered upon its books. For this purpose the account in a stock ledger, showing the names of the stockholders, the number and amount of the shares belonging to each, and the sources of their title, whether by original subscription and payment or by derivation from others, is quite suitable, and fully meets the requirements of the law." National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881).

[5] *Re* Argus Co., 138 N. Y. 557 (1893).

[6] Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250 (1892). A stockholder is liable by statute on stock where he has merely transferred the certificate and no effort has been made to complete the transfer on the corporate books; but where there is no transfer book, and the certificates are merely can-

book may well be doubted, and unless the statutes require it there is a strong argument in favor of abolishing it. Probably the transfer book, and the power of attorney on the back of certificates of stock, and the provision in the certificate of stock that it can be transferred on the books of the company only in person or by duly authorized attorney, might be abolished without harm. In these days a sale and assignment of the *certificate* of stock should be sufficient to warrant a corporation making a transfer on its corporate books upon the presentation of the old certificate so assigned. The fact is that the transfer on the transfer book is a mere repetition of the transfer on the back of the certificate of stock, and as the stock ledger can be posted directly from the canceled certificates of stock, the transfer book might well be abolished. A stock journal might be convenient to show the daily transfers. The certificate of stock book, the stock journal and stock ledger would then correspond to the day-book, journal and ledger in ordinary book-keeping. But in these days, when it is the rule to issue certificates of stock,

celed and new ones issued, this is sufficient to effect a transfer on the corporate books. Plumb *v.* Bank of Enterprise, 48 Kan. 484 (1892). Where the corporation keeps a stock-certificate book but no transfer book, a transfer on the back of a certificate, which is then canceled and pasted back in the certificate book, and a new certificate issued to the transferee, is a sufficient transfer to constitute a transferee a stockholder. He may vote at elections, and an assignment by the corporation on the direction of officers elected by such a transferee is valid. Such a transfer is valid also, although a by-law provided that before selling his stock a stockholder must offer it to other stockholders for purchase. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551 (1891). A certificate-of-stock book is sufficient to show stockholdership, if there are no transfer or stock books, even though the statute requires the latter to be kept. Knowles *v.* Sandercock, 107 Cal. 629 (1895). A mere memorandum of a sale of stock, made by the corporation in the certificate book, was held a sufficient transfer to sustain a lien in Bank of Commerce *v.* Bank of Newport, 63 Fed. Rep. 898 (1894). Where the corporation keeps no stock ledger, a transfer is sufficiently registered when the old certificate is surrendered, a new one issued, and the new name entered on the subscription list. Stewart *v.* Walla Walla, etc. Co., 1 Wash. St. 521 (1889). Where no stock or transfer books are kept, although the statute requires them, and the certificate of stock is so kept that upon a transfer the old certificates of stock are not pasted back on to the stubs corresponding thereto, the transferrer may be liable for subsequent debts, even though a new certificate was issued to the transferee and the stub opposite thereto stated from whom the stock was transferred. Herrick *v.* Wardwell, 58 Ohio St. 294 (1898). Under the New York statute a holder of unpaid stock is not relieved from liability by a transfer of the same, unless such transfer is registered in a stock book; and it is held that even though no stock book is kept by the corporation, yet, if the transferrer was an officer of the company and partially responsible for not having such book kept, he cannot set up the defense that no such book was kept, especially where there is evidence of bad faith in the transfer. Beals *v.* Buffalo, etc. Co., 49 N. Y. App. Div. 589 (1900).

and a transfer thereof transfers the equitable title to the stock itself in all the states, and the legal title in most of the states, every legal and equitable right can be preserved as well without a transfer book and power of attorney as with them. The practical result would be the saving of transfer books and much bookkeeping. Many small corporations in these days do not keep any transfer book at all, and yet they experience no difficulty in transferring stock. Of course where the statutes of a state, as in New Jersey, require the keeping of a transfer book, the above suggestions could not be adopted. A demand for registry of a transfer of stock should be made upon the principal officer or clerk at the office of the corporation. When so made it is sufficient.[1] The method of registry may be regulated by the by-laws of the corporation. Thus, a by-law that the stock shall be transferable by indorsement in writing, made in the presence of the cashier or two other witnesses, has been sustained as valid, and is complied with only by the presence and signature of the cashier or of the witnesses.[2] So, also, of a by-law requiring registry in the presence of the president and secretary of the company.[3] But a by-law requiring the assent of the president of the corporation to the registry of a transfer would be in restraint of trade and void.[4] It is legal for a corporation to enact a by-law requiring stockholders to pay a small fee on making transfers of their stock upon the corporate books.[5] A delivery of certificates to the corporation, and a mere request to the corporate officers to make the transfer, is not a com-

[1] "It is sufficient for him to apply at the bank during the usual hours of business and make his demand upon the officers and clerks who may be in attendance there; and, in case they are not authorized to transact that particular business, they must either refer him to the proper officer in the bank or procure the attendance of such officer, or of the board of directors, if necessary, without any unreasonable delay. . . . In the absence of any proof to the contrary, it may be fairly presumed that the principal officer or clerk in attendance at the bank, during the usual hours of business, is authorized to permit such a transfer when proper." Commercial Bank *v.* Kortright, 22 Wend. 348, 351 (1839); Case *v.* Bank, 100 U. S. 446 (1879), where application to the cashier was held to be proper: McMurrich *v.* Bond Head Harbor Co., 9 Up. Can. Q. B. 333 (1852), where the application was to the secretary; Goodwin *v.* Ottawa, etc. Ry., 13 U. C. C. P. 254 (1863), where an application to secretary and treasury was sustained; Green Mount, etc. Co. *v.* Bulla, 45 Ind. 1 (1873), where the application was to the president. Presentation of the certificate of stock, duly indorsed, to the person in charge of the office of the corporation is a sufficient demand of transfer. Dunn *v.* Star F. Ins. Co., 19 N. Y. Week. Dig. 531 (1884).

[2] Dane *v.* Young, 61 Me. 160 (1872).

[3] Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879).

[4] Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). See also § 622, *infra*.

[5] Giesen *v.* London, etc. Mortg. Co., 102 Fed. Rep. 584 (1900).

plete registry until the entry is actually made,[1] excepting as to liability,[2] attachments,[3] and liens.[4]

The fact that the registry clerk marks on the instrument of transfer the words "received for record" does not constitute a registry.[5] A memorandum on the stock book that the stock has been transferred as collateral security is sufficient to give the transfer precedence over an attachment.[6] It has been held that, where the corporation has a branch registry office in another state, a registry in the branch office is not an effectual registry until it has been reported and entered in the books of the main office of the corporation.[7] It has been held in Iowa that where an Iowa corporation keeps its stock books in Boston, a transfer on such books in Boston is not effective as against subsequent attachments on the stock in Iowa, unless a book is kept in Iowa showing all transfers as required by the statutes of Iowa.[8] If the corporation does not keep books for the registry of transfers of stock, a mere notice to the corporation that a transfer has been made constitutes a registry.[9] But if the statute or charter requires a transfer to be made on the corporate books, no registry is possible until such books are obtained and opened.[10] If the corporation never issues certificates of stock, the stockholder cannot demand them.[11] If the corporation cannot allow the registry on account of an injunction, it is never-

[1] Brown *v.* Adams, 5 Biss. 181 (1870); s. c., 4 Fed. Cas. 350. Nor will a mere entry of credit to the transferee, on the treasurer's books, suffice. Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818).

[2] See § 258, *supra.*

[3] See § 490, *infra.* Under the Iowa statute a transfer of stock is not effective as against creditors, even though a request has been made to the corporation to transfer the stock, if such transfer has not been made, and even though the corporation attached to the stub of the certificate an acknowledgment of the assignment of the certificate, and even though the attaching creditor knew of such request. Perkins *v.* Lyons, 111 Iowa, 192 (1900).

[4] See § 532, *infra.*

[5] Northrop *v.* Newtown, etc. Co., 3 Conn. 544 (1821); Northrop *v.* Curtis, 5 Conn. 246 (1824). But a memorandum entered on the stub in the stock book opposite to the certificate issued, that that certificate has been transferred, is a sufficient registry as against attaching creditors of the transferrer. Fisher *v.* Jones, 82 Ala. 117 (1887). A mere letter from the transferee to the corporation that he has purchased the certificate is insufficient, even though such letter is pinned to the transfer book. Newell *v.* Williston, 138 Mass. 240 (1885).

[6] Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890).

[7] Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861).

[8] Perkins *v.* Lyons, 111 Iowa, 192 (1900).

[9] Crawford *v.* Provincial Ins. Co., 8 U. C. C. P. 263 (1859); Agricultural Bank *v.* Wilson, 24 Me. 273 (1844), holding that a transfer on the books of a corporation of stock for which certificates had not been issued is sufficient to pass the property in the stock, and a valid consideration for a note given in payment.

[10] McCourry *v.* Doremus, 10 N. J. L. 245 (1828).

[11] Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844). See §§ 61, 192, *supra.*

theless bound to respect the rights of a transferee who gives notice to it of the transfer.[1] The issue of a new certificate of stock is not essential to the completeness of a registry of the transfer.[2] If the corporation delays unreasonably in allowing a registry, it is liable in damages to the applicant for registry.[3]

The instrument of transfer must be in proper form.[4] Unless the old stockholder, or his duly authorized attorney, offers to make the registry, the corporation may refuse to allow it.[5] The power of attorney must run from the previous registered stockholder, and not from an intermediate unregistered transferee of the certificate.[6] Transfers under bankruptcy or insolvent laws are to be registered like voluntary transfers.[7] In England a written acceptance of the stock by the transferee is required.[8]

A mere notice to the corporation that an assignment has been

[1] Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164 (1865).

[2] First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877); Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855).

[3] Sutton *v.* Bank of England, 1 Car. & P. 193 (1824), where the bank delayed longer than one day, the customary time, and refused to give any reason therefor; Catchpole *v.* Ambergate, etc. Ry., 1 El. & B. 111 (1852), where, by reason of the delay, the stock was forfeited, notice of forfeiture going to the old stockholder. See also Healey, Companies Law, 3d ed., p. 93. Although the directors are entitled to reasonable time to decide whether to make a transfer, yet, if they had already made up their minds, the measure of damages for refusal is the price of the stock on the day when the application was made. *Re* Ottos, etc. Mines, [1893] 1 Ch. 618.

[4] Queen *v.* General Cemetery Co., 6 El. & B. 415 (1856), holding that the deed of transfer, where a deed is necessary, must be properly drawn. See also Société Générale *v.* Walker, L. R. 11 App. 20 (1885).

[5] Mechanics' Banking Assoc. *v.* Mariposa Co., 3 Rob. (N. Y.) 395 (1865).

[6] Dunn *v.* Commercial Bank, 11 Barb. 580 (1852).

[7] Dutton *v.* Connecticut Bank, 13 Conn. 493 (1840); State *v.* Ferris, 42 Conn. 560 (1875).

[8] Ortigosa *v.* Brown, 47 L. J. (Ch.) 168 (1878). The Joint-stock Companies Act of 1856 required such an acceptance. The act of 1862, repealing the act of 1856, prescribed that transfers should he made as was customary, unless the by-laws prescribed otherwise. Hence, in the absence of by-laws, the written acceptance is held to be customary and necessary. In England, where a transfer of stock is made by first applying to the company, and having the company certify that the certificate of stock had been lodged with the company, and then the money is paid, it is held that the party purchasing the stock on the faith of this certificate of the company cannot hold the company liable, although it turns out that the vendor was not entitled to the stock, and consequently, the whole capital stock being already issued, that the transfer could not be made. The court held that the certification was *ultra vires* and hence not enforceable. Bishop *v.* Balkis Consol. Co., L. R. 25 Q. B. D. 77, 512 (1890), the court, however, dissenting from the view that the certification was *ultra vires*, but holding that the certification did not warrant the title nor the validity of the various documents.

made need not be considered by the corporation.[1] Where, however, the transferee giving such notice does not obtain registry because the corporation refuses, for any reason, to make the registry, the mere notice must be borne in mind by the corporation, and the rights of the applicant preserved by it, as regards future registries.[2] The Arkansas statute requiring transfers of stock to be recorded with the county clerk does not apply to a pledge of stock.[3]

§ 383. *Formalities of registry may be waived by the corporation.* The corporation may waive the formalities connected with a registry of transfer, and when it does so the transferee becomes a stockholder as completely as though registry had been regularly made.[4] Frequently the waiver arises by placing the transferee's

[1] Stockwell *v.* St. Louis Mer. C. Co., 9 Mo. App. 133 (1880). A mere oral notice by a third party that a stockholder had transferred his stock to a designated person does not relieve the former from his liability on the subscription, no formal transfer having been made, the stock having been issued at twenty cents on a dollar. Vermont, etc. Co. *v.* Declez, etc. Co., 135 Cal. 579 (1902). Where a bank knows that a stockholder has pledged his certificate of stock, the bank cannot claim a lien upon such stock for a debt incurred to the bank subsequently by the pledgor of the stock, even though the stock is not transferred on the books, and even though the statute requires that transfers should be made only on the books of the bank. But the fact that the pledgor was the cashier of the bank is not notice to the bank, nor is the fact that the president knew of the pledge notice to the bank where he took no active part in the management of the bank and was not acting for the bank when he learned of the pledge. Curtice *v.* Crawford, etc. Bank, 110 Fed. Rep. 830 (1901). See § 523, *infra.*

[2] See § 258, *supra,* and §§ 383, 490, 532, *infra.*

[3] Batesville, etc. Co. *v.* Myer, etc. Co., 68 Ark. 115 (1900).

[4] Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487 (1833); Clowes *v.* Brettell, 11 M. & W. 461 (1843); Sadler's Case, 3 De G. & S. 36 (1849); Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849); Walters's Case, 3 De G. & S. 149 (1850); Bain *v.* Whitehaven, etc. Ry., 3 H. L. Cas. 1 (1850); Wills *v.* Murray, 4 Exch. 843 (1850); Yelland's Case, 5 De G. & Sm. 395 (1852); Powis *v.* Harding, 1 C. B. (N. S.) 533 (1857); Henderson *v.* Royal British Bank, 7 El. & B. 356 (1857); Daniell *v.* Royal British Bank, 1 H. & N. 685 and note (1857); East Gloucestershire Ry. *v.* Bartholomew, L. R. 3 Exch. 15 (1867); Ind's Case, L. R. 7 Ch. App. 485 (1872); Weber *v.* Fickey, 52 Md. 500, 516 (1879); Home Stock Ins. Co. *v.* Sherwood, 72 Mo. 461 (1880); Isham *v.* Buckingham, 49 N. Y. 216 (1872). Where a party about to take stock in pledge inquires of the corporation as to its value, and as to whether there was any lien upon the stock, and no lien is claimed, and he then takes the stock in pledge and causes an indorsement thereof to be made on the stub of the stock book of the corporation, the corporation cannot thereafter claim a lien as against him; and, moreover, a subsequent transfer of the stock by the pledgor to the corporation as security for a debt due from him to it does not take precedence over the first pledge, the certificates themselves having been transferred to the first pledgee, but not transferred on the books. Des Moines, etc. Co. *v.* Des Moines, etc. Bank, 97 Iowa, 668 (1896). See also §§ 258, 260, 262, 382, *supra,* and §§ 490, 532, *infra.*

name on the list of stockholders, although no formal registry has been had.[1] Even a charter requirement that the consent of the directors to a registry of transfer shall be obtained may be waived by the corporation.[2] The corporation, by paying dividends to an unregistered transferee of stock, thereby waives the formalities of registry.[3] When the corporation refuses to allow a registry for reasons other than those connected with the mere formalities of registry, or for reasons not given to the applicant, it waives its right to insist on them, and cannot afterwards claim that the applicant did not conform to such technicalities.[4] A failure, however, on the part of the corporation to notify the transferee of a refusal to allow registry is no waiver of such registry.[5]

§ 384. *Either the transferrer or the transferee may apply to the corporation for a registry of transfer.*— A person who appears on the corporation books as the holder of stock, but who in fact has sold the stock, has a right to have his transfer recorded on the corporate books, thereby releasing him from liability on the stock.[6] The vendor may request the corporation to register the transfer, and the corporation may make it at his request upon the certificate

[1] Upton *v.* Burnham, 3 Biss. 431, 520 (1873); s. c., 28 Fed. Cas. 831, 833; Yelland's Case, 5 De G. & Sm. 395 (1852).

[2] *Ex parte* Walton, 26 L. J. (Ch.) 545 (1857). Likewise where the by-laws contain such a provision. Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849), holding also that an oversight, whereby the attorney who makes the registry omits to sign the registry, is immaterial.

[3] Cutting *v.* Damerel, 88 N. Y. 410 (1882). Where a person buys certificates of stock in a national bank, the certificates being indorsed in blank, and the bank makes a memorandum in the certificate-of-stock book that it had been transferred to him, and sends him dividends, he is liable thereon, although no transfer of the certificate is made on the corporate books, and although he bought the stock for the cashier of the bank and was merely a nominal holder. He is not such a trustee as is exempt from liability under the National Bank Act. Horton *v.* Mercer, 71 Fed. Rep. 153 (1895).

[4] State *v.* McIver, 2 S. C. 25 (1870); Bond *v.* Mt. Hope Iron Co., 99 Mass. 505 (1868), holding that the corporation must put the refusal on the ground of non-conformity with formalities at the time of the application, and cannot afterward raise such. Chouteau Spring Co. *v.* Harris, 20 Mo. 382 (1855): Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884), where the court said: "The requirement of a registry, existing only for its own protection and convenience, must be deemed waived and non-essential when it wrongfully refuses to obey its own rule."

[5] Gustard's Case, L. R. 8 Eq. 438 (1869).

[6] "The purchase was in itself authority to the vendor to make the transfer. . . . A court of equity will compel a transferee of stock to record the transfer, and to pay all calls after the transfer. . . . If so, it is clear that the vendor may himself request the transfer to be made." Webster *v.* Upton, 91 U. S. 65, 71 (1875). "If a subsequent transfer of the certificate be refused by the bank, it can be compelled at the instance of either of them." Johnston *v.* Laflin, 103 U. S. 800, 804 (1880).

of stock being delivered up for cancellation. If the vendee refuses to cause registry to be made, the vendor may bring suit in a court of equity to compel the registry of the transfer.[1] It has been held also that an intermediate vendor of the stock, whose name has never appeared on the corporate books, may likewise compel a registry to be made.[2] After an ultimate vendee has been registered, the original vendor cannot have an intermediate vendee and vendor registered as the stockholder.[3] The corporation may register the transfer, even against the wishes of the transferee.[4] The transferee also has a right to apply for and compel a registry of the transfer of stock to himself.[5]

C. RIGHTS AND DUTIES OF THE CORPORATION IN ALLOWING OR REFUSING REGISTRY.

§ 385. *Corporation may require proof of identity; also of genuineness of signature, etc.*— When a transfer of stock is presented to the corporation for registry, if the corporation is in doubt as to the identity of the person presenting it, whether he be the stockholder already registered on the books or the attorney of such, the corporation may require proof of such identity.[6] The officers have a reasonable time, after a transfer has been requested, in which to find out whether the transfer is in order.[7] If they are in doubt as to the competency of the transferrer to sell the stock,[8] legal proof

[1] Wynne *v.* Price, 3 De G. & S. 310 (1849). See also Bermingham *v.* Sheridan, 33 Beav. 660 (1864); Eustace *v.* Dublin, etc. Ry., L. R. 6 Eq. 182 (1868).

[2] Paine *v.* Hutchinson, L. R. 3 Ch. App. 388 (1868).

[3] Shaw *v.* Fisher, 5 De G., M. & G. 596 (1855).

[4] Upton *v.* Burnham, 3 Biss. 520, 525 (1873); s. c., 28 Fed. Cas. 833, 835.

[5] Norris *v.* Irish Land Co., 8 El. & B. 512 (1857); Daly *v.* Thompson, 10 M. & W. 309 (1842); Johnson *v.* Laflin, 5 Dill. 65 (1878); s. c., 13 Fed. Cas. 758; s. c., 103 U. S. 800; Hill *v.* Pine River Bank, 45 N. H. 300 (1864); Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847); Mechanics' Bank *v.* Seton, 1 Pet. 299 (1828); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879). But the complaint must be full and accurate in its averments. Edwards *v.* Sonoma Valley Bank, 59 Cal. 136 (1881). Where a contract does not merely pledge stock, but gives the creditor the legal title and unlimited power of disposition, the creditor may by suit in equity compel the company to allow a transfer, and the transferrer need not be made a party to the suit. Skinner *v.* Fort Wayne, etc. R. R., 58 Fed. Rep. 55 (1893).

[6] Telegraph Co. *v.* Davenport, 97 U. S. 369 (1878); Davis *v.* Bank of England, 2 Bing. 393 (1824), where the court says the corporation "may take reasonable time to make inquiries, and require proof that the signature to a power of attorney is the writing of the person whose signature it purports to be;" Bayard *v.* Farmers', etc. Bank, 52 Pa. St. 232 (1866).

[7] Ireland *v.* Hart, 86 L. T. Rep. 385 (1902).

[8] See §§ 318, 319, *supra*.

of such competency must be given. If the applicant for registry applies as the attorney of the registered stockholder, the corporation may require satisfactory evidence of the genuineness of the latter's transfer, or may require the presence of the stockholder himself.[1] A corporation cannot refuse to transfer stock to a person on the ground that a trustee in bankruptcy has been appointed of his estate.[2]

§ 386. *Corporation cannot refuse registry on account of the motive of the transferrer or transferee in the transaction.*—The corporation has nothing to do with the motive or purpose of the vendor or vendee of the stock.[3] It can refuse a registry only when there is doubt as to the legal right of the applicant to have such registry. It cannot refuse on the ground that the transfer would injure the corporation, nor on the theory that the object of the transfer is to increase the votes of the transferee.[4] A bank, however, may refuse to allow a transfer of its stock to another bank where the latter has purchased the same in violation of its charter.[5] In England the directors are by charter often given a discretionary power to refuse a transfer.[6]

[1] See notes, p. 858, *supra;* and §§ 365–370, *supra.*

[2] Sutton *v.* English, etc. Co., 87 L. T. Rep. 438 (1902).

[3] State *v.* McIver, 2 S. C. 25 (1870); People *v.* Paton, 5 N. Y. St. Rep. 316 (1887). See also §§ 391, 736, *infra.* But a transfer, merely nominal, to obtain for the transferee certain special privileges, such as free admission to a place of amusement, may be a fraud on other stockholders and will be set aside. Academy of Music's Appeal, 108 Pa. St. 510 (1885). Equity will not compel a corporation to register a transfer of stock when the purpose of the transfer is to obtain the control of the corporation and wreck it. Gould *v.* Head, 41 Fed. Rep. 240, 248 (1890). In an action to compel the unincorporated Standard Oil "trust" to transfer on its books trust certificates which the plaintiff has purchased, the defendants, who allege that the plaintiff is a competitor of the trust and purchased the certificates in order to break up the trust and compel it to buy the plaintiff out, may be compelled to give a bill of particulars. Rice *v.* Rockefeller, N. Y. Daily Reg., May 29, 1888. The plaintiff in this case finally succeeded. (134 N. Y. 174 — 1892.) Where a corporation is sued for damages for a refusal to transfer stock, the company cannot set up that the plaintiff acquired his stook by an illegal gambling contract, there being nothing to show that the prior owner objected or made any claim upon the company; nor is it any defense that the stock was held as collateral security for a debt which was barred by the statute of limitations, that defense being personal to the debtor. Miller *v.* Houston, etc. Ry., 55 Fed. Rep. 366 (1893).

[4] Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878).

[5] Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350 (1881).

[6] See Healey, Companies Law, 3d ed., p. 90. Where the directors are authorized by the articles of incorporation to reject a transfer of stock on the ground that they do not approve of the transferee, "the discretionary power is of a fiduciary nature and must be exercised in good faith; that is, legitimately for the purpose for which it is conferred.

§ 387. *Corporation may interplead between two claimants to stock.* The task imposed upon a corporation in determining whether to refuse or to allow a registry of stock is a difficult and dangerous one. It is easy to avoid the risk of forgery or of failure of the applicant to identify himself. But circumstances frequently are such that the corporation dare not allow registry to either of two parties, each of whom claims to be the sole and absolute owner of the stock, and each of whom claims the right of registry or notifies the corporation not to register the other claimant as a stockholder. These cases arise on various occasions, but most often where the stock has been attached or sold on execution by the transferrer's creditors before the transferee has obtained registry; or where, by the fraud of the old stockholder's agent, the certificate has passed into the hands of a *bona fide* purchaser; or where, by a breach of trust, an executor or administrator, or trustee or guardian, has sold the trust stock and appropriated the proceeds; or under other states of fact wherein there are two claimants of the stock, each having rights which can be clearly ascertained only by litigation. It is not incumbent on the corporation to decide between these conflicting parties and rights.[1] Such a requirement would expose it to unreasonable risks and compel it to assume the functions of a court. Where there is a reasonable doubt as to the facts involved or as to the respective rights of the claimants of the stock, and the corporation is sued by one of the claimants for refusing to allow a registry by him, the corporation may interplead, and thus compel the claimants to ascertain their rights through the medium of a court of justice.[2] A similar interpleader may be made where the corpora-

It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously, or wantonly. It may not be exercised for a collateral purpose. In exercising it the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting." It is not a sufficient reason that the transferee is not a member of a particular family, and the directors will be ordered to make the transfer. *Re* Bell, 65 L. T. Rep. 245 (1891). See also § 622, *infra.*

[1] The discussion of the duty of the corporation in various circumstances is given under chapters devoted to them. See also § 363, *supra.*

[2] Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77; State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874); Leavitt *v.* Fisher, 4 Duer (N. Y.), 1 (1854). In Lovell *v.* Jacobs, 150 N. Y. 84 (1896), a trust company, acting as depositary for stock which had been sold on certain conditions, sustained a bill of interpleader, the vendor having claimed that the stock should not be delivered and the vendee claiming the contrary. In Equity Gas Light Co. *v.* McKeige, 139 N. Y. 237 (1893), where a bailee of stock was sued by one of the claimants for the return of the stock, the court said: "The de-

tion is sued for dividends which are claimed by two opposing parties.[1]

There is some doubt and considerable difficulty in laying down rules as to when a corporation may safely claim a right to refuse

fendant may ordinarily protect himself by bringing suit in the nature of a bill of interpleader, making the different claimants parties." A corporation interpleaded between a purchaser of bank stock at an execution sale and an alleged *bona fide* purchaser of the stock from a judgment debtor, in the case of M'Donald *v.* First, etc. Bank, 116 Fed. Rep. 129 (1902). In the case of American Press Assoc. *v.* Brantingham, 75 N. Y. App. Div. 435 (1902), the corporation interpleaded between two claimants for certain stock. Where the real owner of stock brings suit against a transferee of that stock who has obtained a new certificate therefor and succeeds in the suit, and in the meantime the defendant has assigned the stock to a third party, the corporation may institute suit and interplead between the successful claimant of the stock and the transferee of the stock from the defendant. The defendant in the former suit need not be joined as a party in the latter suit. The purchaser of the certificate may be enjoined from transferring the same. and may be compelled to deposit the certificate with the clerk of the court. American, etc. Assoc. *v.* Brantingham, 57 N. Y. App. Div. 399 (1901). If the court decides that the interpleader is properly filed by the corporation herein, it generally on a motion dismisses the proceeding with costs to the corporation, and the court also decides between the defendants if the case is ready as between them. If not ready, it directs an action or an issue, or a reference to a master, to ascertain contested facts, as may be best suited to the nature of the case: "or the court may leave it to the defendants to prepare the case between them as they may be advised, which would be the effect of a general order to interplead." State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874), citing, as cases on above rules of practice, East. etc. Co. *v.* Littledale, 7 Hare, 57, 62 (1848); Martinius *v.* Helmuth, 2 Ves. & B. 412, note (1817); Horton *v.* Baptist Church, 34 Vt. 309, 317 (1861); Rowe *v.* Matteson, 7 N. J. Eq. 131 (1848); Crawford *v.* Fisher, 1 Hare, 436, 441 (1842); Condict *v.* King, 13 N. J. Eq. 375, 383 (1861); Hendrickson *v.* Shotwell, 1 N. J. Eq. 595 (1802); City Bank *v.* Bangs, 2 Paige, 570 (1831); Angell *v.* Hadden, 16 Ves. Jr. 202 (1809).

In State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 82 (1874), the court also said: "The law is that the mere pretext of a conflicting claim is not sufficient; the court must be able to see from the facts stated that there is a question to be tried." In England, by section 35 of the Companies Act, 1862 (25 & 26 Vict., c. 89), a corporation may interplead between two claimants of stock, and need not pay costs. *Re* Kimberley, etc. Min. Co., 58 L. T. Rep. 305 (1888). An interpleader was sustained in Bangor, etc. Co. *v.* Robinson, 52 Fed. Rep. 520 (1892). Where a judgment creditor levies on stock standing in the name of a dummy for the debtor, the corporation may practically interplead between such creditor and an alleged *bona fide* holder of the stock. A court of equity has

[1] Salisbury Mills *v.* Townsend, 109 Mass. 115 (1871); Todd *v.* Diamond State Iron Co., 8 Houst. (Del.) 372 (1889). Quere, as to whether an action for dividends can be maintained before the right of the claimant to the stock is established. Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207 (1878). See also § 538, *infra.*

to act, and to compel the claimants to litigate between themselves before it allows a registry to either. The policy of the law doubtless is to go very far in allowing the corporation to refuse to incur responsibility by taking action. Where, however, the rights of one claimant are reasonably clear, the corporation should suspend action for a reasonable time within which the contesting party may commence suit; and if no such action is brought it should allow a registry by the first-named claimant.[1] Any other rule would enable any person to practically deprive a stockholder of the possession of his stock temporarily, by simply notifying the corporation that he claims the stock.[2] Where, however, the corporation has allowed

jurisdiction in order to decree a transfer. Spencer *v.* James, 10 Tex. Civ. App. 327 (1895). In Langston *v.* Boylston, 2 Vesey, Jr. 101 (1793), where a bailee of bonds was sued by the bailor for conversion for not delivering up the bonds to the latter, although attachments had been levied on them, the bailee sustained a bill of interpleader. In Cady *v.* Potter, 55 Barb. 463 (1869), a corporation sustained its bill of interpleader as between a person to whom it had issued stock on a transfer without a surrender of the old certificate and a person to whom it afterwards issued the stock on a surrender of the old certificate. The author himself, as recently as 1897, has maintained, in the New York supreme court, a suit of interpleader by a corporation as between two claimants of stock, together with an injunction against the prosecution of a suit at law commenced by one of the claimants against the corporation for damages for refusal to transfer the stock. A broker cannot interplead between his customer and an indorser of the customer's note, in regard to stocks deposited with the broker by the customer, even though the administrator of the indorser claims that he has an interest in such stock. Post *v.* Emmett, 40 N. Y. App. Div. 477 (1899). A person holding stock in escrow under an option agreement may interplead between the parties in interest if they make conflicting claims. Walker *v.* Bamberger, 17 Utah, 239 (1898).

1 State *v.* McIver, 2 S. C. 25 (1870). A corporation cannot interplead as between stockholders for the purpose of determining the ownership of stock, there having been no claim made upon it in regard to registry or in regard to dividends. It must be shown also that the company has not acted in a partisan manner as between the different claimants. Hinckley *v.* Pfister, 83 Wis. 64 (1892). If the corporation allows a transfer to be made during the pendency of a suit between two claimants therefor, and the corporation has notice, it is not liable to the successful party, who is thereby deprived of the stock, there having been no injunction *pendente lite.* Hawes *v.* Gas, etc. Co., 12 N. Y. Supp. 924 (1891). An interpleader may be proper even though no suit has been actually commenced against the corporation. See Story's Eq. Juris., § 808; Daniell, Ch. Pl. & Pr., pp. 1561, 1564, notes. In New York, under the Code of Civil Procedure, an *order* for interpleader can only be granted after a suit has been commenced against the corporation. Buffalo Grape Sugar Co. *v.* Alberger, 22 Hun, 349 (1880). As to the proper allegations, see Crane *v.* Macdonald, 118 N. Y. 648 (1890), involving a *suit.* A corporation cannot refuse to transfer stock to a person on the ground that a trustee in bankruptcy has been appointed of his estate. Sutton v. English, etc. Co., 87 L. T. Rep. 438 (1902).

2 *Ex parte* Sargent, L. R. 17 Eq. 273 (1874).

one claimant to register his transfer, or has recognized him as a stockholder, the right of the corporation to interplead is gone.[1] It cannot afterwards remove the name of the registered stockholder, especially where such stockholder has acted in reliance upon such registry.[2] It may, however, bring a suit to recover back the stock.[3]

§ 388. *Corporation must obey mandate of court ordering registry and issue of new certificates.*— The authorities on this proposition of law are few in number, but they are decisive in protecting the corporation from liability where it proceeds under mandate of a court. Thus, where a decree is obtained commanding the corporation to register a transfer, the corporation is protected in obeying the decree, even though it is reversed on appeal, there having been no stay of proceedings.[4] Under the statutes of California, however, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless, if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such pur-

[1] Dalton *v.* Midland Ry., 12 C. B. 458 (1852); Mt. Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864). If the party has favored one of the two parties, as by voluntarily agreeing with the sheriff to recognize an execution, an interpleader will not lie. Cromwell *v.* American Loan, etc. Co., 57 Hun, 149 (1890). See also American Tel. etc. Co. *v.* Day, 20 J. & S. (N. Y.) 128 (1885). A corporation cannot refuse to transfer stock on the ground that the vendor fraudulently induced the company to issue the stock to him, where the company has been guilty of laches in not seeking a remedy before the transfer. The vendee in this case was a director. American, etc. Co. *v.* Bayless, 91 Ky. 94 (1891).

[2] Ward *v.* Southeastern Ry., 2 El. & El. 812 (1860); Hart *v.* Frontino, etc. Co., L. R. 5 Exch. 111 (1870); Cohen *v.* Gwynn, 4 Md. Ch. 357 (1848). Unless there clearly is a clerical mistake and the issue is to the wrong party. Smith *v.* North Am. Min. Co., 1 Nev. 423 (1865). The corporation is liable for such mistakes. Harrison *v.* Pryse, Barn. Ch. 324 (1740).

[3] See § 367, *supra.* Where the president claims certain unissued stock as assignee of a contractor who was entitled to it, and another person also claims it as assignee of the contractor, and the president issues the stock to himself without authority of the board of directors, the corporation may institute a suit to compel him to give it up, and in such suit the court will determine who is entitled to such stock. Lakewood Gas Co. *v.* Smith, 51 Atl. Rep. 152 (N. J. 1902).

[4] Chapman *v.* New Orleans, etc. Co., 4 La. Ann. 153 (1849). See also Purchase *v.* New York Exch. Bank, 3 Rob. (N. Y.) 164 (1865). But when the court directs the corporation to issue a certificate to the life tenant of stock, the corporation is still bound to notify a purchaser of that certificate that it represents a life interest only; otherwise the corporation is liable to the remainderman. Caulkins *v.* Gaslight Co., 85 Tenn. 683 (1887). A corporate officer is guilty of contempt if he refuses to obey an order of court requiring him to make certain transfers of stock upon the surrender of the old certificates. King *v.* Barnes, 113 N. Y. 476, 655 (1889).

chasers.[1] Cases herein may arise also where the registered stockholder alleges that he has lost his certificate, and the court compels the corporation to issue to him a new one;[2] also where an attachment or execution has been levied, the old certificate of stock being outstanding.[3] There is a limit, however, to the power of courts in these matters. If the whole capital stock has been issued and the certificates therefor are outstanding, a court cannot order the issue of other certificates, unless the decree at the same time practically nullifies a corresponding outstanding certificate.[4]

§ 389. *Remedies of a transferee of stock against the corporation for refusal to allow registry.*— Where, for any reason, the corporation refuses to allow the registry of a transfer of stock, when it is the duty and obligation of the corporation to allow it, the transferrer or the transferee who applies for registry may, in general, pursue one of three remedies. He may apply to a court of law for a *mandamus* to the corporation to compel it to open its books and allow the registry; or he may bring a suit in equity, praying that the corporation be decreed to allow the registry, or to pay him damages if registry is impossible; or he may sue the corporation at law for damages, on the ground that by its refusal it has been guilty of a conversion of his stock.[5]

§ 390. *Remedy by mandamus.*— The authorities are in irreconcilable conflict on the question whether a *mandamus* lies to compel a corporation to allow a registry on its books of a transfer of stock. The weight of authority holds very clearly that the *mandamus* will not lie.[6] This rule is based largely on the historical origin of the

[1] In a suit by the executors to recover such dividends the purchasers need not be made parties. Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). See also Ashton *v.* Heggerty, 130 Cal. 516 (1900).

[2] See §§ 358-362, *supra.*

[3] See § 489, *infra.*

[4] See § 284, *supra.* Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890).

[5] Quoted and approved in Herbert, etc. Bank *v.* Bank of Orland, 133 Cal. 64 (1901), and in Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899).

[6] The leading case in this country is Shipley *v.* Mechanics' Bank, 10 Johns. 484 (1813), where the court said: "The applicants have an adequate remedy, by a special action on the case, to recover the value of the stock if the bank have unduly refused to transfer it. There is no need of the extraordinary remedy by *mandamus* in so ordinary a case. It might as well be required in every case where trover would lie. It is not a matter of public concern, as in the case of public records and documents; and there cannot be any necessity, or even a desire, of possessing the identical shares in question." *Ex parte* Fireman's Ins. Co., 6 Hill (N. Y.), 243 (1843); People *v.* Parker Vein Coal Co.,

writ of *mandamus*, and on the theory that the stock of a private corporation has no peculiar value, and may be readily obtained in open market or fully compensated for in damages. There is a

10 How. Pr. 543 (1854); State *v.* Rombauer, 46 Mo. 155 (1870); State *v.* St. Louis, etc. Co., 21 Mo. App. 526 (1886); Rex *v.* London Assur. Co., 1 Dowl. & R. 510 (1822); Stackpole *v.* Seymour, 127 Mass. 104 (1879); Rex *v.* Bank of England, 2 Doug. 524 (1780); Curry *v.* Scott, 54 Pa. St. 270, 276 (1867); Gray *v.* Portland Bank, 3 Mass. 364, 381 (1807); State *v.* Guerrero, 12 Nev. 105 (1877); People *v.* Miller, 39 Hun, 557 (1886); aff'd, 114 N. Y. 636; Baker *v.* Marshall, 15 Minn. 177 (1870), where the stock had already been issued to another; Wilkinson *v.* Providence Bank, 3 R. I. 22 (1853); Kimball *v.* Union Water Co., 44 Cal. 173 (1872); Birmingham F. Ins. Co. *v.* Commonwealth, 92 Pa. St. 72 (1879), where the court says that, even if the courts "were inclined to enlarge the remedy, it could not be done in a case where the right is disputed, where no public interest is involved, where no reason is shown for a transfer of a specific and favorite thing, and where the remedy by action is fully adequate;" Townes *v.* Nichols, 73 Me. 515 (1882), where the court vigorously says: "All the authorities declare that the remedy by *mandamus* cannot be resorted to in a case like this, unless the legal right of the petitioner to the possession of the thing sought for is clear and unquestionable. If there be doubt as to what his legal right may be, involving the necessity of litigation to settle it, *mandamus* must be withheld. *Mandamus* is the right arm of the law. Its principal office is, not to inquire and investigate, but to command and execute. It is not designed to assume a part in ordinary law-suits or equitable proceedings. It is properly called into requisition in cases where the law has been settled, or in cases where questions of law or equity cannot properly and reasonably arise. Its very nature implies that the law, although plain and clear, fails to be enforced and needs its assistance." See also Rex *v.* Worcester, etc. Nav. Co., 1 Man. & R. 529 (1828); Regina *v.* Liverpool, etc. Ry., 21 L. J. (Q. B.) 284 (1852); Murray *v.* Stevens, 110 Mass. 95 (1872), where the court said, in refusing a *mandamus* to compel a registry of stock: "Without undertaking to lay down an invariable rule on the subject, we think it must be said that this process was not attended and is not well adapted for the trial of mere questions of property;" State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868), where a previous transfer had been registered, although possibly in fraud of creditors; Freon *v.* Carriage Co., 42 Ohio St. 30 (1884), refusing a *mandamus*, although it is said "that this stock has no market value, that the corporation is doing a growing and profitable business, that its good-will enhances the value of the stock, and that by reason of these things damages will not be an adequate remedy. These facts do not change the rule. They are elements in assessing damages which may be fully ascertained in an action at law." See also Pomeroy, Eq. Jur., § 1412; State *v.* People's Bldg. etc. Assoc., 43 N. J. L. 389 (1881); State *v.* Timkin, 48 N. J. L. 87 (1886); Tobey *v.* Hakes, 54 Conn. 274 (1886), refusing a *mandamus* on the corporate secretary; Bank of State *v.* Harrison, 66 Ga. 696 (1881). See also Lindley, Company Law, pp. 79, 811, 812, 6th ed. *Mandamus* does not issue to compel a corporation to transfer stock when there is no written transfer of the certificate and another party claims it. Burnsville Turnp. Co. *v.* State, 119 Ind. 382 (1889). See also Durfee *v.* Harper, 22 Mont. 354 (1899). *Mandamus* does not lie to compel a corporation to transfer stock. People *v.* Brandis Mfg. Co., N. Y. L. J., Dec. 11, 1889. *Mandamus* does not lie against the Bank of

strong line of decisions, however, which holds that a *mandamus* does lie to compel a corporation to allow a registry of a transfer of stock, particularly where the corporation has no good and sufficient reason for refusing the registry.[1] Perhaps the strongest argument against granting a *mandamus* for this purpose lies in the fact that by a bill in equity not only can a registry be specifically decreed and ordered by the court, but the rights of the corporation and of all of the claimants may be fully and finally heard and disposed of.

§ 391. *Remedy by suit in equity.*— This is the surest, most complete, and most just remedy for compelling a corporation to reg-

England to compel it to register a transfer of stock to an individual and a corporation jointly. Law Guarantee, etc. Soc. *v.* Bank of England, L. R. 24 Q. B. D. 406 (1890). *Mandamus* is not the proper remedy to compel the issue of a certificate of stock. State *v.* Carpenter, 51 Ohio St. 83 (1894). Under the statutes of Georgia it is held that *mandamus* does not lie to compel a transfer of stock, unless the transfer is connected with a judicial sale: and even though a sale is made by a trustee appointed by a court and he has been authorized to sell the stock, yet this is not sufficient to sustain *mandamus.* Terrell *v.* Georgia, etc. Co., 41 S. E. Rep. 262 (Ga. 1902). *Cf.* 93 N. W. Rep. 1044.

[1] People *v.* Goss, etc. Co., 99 Ill. 355 (1881); State *v.* First Nat. Bank, 89 Ind. 302 (1883); Green Mount, etc. Co. *v.* Bulla, 45 Ind. 1 (1873); People *v.* Crockett, 9 Cal. 112 (1858); State *v.* McIver, 2 S. C. 25 (1870); State *v.* Cheraw, etc. R. R., 16 S. C. 524 (1881); Cooper *v.* Dismal Swamp, etc. Co., 2 Murph. (N. C.) 195 (1812); Norris *v.* Irish Land Co., 8 El. & Bl. 512 (1857); Regina *v.* Carnatic Ry., L. R. 8 Q. B. 299 (1873); Crawford *v.* Provincial Ins. Co., 8 U. C. C. P. 263 (1859); Goodwin *v.* Ottawa, etc. Ry., 13 U. C. C. P. 254 (1863), holding also that the *mandamus* may run to the corporation itself without specifying any officers, and that an evasive answer by them is equivalent to a refusal to register. It has been held that *mandamus* will issue to aid the sheriff in transferring stock sold on an execution sale. This rule, however, would work harshly in states where the purchaser of the outstanding certificate may have some rights. Where such a possibility exists the *mandamus* should be denied. State *v.* First Nat. Bank, 89 Ind. 302 (1883); Bailey *v.* Strohecker, 38 Ga. 259 (1868); Durham *v.* Monumental, etc. Co., 9 Oreg. 41 (1880). *Cf.* § 489, *infra*. *Mandamus* will lie to compel the corporation to transfer the stock on its books where any other record would be inadequate because there is no market value for the stock, and because the company has fraudulently transferred its property for the purpose of injuring the value of the stock. The *mandamus* will lie although a suit is pending in equity to accomplish the same purpose. Slemmons *v.* Thompson, 23 Oreg. 215 (1892). *Mandamus* lies to compel a corporation to transfer stock sold under levy of execution. It may be granted as a common-law remedy or as a remedy ancillary to the suit. Hair *v.* Burnell, 106 Fed. Rep. 280 (1900). Where the purchaser of stock at execution sale applies for a *mandamus* to compel the corporation to transfer the stock to him, and the owner of the stock intervenes and claims that the debt on which the stock was sold had been paid, and asks for a delivery of the certificates to the owner, the case may be tried in equity. Croft *v.* Colfax, etc. Co., 113 Iowa, 455 (1901). *Cf.* 33 S. Rep. 507.

ister a transfer of stock, and for adjusting the various conflicting rights or claims of other parties.[1] It is a remedy applicable to almost all cases arising under a refusal of the corporation to allow a registry of transfer. The case will be decided on equitable prin-

[1] Quoted and approved in Real-Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899); Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879); Walker *v.* Detroit Transit Ry., 47 Mich. 338 (1882); Iasigi *v.* Chicago, etc. R. R., 129 Mass. 46 (1880); Mechanics' Bank *v.* Seton, 1 Pet. 299 (1828); Wilson *v.* Atlantic, etc. R. R., 2 Fed. Rep. 459 (1880); Middlebrook *v.* Merchants' Bank, 3 Abb. App. Dec. 295 (1866); Buckmaster *v.* Consumers' Ice Co., 5 Daly, 313 (1874). In Rice *v.* Rockefeller, 134 N. Y. 174 (1892, reversing 9 N. Y. Supp. 866), a court of equity compelled the trustees of a trust to transfer on their books trust certificates which had been purchased in open market by a person who then applied to the trustees for a transfer. The court based its decision on the similarity of such trust certificates to stock certificates, and said: "The denial of the right to transfer upon the books is not consistent with the transferable quality of the shares, which imports that the purchaser taking an assignment of them in a duly formal manner has the right to become a transferee within the meaning of the agreement upon which the trust was formed. . . . In such case it is within the equitable power of the court to compel such transfer to be made." The court held also that it was immaterial that the purchaser who applied for the transfer was hostile to and a competitor of the trust. The court said that although it would have been legal in the beginning to have vested a discretion in the trustees as to allowing transfers, yet that, such discretion not having been reserved, it could not be exercised by the directors. See also White *v.* Price, 39 Hun, 395 (1886); aff'd, 108 N. Y. 661 (1888); Iron R. R. *v.* Fink, 41 Ohio St. 321 (1884), the court saying that the power of equity to decree a registry is well settled. As regards the pleadings, see Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878). See also § 579, *infra.* A purchaser of stock at an execution sale may file a bill against an alleged transferee of the stock and the corporation to have the conflicting rights adjudicated. Howard *v.* Corey, 126 Ala. 283 (1900). In an action against the secretary of a corporation to compel him to register a transfer of stock, the corporation is not a necessary party. Gould *v.* Head, 41 Fed. Rep. 240 (1890).

The federal courts have jurisdiction of a suit in equity brought by a citizen of one state to compel a corporation of another state to transfer on its books certain shares of stock which the complainant purchased from a citizen of the same state as the defendant. Jewett *v.* Bradford, etc. Co., 45 Fed. Rep. 801 (1891). If the holder of a certificate of stock has applied for transfer and been refused, he may sue for the dividend before bringing a suit in equity to obtain a transfer of his stock. Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo. 1893). This case arose again in 124 Mo. 153. An agreement of the holder of a majority of the stock that he will retain control is no defense by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. Weller *v.* Pace Tobacco Co., 25 N. Y. Week. Dig. 531 (1886). A pledgee of a certificate of stock is not bound by an agreement of all the stockholders to surrender to the corporation a part of their stock, which part is to be then considered preferred stock, and is to be sold by the corporation for the purpose of paying corporate debts. Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the

ciples, however, and a transfer will not be decreed if it involves bad faith.[1] In a suit in equity by the claimant of stock against other parties, claiming the stock, the corporation is a proper but not a necessary party defendant, in order that a transfer of the stock may be had upon the corporate books.[2] A somewhat similar suit in equity is involved where the purchaser of stock files a bill in equity against the vendor for specific performance of the

stock so pledged shall allow the same agreement to be stamped on the new certificate issued to such purchaser. The court will order a transfer free from the agreement. Campbell *v.* American Zylonite Co., 122 N. Y. 455 (1890). Even though the charter of an irregation company provides that no one shall hold stock, except an owner of land to the amount of one acre for each share of stock held by him, yet where the stock is sold for non-payment of assessments the purchaser at such sale is entitled to a transfer on the corporate books, although he owns no land. The purchaser may file a bill in equity to determine his rights. The court found it unnecessary to pass on the question as to whether such a restriction as to the stock is legal. Spurgeon *v.* Santa Ana, etc. Co., 120 Cal. 71 (1898). A bill in equity lies to compel a corporation which has declared a stock dividend to stockholders of record on July 1st, to deliver such stock dividend to a purchaser on July 6th whose purchase included such dividend. Rose *v.* Barclay, 191 Pa. St. 594 (1899).

[1] Regina *v.* Liverpool, etc. Ry., 21 L. J. (Q. B.) 284 (1852). *Cf.* Rice *v.* Rockefeller, 134 N. Y. 174 (1892). See also § 386, *supra*, and § 736, *infra*.

[2] See § 338, *supra;* also Tanner *v.* Gregory, 71 Wis. 490 (1888); Kendig *v.* Dean, 97 U. S. 423 (1878); Budd *v.* Munroe, 18 Hun, 316 (1879), the latter case holding also that the corporation may recover costs against a co-defendant who is defeated in the suit; Johnson *v.* Kirby, 65 Cal. 482 (1884). In such cases the corporation is but nominally concerned in the result of the suit. It cannot appeal from the judgment when both of the real parties in interest are satisfied and do not appeal. Board of Liquidation *v.* New Orleans Water-works Co., 39 La. Ann. 202 (1887). If the complainant is a citizen of the same state as the corporation, one of the parties defendant, another defendant cannot remove the case into a United States court. Crump *v.* Thurber, 115 U. S. 56 (1885). Where a corporation has not yet issued stock as called for by a contract, a claimant of such stock may bring suit in the state where the corporation was organized to obtain the stock, even though the other claimant is a non-resident. Jennings *v.* Rocky Bar, etc. Co., 70 Pac. Rep. 136 (Wash. 1902). Where the title to stock is litigated in a suit in equity and an officer of the corporation is a party defendant, being interested in the transaction, the court may compel him in that suit to transfer the stock on the corporate books, even though the corporation is not a party to the suit. Durfee *v.* Harper, 22 Mont. 354 (1899). A corporation by the action of its board of directors and consent of all of its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902).

contract.[1] The relief usually demanded is in the alternative, being either for a registry of the transfer or damages in lieu thereof.[2] A preliminary injunction is often obtained in connection with such a suit.[3] If all the stock has already been issued, equity has no power

[1] See §§ 337, 338, *supra*.

[2] Quoted and approved in State *v.* Carpenter, 51 Ohio St. 83 (1894). "A bill in equity may be maintained by a *bona fide* purchaser of stock against the corporation to compel a transfer of the stock upon the corporate books." The bill may be in the alternative for a transfer of the stock or for damages, and, if the company has already issued its whole capital stock, damages will be granted. Birmingham Nat. Bank *v.* Roden, 97 Ala. 404 (1892). In a suit against a corporation to compel it to issue stock to the plaintiff or else pay the value thereof, the proper form in judgment is an order to issue the stock. A money judgment should be entered only after proof of the corporation's failure to comply with the main order. Consolidated, etc. Co. *v.* Huff, 62 Kan. 405 (1901). Where a corporation refuses to issue the stock to a subscriber, he may file a bill in the alternative to compel the issue of the shares or the payment of their value with damages. If during the pendency of the suit the company becomes insolvent, the court can give him damages payable *pro rata* out of the assets of the corporation. *Re* Reading Iron Works, 149 Pa. St. 182 (1892). See § 61, *supra*.

[3] See § 579, *infra*, and § 363, *supra*. Where a stockholder has delivered his stock to the directors to be divided into smaller certificates, and the directors claim that it was agreed that a part of the stock should be sold for the benefit of the corporation, the stockholder may have a preliminary injunction against such sale pending his suit to compel delivery of the stock. Bedford *v.* American, etc. Co., 51 N. Y. App. Div. 537 (1900). Where a corporation refuses to transfer stock, the purchaser may file a bill in equity to compel such transfer, and may make the vendor a party thereto, an injunction against any sale by him being asked. Thornton *v.* Martin, 42 S. E. Rep. 348 (Ga. 1902). A court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite*, where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration. Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899). Where stock is tied up by an injunction which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the enjoining party if the stocks could and would have been sold before the depreciation if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up, no damages can be recovered. Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897). Under the statutes of California, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless, if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties. Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). See also § 330, *supra*.

to compel a further issue.[1] Laches or the statute of limitations may also be a bar.[2] A citizen of Alabama cannot maintain in the courts of Alabama a suit to enjoin non-residents from transferring stock in a non-resident corporation where the defendants are not personally served within the state.[3] Where a decree directs the transfer of certain stock in the distribution of an estate and the corporation makes such transfer, and thereafter the decree is reversed on appeal, the executors may bring suit to have the transfer canceled.[4]

§ 392. *Remedy by an action for damages.*— An action at law for damages is an old and well-established remedy of a stockholder who has applied to the corporation for a registry of a transfer and has been refused.[5] The form of the action may vary, and may

[1] Smith *v.* North Am. Min. Co., 1 Nev. 423 (1865); and see § 284, *supra.*

[2] In New York the ten-year statute of limitations runs against an equitable action against the corporation for a transfer of the certificates on its books from the time when the outstanding certificate was issued. Ryder *v.* Bushwick R. R., 10 N. Y. Supp. 748 (1890). In Ware *v.* Galveston City Co., 146 U. S. 102 (1892), the bill of a claimant of stock against the company to hold it liable for allowing a transfer of the stock in fraud of his rights was barred by laches, the suit having been brought thirty-five years after the cause of action had accrued. *Cf.* § 392, *infra.* The holders of full-paid stock cannot be assessed on such stock even under a reorganization agreement of the majority of the stockholders. Where, however, for four years the stockholder does not object, and then applies for a transfer of his stock, a court of equity may refuse to grant the transfer, but may give him damages for the value of his stock at the time of the demand of transfer, together with interest. Gresham *v.* Island City Sav. Bank, 2 Tex. Civ. App. 52 (1893).

[3] Rucker *v.* Morgan, 122 Ala. 308 (1899). See also note 2, p. 761, *supra.*

[4] Ashton *v.* Heggerty, 130 Cal. 516 (1900). See also Ashton *v.* Zeila Min. Co., 66 Pac. Rep. 494 (Cal. 1901).

[5] Hussey *v.* Manufacturers', etc. Bank, 27 Mass. 415 (1830); Helm *v.* Swiggett, 12 Ind. 194 (1859). Cases supporting this rule abound in all the states. They will be found together with others in ch. XXXV, *infra.* If the corporation illegally refuses to allow a registry, but afterwards does allow it, the corporation is not liable in damages for the decline of the market value of the stock in the meantime. Skinner *v.* City of London M. Ins. Co., L. R. 14 Q. B. D. 882 (1885). Even in England, if the company has completed a transfer upon its books and then repudiates the transfer on the ground that it had prior to that time transferred the same stock to others, the company is liable in damages to the party to whom the last transfer was made. Tomkinson *v.* Balkis Consol. Co., [1891] 2 Q. B. 614. A corporation is liable in damages for refusing to allow a transfer of the stock where such refusal is unjustifiable. Doty *v.* First Nat. Bank of Larimore, 3 N. Dak. 9 (1892). If the company illegally refuses to transfer stock it is a conversion. Rio Grande Cattle Co. *v.* Burns, 82 Tex. 50 (1891). An action on the case lies, wherein the measure of damages is the value at the time of refusal to transfer. See § 575, *infra.* In a suit against a corporation for refusing to transfer stock, the fact that the certificates had been lost since the refusal need not be alleged. Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

sound in tort or contract.[1] Conversion lies against a corporation at the instance of a purchaser of certificates of stock for refusal to transfer the stock on the books of the company.[2] The common-law action of trover is a proper remedy.[3] Where the transferee of certificates of stock in a bank presents them to the cashier of the bank for transfer, and the cashier and a director delay transfer until a debt of the transferrer to the bank becomes due, and then in behalf of the bank levy an attachment on the stock for such debt, the transferee may hold the bank and the cashier and such director liable in trover for conversion of the stock, and it is no defense that the transfer of the certificate was made to defraud creditors.[4] A transferee's action upon the case for damages, instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage.[5] Where the corporation has been held liable for conversion, it cannot then tender the stock back to the stockholder and avoid the payment of the damages.[6] The statute of limitations runs only from the time when a demand for registry was made.[7]

[1] See ch. XXXV, *infra.*

[2] See ch. XXXV, *infra.* Where the purchaser of a certificate of stock sends it to the corporation fór transfer and the secretary replies that the corporation has a lien on the stock, the corporation is not liable for a conversion of the stock, no demand for the return of the certificate being shown. Cummins *v.* Peoples', etc. Assoc., 86 N. W. Rep. 474 (Neb. 1901).

[3] Ralston *v.* Bank of California, 112 Cal. 208 (1896).

[4] Hine *v.* Commercial Bank, etc., 119 Mich. 448 (1899).

[5] McLean *v.* Charles, etc. Co., 96 Mich. 479 (1893). On this subject, see ch. XXXV, *infra.* In a suit against a corporation for refusal to transfer stock on its books, "the rule of damages is the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock." A general allegation of damage is sufficient, inasmuch as the plaintiff is entitled to nominal damages anyway. Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

[6] Carpenter *v.* American, etc. Assoc., 54 Minn. 403 (1893).

[7] Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880); Iron R. R. *v.* Fink, 41 Ohio St. 321 (1884). *Cf.* § 391, *supra.*

CHAPTER XXIII.

RULES FOR CORPORATIONS IN REGARD TO REFUSING OR ALLOWING REGISTRIES OF TRANSFERS OF STOCK.

§ 393. *Purpose of the chapter.*— It is proposed in this chapter, as a continuation of the last, and as a recapitulation of the various rights, liabilities, and duties of the corporation in refusing or allowing a registry of a transfer of stock, to state briefly the rules which prevail herein. The standpoint taken is that of the corporation. The minute and particular application of the general rules governing this subject are not stated here at length; but an effort has been made to give, in systematic order, certain directions which will enable a corporation, when in doubt as to whether to allow or refuse a registry, to decide the question intelligently and safely.

§ 394. *Right to refuse until the transferrer pays the unpaid subscription price.*[1]—A corporation cannot refuse to register a transfer of stock merely because the subscription price has not been fully paid in, unless the charter or the statutes of the state expressly give that right. Nor can it refuse registry, even though a call for part of the subscription price has been made, is due, and remains unpaid. It must allow registry, but may continue to hold the transferrer liable for the call. The corporation has no lien on the stock for the subscription price, nor has it a right to restrict transfers until calls or parts of the subscription price not yet called are paid. The policy of the law is to favor the right of transfer, and

[1] See ch. XV, *supra.*

no impediments by the corporation are allowed to restrict that right. As regards parts of the subscription not yet called in, the transferrer is released from and the transferee assumes the liability. As regards calls made before the application for registry, but not yet due, the transferrer is liable, but, it seems, not the transferee. As regards calls made before the application and due before such, the transferrer and not the transferee is liable. As regards calls made after the application the transferee alone is liable. In some states, however, a different rule prevails, and by statute the transferrer, if he is the original subscriber, is liable until the whole subscription is paid.

§ 395. *Whether the corporation may refuse to register a transfer to an irresponsible transferee.*[1]— Greater difficulty is experienced in finding a working rule on this subject. On one point, however, all the authorities agree. If the corporation is insolvent, or in such a state of decline that insolvency seems inevitable, the corporation may refuse to allow a registry of transfer from a responsible to an irresponsible insolvent transferee. The policy of the law is to protect corporate creditors, even at the expense of restricting the right of transfer. The above rule applies not only where the subscription is unpaid, but also where it has been paid and only a statutory liability exists. Where, however, the corporation is solvent, and a stockholder applies for a registry of transfer from himself to an irresponsible transferee, it seems that the corporation cannot refuse to make the registry.

§ 396. *Corporation may refuse to register as transferees persons who are incompetent to contract.*[2] — If the transferee of a certificate of stock is an infant or person of unsound mind, the corporation may refuse to register such transferee as a stockholder. The reason of the rule is that such persons would not be obliged at law to respond to the obligations of a stockholder, and consequently are not entitled to its privileges. With married women at the present day the law is different. At common law they were incompetent to become stockholders, as is an infant at the present time. But the statutes of all the states have substantially removed these disabilities, and enabled a married woman to transact business as a *feme sole*, so far as her separate estate is concerned. She may become a stockholder in a corporation, but cannot bind her husband's estate for the liabilities of such stockholdership.

§ 397. *Trustees, executors, guardians, agents, pledgees.*[3]— In registering a transfer to a trustee, executor, or guardian, the corporation may be required to register the transferee as holder in his official capacity. A trustee who purchases or receives stock to

[1] See ch. XV, *supra*. [2] See ch. XIV, *supra*. [3] See ch. XIV, *supra*.

hold in trust for the benefit of another may, it seems, require the corporation to register the transfer and issue new certificates to himself in his own name as "trustee." In England the rule appears to be different. The reason of this rule is that the liability of a trustee on stock is in many of the states different from that of a complete owner of the stock, and also because, where stock is held by a trustee as such, it is the duty of the corporation to refuse to allow the trustee to sell and register a sale of the stock unless the instrument creating the trust authorizes such sale. So also an executor or administrator or guardian may compel the corporation to place his official title after his name in the stock registry. Pledgees, however, and agents have not this right. The corporation may, but is not obliged to, write the word "pledgee" after the transferee's name either in the stock registry or on the certificate. Such is the rule, for the reason that the corporation is not obliged to protect the rights of the pledgor, nor to recognize the pledgeeship of the transferee. The same rule applies to transferees who take as agents of the transferrer.

§ 398. *Sales of stock by executors or administrators.*[1]— A corporation may with safety, and in fact is obliged to, allow a domestic executor or administrator to register a transfer of the sale of stock belonging to the estate upon presentation by the executor or administrator of the letters testamentary or letters of administration. The executor or administrator may then register a transfer of the stock to himself as executor or administrator, or directly from the name of the deceased to a purchaser from the executor; or from the deceased to the executor, and then from the executor to the purchaser. One executor may sell and register a transfer of the stock. The corporation is not bound to inquire whether it is necessary that the sale be made in order to pay the debts of the estate, nor to see to it that the executor actually applies the proceeds of the sale to that purpose. Where, however, the corporation has actual knowledge through its officers that a breach of trust is contemplated by the executor, it is bound to refuse registry, and will be liable to the estate for neglecting so to do. So, also, where such a long time has elapsed between the taking out of the letters and the sale by the executor that the latter has become practically a trustee, the corporation must use the same precaution as in sales by a trustee. In the case of specific legacies of stock, the corporation need not protect them, but may allow the executor to transfer the stock into his own name as executor, since he may need it to pay debts, and the corporation is not bound to investigate such questions. In England it is held that the corporation is liable for allow-

[1] See ch. XIX, *supra.*

ing a transfer by foreign executors without payment of an inheritance tax.

§ 399. *Sales by trustees.*[1]— A trustee who holds stock belonging to the trust estate has no right to sell and transfer such stock unless he is expressly authorized so to do by the instrument creating the trust. Consequently the law imposes upon the corporation the duty of refusing to allow a trustee to transfer the stock unless he clearly has a right so to do. If the corporation neglects this duty it is liable to the trust estate, and, in case of a breach of trust by the trustee, may be compelled to replace the stock or pay damages. If the trustee has an express power given to him to sell, the corporation may allow him to make the transfer. If no such power is given, the corporation must refuse. The trustee is bound to reasonably satisfy the corporation of his right, but the corporation cannot permanently retain the papers submitted to it for that purpose.

§ 400. *Sales by guardians.*[2]— A guardian has a right to change the investment of the funds in his charge, and consequently has a right to sell stock held by him in his official capacity. Accordingly, the corporation may allow him to register a transfer of stock held by him as guardian, and cannot require the guardian to obtain an order or decree from a court authorizing such transfer. An order or decree is often obtained by the guardian, however, for his own protection, and is to be commended. In New York the rights and duties of guardians are regulated by statute, and other states have similar statutes.

§ 401. *Forgery of transfer.*[3]— A corporation is bound and required to detect a forgery whereby the name of the owner of a certificate of stock is signed to it and a transfer made which the corporation is requested to register. The stockholder in whose name the old certificate was made out, and whose name was forged to the transfer, may hold the corporation liable if it fails to detect the forgery and allows a registry of the forged transfer. He may compel it to replace the stock or pay damages. This rule is due to the fact that the corporation is a custodian of the books whereby a stockholder obtains his rights of stockholdership, and it cannot deprive him of these rights by allowing others to take them from him by the aid of the corporation and without his consent. It is in the power of the corporation to require the presence of the transferrer at the time of registry, or at least clear proof that the signature is genuine. The corporation, however, has recourse over against the person who applied for registry on the forged transfer, however

[1] See ch. XIX, *supra*. [2] See ch. XIX, *supra*. [3] See ch. XXI, *supra*.

innocent the latter may be. He is held to have impliedly represented that the transfer was genuine.

§ 402. *Corporation must require a surrender of the outstanding certificate.*[1]— If a corporation permits a registry of a transfer of stock, and issues new certificates to the transferrer without requiring a surrender of the old certificate, it assumes a dangerous position, and one which it is not obliged to assume. If the certificate which is not delivered up is in the hands of a *bona fide* purchaser for value and without notice, he may hold the corporation liable for allowing a registry of transfer to another without requiring a delivery of the certificates. It is negligence and a breach of duty on the part of the corporation to allow a registry without a surrender of the old certificate. It generally refuses to do so, as is its duty, and is sustained by the law in its refusal. There are occasions, however, where the law compels the corporation to register the transfer without a surrender of the old certificate. When so compelled to do, the corporation cannot be held liable by the purchaser of the outstanding certificate, but he must seek his remedy against others. Such compulsory registry, excusing the corporation, may exist in cases of alleged loss of the old certificate, a decree of a court compelling the registry, and, under the latter, an attachment or execution against the stock.[2]

§ 403. *Alleged loss of the old certificate.*[3]—According to the rule of nearly all the states, a corporation is not obliged to issue a new certificate of stock to the owner of an old one, which he alleges he has lost, unless such person gives to the corporation a sufficient bond of indemnity to protect it against liability in case it turns out that the old certificate was not lost but was sold and passed into *bona fide* hands. In New York this rule is fixed by statute. The corporation is liable to the holder of the outstanding certificate, if it is outstanding, and consequently should be protected against that liability by a bond from the applicant for registry. In Louisiana a statutory advertisement is made and a bond of indemnity dispensed with. But in the other states the court compels the loser to give a bond, varying in amount according to the amount of the stock and the clearness of the proof of loss.

§ 404. *Attachment or execution.*[4]— Nearly all the states have laws whereby shares of stock are rendered subject to levy of attachment and to sale on levy of execution. When an execution sale, or an attachment followed by an execution sale, takes place in the state where the corporation exists, the purchaser at such sale generally has not the outstanding certificate, but nevertheless de-

[1] See ch. XXI, *supra.*

[2] But see § 489, *infra.*

[3] See ch. XXI, *supra.*

[4] See ch. XXVII, *infra.*

mands registry of himself as stockholder in accordance with the law authorizing the attachment and execution. In the meantime the judgment debtor whose stock is thus attached or sold under an execution generally may have sold his certificate of stock to a *bona fide* purchaser for value. If it happens that both parties claim the stock, the duty and privilege of the corporation is plain. It may refuse to decide between them, and when sued by either may interplead and compel the claimants to settle the right between them in the courts. But frequently it happens that the corporation does not know whether the judgment debtor has sold the outstanding certificate or not. By the law of most of the states, if such certificate was sold before the attachment or execution was levied, the purchaser would be protected, and the corporation would be liable to him for registering as a stockholder the purchaser at the execution sale. Accordingly, in that case, it is the duty of the corporation to refuse to register the purchaser at the execution sale. It cannot afford to take the risk, and is not obliged to take it. If the court then compels it to make the registry of transfer to the execution purchaser, the court will also, probably, compel such purchaser to give a bond of indemnity to protect the corporation. If such a bond is not required by the court, the corporation must nevertheless obey the decree. What rights the purchaser of the outstanding certificate would then have, has not as yet been passed upon by the courts.

§ 405. *Decree of a court that certificates be issued.*[1]— A corporation must of course obey the decree of a court that it issue a certificate of stock to a specified person. But a court will rarely resort to such an extreme remedy where it is probable or possible that there may be an outstanding certificate in the hands of an innocent holder representing the same shares. As a principle of law the court has no power to decree such an issue ordinarily, since the whole capital stock has been issued, and its decree amounts practically to an order to make an overissue of stock. Generally the court decrees damages to be paid, or directs the corporation to purchase stock for the purpose of reissuing it to the specified party. This occurs frequently where the corporation has unjustly deprived a person of his stock. A different class of cases arises where the corporation has refused to allow a registry because the outstanding certificate is not surrendered. Such cases include those of alleged loss of certificate, an execution sale of the stock, and, possibly, a suit in equity at the domicile of the corporation to recover from another stock which the complainant claims. A decree in such a suit in most states would be ineffectual to de-

[1] See ch. XXII, *supra*.

prive of his rights one who purchased from the defendant his certificate of stock before the decree was rendered. It would accordingly be a harsh decree that compelled the corporation to register the successful complainant as a stockholder. The corporation should not be compelled to assume the risk of being sued by the purchaser of the outstanding certificate. The complainant should be compelled to give a bond of indemnity, or else be content with a personal judgment against the defendant. The demands of trade and of the investing public require that the safety of a purchaser of a certificate of stock should be assured, except against attachments, execution sales or decrees duly obtained and notified to the corporation before the *bona fide* purchaser received the certificate of stock.

§ 406. *Theft of certificates indorsed in blank.*[1] — The corporation has a duty to perform as regards certificates of stock which have been stolen from the owner who held them indorsed in blank.

If the owner notified the corporation of the theft it must refuse to register a transfer to a purchaser of such stolen certificate. Since the owner's negligence may have estopped him from reclaiming the stock, the corporation may refuse to recognize either party as a stockholder, where there is a reasonable question of negligence, and when sued by either may interplead. If the corporation allowed a registry before it was notified of the theft, it is difficult to see on what principle it is to be held liable to the owner. Such a case seems not yet to have arisen. If notified of the theft before anything is learned concerning the whereabouts of the certificate, the case is to be treated the same as when the certificate is alleged to have been lost.

§ 407. *Interpleader by the corporation.*[2] —Whenever there are two or more conflicting claims made to stock, and demands are made on the corporation to allow registry, it is the privilege of the corporation, if there is a reasonable legal doubt as to the rights of the parties, to refuse to register either party, and, when sued by one, to interplead and compel the parties to contest the matter between themselves in the courts. The law does not oblige the corporation to turn itself into a court of justice and decide the rights of the parties. The corporation, however, cannot interplead if it has already committed itself by registering one of the claimants as the stockholder. Nor can the corporation resort to an interpleader where one of the claimants is clearly wrong. The right of interpleader and the power of the corporation to refuse to register a transfer until compelled to do so by the courts, where an outstand-

[1] See ch. XXI, *supra.*

[2] See ch. XXII, *supra.*

ing certificate is not surrendered, constitute the two most effective safeguards of the corporation in allowing or refusing registry.

§ 408. *Restrictions by corporation on stockholder's right to sell or transfer.*[1]— The law has uniformly and decisively discountenanced and overruled all attempts of a corporation to prevent the sale and transfer of its stock by the stockholder. Such attempted restrictions are generally made by means of by-laws. Thus, a by-law requiring the consent of the directors or other corporate officers to a transfer, or a by-law requiring the stockholder, when he sells, to sell his stock to specified persons, is null and void. Restrictions may be created by a contract mutually agreed to by the stockholders, but cannot be imposed upon them by the majority of the stockholders nor by the board of directors. When, however, such restrictions are created by the charter, they are valid, since they arise with the corporation and stock itself. Thus, in England, the charter frequently authorizes the directors to refuse a registry unless the transferee is satisfactory to them. Even here, however, the directors must be reasonable in the use of their discretion. In this country the most frequent restriction created by charter is that of a lien for debts due to the corporation from the transferrer.

§ 409. *Lien of the corporation.*[2]— The charters of many corporations contain an express provision that the corporation may refuse to allow a stockholder to register a transfer of his stock until he has paid any and all debts which he may at that time owe to the corporation. Such a lien need not be stated in the certificate of stock. While it may not be created generally by a by-law, yet certain phrases in charters have been held to uphold a lien that is declared and made effectual by a by-law. Where the lien exists the corporation may refuse to allow a registry of transfer of any stock owned by the debtor until all debts due from him to the corporation are paid, whether due or not due, including, it seems, unpaid subscriptions. It does not apply, however, to debts due from a transferee of the certificate who never obtained registry or appeared as a stockholder on the corporate books. Nor does it apply to debts due from the registered stockholder, but incurred after the corporation was given notice that he had sold his stock to another. The corporation may waive its lien and allow registry without the debts of the old stockholder being paid. A registry without requiring payment is a waiver in itself.

§ 410. *Formalities of registry which the corporation may insist upon.*[3]— Where, as is ordinarily the case, the owner of stock has sold it by signing the transfer and power of attorney on the back of the certificate, leaving the names of the transferee and of the at-

[1] See ch. XXXVII, *infra*. [2] See ch. XXXI, *infra*. [3] See ch. XXII, *supra*.

torney blank, the corporation may require the names of the transferee and of the attorney to be filled in before it allows a registry. If it is in doubt as to the genuineness of the signature of the former owner of the certificate, it may require his presence or reasonable proof that he actually made the signature. It cannot compel the transferrer to be present, but may require the presence of the attorney authorized to make the registry. The registry itself is generally made by a corporate officer as attorney. A surrender of the old certificate is required, and new certificates in the name of the transferee are issued. The by-laws may prescribe that the registry shall be in the presence of certain corporate officers. If the corporation does not keep a transfer book or stock book, a surrender of the old certificate and the issue of a new one is sufficient to constitute a transfer and registry. The applicant may inquire of the corporate officer in charge for the registry clerk, and is not bound to ascertain the individual himself: The corporate registry may be on its ledger without any issue of certificate. If it keeps no registry at all, mere notice to it of a transfer constitutes a legal registry. The corporation has no right to delay registry unreasonably for the purpose of obtaining advice or for any other reasons. It may require that the power of attorney run directly from the former registered stockholder and not from an intermediate one. A written acceptance of the stock by the transferee cannot be insisted on by the corporation. The formalities of registry may be waived by the corporation, and any act which indicates that it considers a transferee to be a stockholder is effectual to make him such so far as the corporation is concerned, though no registry was had.

Either the transferrer or the transferee or an intermediate unregistered transferee may apply to the corporation for the purpose of obtaining a registry. The corporation cannot refuse it merely because of the motive of the transferrer or of the transferee in making the sale and transfer. Whenever the corporation refuses to allow a registry the applicant may sue it for damages, or he may go into a court of equity and ask that the corporation be decreed to allow registry or to pay damages in lieu thereof. A few cases hold that he may compel registry by a *mandamus* against the corporation, but the weight of authority holds otherwise. In the notes below are given the rules of a great railroad corporation on this subject,[1] and it will be noticed that particular attention is

[1] 1. Give the name of the transferee *in full*, without abbreviation of any kind.

2. If the transferee be a woman, give her title, Mrs. or Miss.

3. Prefixes and affixes, such as Judge, Major, Hon., Rev., Doctor, M. D., LL.D., should not be used.

4. In transferring to a married woman use her own christian name, NOT

called to transfers by or to married women, trustees, executors, administrators and corporations.

that of her husband with Mrs. prefixed.

5. Avoid using diminutives, always give full christian name.

6. If the transferee be a minor, so state in the transfer, thus: "A. B., a Minor," and give guardian's name and address. Avoid, if possible, transferring to minors.

7. Shares of a minor are transferable only by the guardian, who must exhibit a certificate of appointment.

8. Do not transfer to a trustee, agent or attorney who is not appointed by an instrument in writing. If properly appointed, give words in the transfer briefly descriptive of the trust, or the nature of the instrument creating it.

9. In transferring to a society or institution, make sure that it has authority to hold and transfer stock. Transfers by officers of societies, institutions or corporations must be accompanied by proper evidence of their power to act in the premises.

10. In transfers by trustees, if there be more than one, *all must sign.* In all cases the instrument creating the trust must be exhibited.

11. Shares of an *intestate* are transferable by the administrator, who must exhibit a proper certificate of appointment.

12. Shares of a *testate* are transferable by the executor, who must exhibit a certified copy of the will and certificate of appointment. Copies of wills will be returned after inspection.

13. Trustees, attorneys, agents, administrators, executors and guardians should not transfer directly to themselves.

14. Always give full post-office addresses of transferees, with post-office box, or street and number.

15. In case of change of name by marriage, send certificate to the undersigned, having made transfer on the back of it to the *new* name, signing the transfer thus: — "A. B. C., *now* Mrs. A. B. D.," and a new certificate will be returned.

16. If a certificate is lost, give immediate notice to the undersigned.

CHAPTER XXIV.

NON-NEGOTIABILITY OF STOCK AND DANGERS INCURRED IN THE PURCHASE OF CERTIFICATES OF STOCK.

A. NON-NEGOTIABILITY.

§ 411. *Nature and kinds of negotiable instruments.*—Negotiable instruments at the present day are promissory notes, bills of exchange, checks, bank-notes, bonds of the United States, of states, of foreign governments, of cities and counties and municipalities

generally,[1] certificates of deposit, interest coupons, and bonds of corporations.[2] Bills of lading have only a quasi-negotiability.[3] These different instruments, however, are not necessarily negotiable, but are so only when in writing; when containing an unconditional promise or order to pay; when the payment is to be in money only; when the amount is certain; when it is payable to a specific person, and not in the alternative; when it is payable at a certain time; when it contains words such as "to A. or order," or "to bearer," or their equivalent; and when delivery has been duly made. If the instrument is lacking in any one of these qualities, it falls back into the category of non-negotiable — that, is merely assignable — instruments. Again, a holder of one of the above-named negotiable instruments can have the benefit of its negotiability only when he has purchased it in good faith, for value, before the instrument was due, and without notice of the equitable rights of previous holders or makers; that is, he must be a *bona fide* holder.[4] When all these elements of negotiability and ownership co-exist, the advantage of negotiability over non-negotiability is this: that the holder of the instrument is entitled to the face value thereof, and his right cannot be affected, decreased, or defeated by any facts or equities between previous holders which would defeat the security as between them, unless it be void for usury or other original cause.

§ 412. *Certificates of stock are not negotiable instruments, but have been given many of the elements of negotiability in America — In England they are not negotiable in any sense.*—It is very clear, and it is well established, that certificates of stock are not negotiable instruments.[5] A certificate of stock is not a promise or order

[1] Warrants issued by a municipality are transferable, but not negotiable. Watson *v.* City of Huron, 97 Fed. Rep. 449 (1899).

[2] Daniel, Neg. Inst., 3d ed., book VI; Dos Passos on Stock Brokers, ch. IX. As to bonds of corporations, see ch. XLVI, *infra.*

[3] Pollard *v.* Reardon, 65 Fed. Rep. 848 (1895). See also Bank of Batavia *v.* New York, etc. R. R., 106 N. Y. 195 (1887). In Oregon by statute warehouse receipts are made negotiable. Anderson *v.* Portland, etc. Co., 37 Oreg. 483 (1900).

[4] As to who is a *bona fide* holder, see § 293, *supra,* and § 767, *infra.*

[5] Certificates of stock are not negotiable. Hammond *v.* Hastings, 134 U. S. 401 (1890). "Certificates of stock are not securities for money in any sense; much less are they negotiable securities." Mechanics' Bank *v.* New York, etc. R. R., 13 N. Y. 599, 627 (1856); Farmers' Bank *v.* Diebold, etc. Co., 64 N. E. Rep. 518 (Ohio, 1902); Barstow *v.* Savage Min. Co., 64 Cal. 388 (1883); Clark *v.* American Coal Co., 86 Iowa, 436 (1892). Weaver *v.* Barden, 49 N. Y. 286, 288 (1872), says that a certificate of stock has none of the qualities of commercial or negotiable paper. Leitch *v.* Wells, 48 N. Y. 585, 613 (1872), says: "Since the decision of the case of McNeil *v.* Tenth Nat. Bank, . . . certificates of stock, with blank assignments, and powers of attorney attached, must be nearly as negotiable as commercial paper." Weyer *v.* Second Nat.

to pay money, nor has it any of the essentials of a negotiable instrument. Moreover, it has been repeatedly decided by the courts that a certificate of stock is not negotiable, and no custom of trade or of brokers can give to it that character. Nevertheless the New York court of appeals has well said that while certificates of stock are not negotiable in form and represent no debt and are not securities for money, yet "the courts of this country, in view of the extensive dealing in certificates of shares in corporate enterprises, and the interest, both of the public and of the corporation which issues them, in making them readily transferable and convertible, have given to them some of the elements of negotiability."[1]

Bank, 57 Ind. 198, 208 (1877), says: "The difference between a promissory note and a certificate of bank stock is so wide and marked that a rule of law governing the transfer of the former is by no means applicable to the latter." Sewall *v.* Boston Water-power Co., 86 Mass. 277 (1862), says: "The authorities cited show that a certificate of stock is not a negotiable instrument, and without any authorities it is apparent that it has not a negotiable character." To same effect, Mandelbaum *v.* North Am. Min. Co., 4 Mich. 465, 473 (1857), holding, however, that by statute in that state certificates of stock are practically negotiable. Shaw *v.* Spencer, 100 Mass. 382 (1868), says: "It is clear that a certificate of stock transferred in blank is not a negotiable instrument. . . . No commercial usage can give to such an instrument the attributes of negotiability." Sherwood *v.* Meadow Valley Min. Co., 50 Cal. 412 (1875); Bridgeport Bank *v.* New York, etc. R. R., 30 Conn. 231, 275 (1871), holding that "the certificate accompanied by the assignment and power of attorney thus executed in blank has, perhaps, a species of negotiability, although of a peculiar character, but one necessary to the public convenience." In First Nat. Bank *v.* Lanier, 11 Wall. 369, 377 (1871), the court said that although certificates of stock are "neither in form or character negotiable paper, they approximate to it as nearly as practicable." Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). In a recent case in Maryland an important distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock signed by the stockholder with the name of the transferee left blank does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities. Under this decision it would seem to be necessary to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894), a case wherein a broker holding stock on a margin repledged it at a bank. Compare § 432, *infra.* In Hampton, etc. R. R. *v.* Bank, 48 S. C. 120 (1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

[1] Knox *v.* Eden Musée Co., 148 N. Y. 441 (1896), rev'g 74 Hun, 483. The New York court of appeals has recently held that where certificates of stock issued by a New Jersey corporation are

In England an entirely different rule prevails. Certificates of stock in that country are merely evidences of ownership of stock, and this muniment of title is not negotiable nor quasi-negotiable. The purchaser of it is not protected against equities involved in the title of prior owners of the certificate. Only a transfer on the corporate books shuts off those equities. Indeed, this rule is insisted upon in England so rigidly that not even the certificates of stock issued by American corporations and held by Englishmen are given the quasi-negotiability of the American law.[1]

within the state of New York, an attachment may be levied upon them and the interest of the owner or pledgor therein sold, such certificates being a property right within the state. Simpson *v.* Jersey City, etc. Co., 165 N. Y. 193 (1900), the court distinguishing the case of Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), on the ground that the certificates of stock in that case were not within the state. The court said: "Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny." In Masury *v.* Arkansas National Bank, 93 Fed. Rep. 603 (1899), the court said: "It is a well known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper." Where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected. Manchester St. Ry. *v.* Williams, 52 Atl. Rep. 461 (N. H. 1902). See also § 374, *supra*.

[1] The English courts refuse to follow the American rule in regard to the practical negotiability of certificates of stock transferred in blank, although such certificates of stock are issued by an American corporation. Hence where the English owner of such certificates delivered them to a broker to forward to America for a transfer, and the broker fraudulently sold them for his own purposes to other persons, it was held that no title was conveyed to such other persons, and that the American law did not apply. The court said, however, that there was sufficient in the case to put the purchasing party upon notice. Colonial Bank *v.* Cady, L. R. 15 App. Cas. 267 (1890); Williams *v.* Colonial Bank, L. R. 38 Ch. D. 388 (1888); Dodds *v.* Hills, 2 H. & M. 424 (1865); Roots *v.* Williamson, L. R. 38 Ch. D. 485 (1888). In England certificates of stock indorsed in blank convey title by estoppel to a *bona fide* purchaser when the transfer need not be

§ 413. *The term "quasi-negotiability," as applied to certificates of stock, throws little light upon the subject.*[1]— It is little satisfaction to the court, the practitioner, the student, or the owner of

by deed under seal. Rumball *v.* Metropolitan Bank, L. R. 2 Q. B. D. 194 (1877), where a broker committed a breach of trust. The court said the stockholder "is in the position of a person who has made a representation, on the face of his scrip, that it would pass with a good title to any one on his taking it in good faith and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made." *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); *Re* Barned's Banking Co., L. R. 3 Ch. App. 105 (1867). But this is generally not the case. Ortigosa *v.* Brown, 47 L. J. (Ch.) 168 (1877); and France *v.* Clark, L. R. 22 Ch. D. 830 (1883), gives no protection to the *bona fide* purchaser until he is registered. See also Shropshire, etc. Co. *v.* Queen, L. R. 7 H. L. 496 (1875); Briggs *v.* Massey, 42 L. T. 49 (1880). See also §§ 325, 361, 377, *supra.* See Easton *v.* London J. S. Bank, L. R. 34 Ch. D. 95 (1886). Even in England, if a broker transfers stock in breach of trust to a bank, and the bank afterwards, at his request, transfers the stock to another person, the bank being ignorant of his agency, is not liable to the principal for the value of the stock. Marshall *v.* National, etc. Bank, 66 L. T. Rep. 525 (1892). As between the trustee in bankruptcy of a defaulter and the party to whom the defaulter has transferred shares of stock without a transfer on the corporate books, the latter is entitled to the stock. *Re* Dodds, 64 L. T. Rep. 476 (1891). In Moore *v.* Northwestern Bank, [1891] 2 Ch. 599, the rules of the company provided that, when certificates were sent in for transfer, the particulars should be entered in a book which must be brought before the directors for approval and be signed by three members of the board, after which the registry of transfer was completed. The real owner of the certificates was permitted to reclaim them before approval by the directors, the court saying that the notice thus given to the company gave the court seisin for purposes of adjudication. In Simmons *v.* London J. S. Bank, [1891] 1 Ch. 270, the court held that a bank to whom a broker had pledged stocks belonging to his customer was not a *bona fide* purchaser under the facts in that case, and consequently was not protected, even though a *bona fide* purchaser might have been. Although in England an unregistered transferee of stock is not protected against another transfer which is registered, yet he is protected where he lodged his transfer with the corporate secretary, and the latter accepted it for transfer before the second transfer was made. Nanney *v.* Morgan, L. R. 35 Ch. D. 598 (1887). In the case of Donaldson *v.* Gillot, L. R. 3 Eq. 274 (1866), the pledgee of one who held the certificate indorsed to himself was not protected, since the pledgor had purchased as agent and had fraudulently taken title in his own name. This would not be good law in this country, where the failure to have the transfer registered has no effect on the pledgee's rights under such circumstances.

[1] Daniel, Neg. Insts., § 1708, says: "The phrase 'quasi-negotiable' has been termed an unhappy one, and certainly it is far from satisfactory, as it conveys no accurate, well-defined meaning. But still it describes better than any other short-hand expression the nature of those instruments which, while not negotiable in the sense of the law merchant, are so framed and so dealt with as frequently to convey as good a title to the transferee as if they were negotiable."

stocks to be told that certificates of stock have a quasi-negotiability. This term has been coined to describe the character of certain things which can be understood only by a study and knowledge of the characteristics of the thing described. Especially is this true of certificates of stock. The information sought is not whether the certificate is quasi-negotiable, but whether the holder of it is protected under different states of fact and circumstances. He who intends to purchase such certificates wishes to know what dangers or risks he incurs by the purchase. The practitioner is interested, not in the general character of the instrument, but in the law as applicable to his particular case. Many of the cases concede to certificates of stock a quasi-negotiability; but it is extremely doubtful whether such discussions do not confuse any understanding of the character of such an instrument more than they explain it.

§ 414. *The distinction between the "legal" and the "equitable" title in the transfer of certificates of stock is unsatisfactory.*— Many of the cases involving the rights of a transferee of stock discuss and treat the subject from the point of view that the transferee is protected in his ownership when the legal title passes to him, but is not so protected when only the equitable title passes. Unfortunately it happens that, under the same state of facts, one court will hold that only the equitable title passes; another that the legal title passes; and a third court will hold that both the legal and the equitable titles pass. The result is confusion, doubt, and difficulty, with little light as to the real status of certificates of stock.[1]

[1] "In reaching this conclusion we have not thought it necessary to consider the supposed distinction between the legal and the equitable title, or to determine whether the title of the executors is the one or the other. The distinction belongs appropriately to the law of real estate; and, though it has been extended to personalty, the application with regard thereto has been less extensive; and the distinction itself is less significant. For in many cases — as, for example, in the case of money received in trust or for the use of another — courts of law recognize the equitable as the legal title; and, even where the distinction obtains, the equitable is regarded as the true owner by courts of equity. Hence, in this state, where the courts exercise both jurisdictions, the question as to the nature of the title sued upon is generally immaterial, or, rather, it is material only to the question of the nature of the action, whether legal or equitable, and to the question of parties." Ashton *v.* Zeila Min. Co., 134 Cal. 408 (1901). Such also seems to be the view taken in Lowell on Transfer of Stock (1884), pp. 104, 105, where the learned author says: "It is often supposed, for example, that the right of a creditor to seize stock which has been sold before it is transferred upon the books depends on the passing of the legal title; but we shall attempt to prove that the legal title has in reality no effect upon the matter." The same authority shows the confusion resulting from this distinction of the legal from the equitable title in the following note to page 103: "That the legal title passes before the transfer on the books. In the following cases this is made part of the *ratio*

§ 415. *The only method of treatment of the subject seems to be by inquiring under what facts the holder or purchaser is protected.*— The court, the practitioner, the purchaser, or the holder of certificates of stock wishes to know what liability and what dangers are incurred by the purchase and ownership of a certificate of stock. It becomes important for him to ascertain whether forgery or theft; or improper registry by the corporation; or breach of trust

decidendi: Ross *v.* Southwestern R. R., 53 Ga. 514, 532 (1874); Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454, 463 (1879); s. c., 74 Mo. 77 (1881); Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249, 252 (1880); Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (*semble*); McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); Leitch *v.* Wells, 48 N. Y. 585 (1872); Smith *v.* American Coal Co., 7 Lans. 317 (1873); Noyes *v.* Spaulding, 27 Vt. 420 (1855); Cherry *v.* Frost, 7 Lea (Tenn.), 1 (1881). In the following cases the same principle was laid down *obiter:* State *v.* Leete, 16 Nev. 242, 250 (1881); Eastman *v.* Fiske, 9 N. H. 182 (1838); New York, etc. R. R. *v.* Schuyler, 34 N. Y. 30, 80 (1865); Grymes *v.* Hone, 49 N. Y. 17 (1872); Johnson *v.* Underhill, 52 N. Y. 203 (1873); Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616 (1874); Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365 (1879); and see Purchase *v.* Exchange Bank, 3 Rob. (N. Y.) 164 (1865). . . . That the legal title does not pass until transfer on the books. In the following cases this principle is made a part of the *ratio decidendi:* Union Bank *v.* Laird, 2 Wheat. 390 (1817); Lowry *v.* Commercial, etc. Bank, Taney, 310 (1848); s. c., 15 Fed. Cas. 1040; Brown *v.* Adams, 5 Biss. 181 (1870); s. c., 4 Fed. Cas. 350; Williams *v.* Mechanics' Bank, 5 Blatchf. 59 (1862); s. c., 29 Fed. Cas. 1376; Becher *v.* Wells, etc. Co., 1 Fed. Rep. 276 (1880); Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818); Northrop *v.* Newtown, etc. Turnp. Co., 3 Conn. 544 (1821); Oxford Turnp. Co. *v.* Bunnel, 6 Conn. 552 (1827); Dutton *v.* Connecticut Bank, 13 Conn. 493 (1840); Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); Coleman *v.* Spencer, 5 Blackf. 197 (1839); Helm *v.* Swiggett, 12 Ind. 194 (*semble*) (1859); Weyer *v.* Second Nat. Bank, 57 Ind. 198 (1877); Fisher *v.* Essex Bank, 71 Mass. 373 (1855); Boyd *v.* Rockport Steam Cotton Mills, 73 Mass. 406 (1856); Blanchard *v.* Dedham Gas Light Co., 78 Mass. 213 (1858); McCourry *v.* Suydam, 10 N. J. L. 245 (1828); . . . Stebbins *v.* Phœnix Ins. Co., 3 Paige, 350 (1832); Mechanics' Bank *v.* New York, etc. R. R., 13 N. Y. 599 (1856); New York, etc. R. R. *v.* Schuyler, 38 Barb. 534 (1860); Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 331, 335 (1869). In the following cases the same doctrine is laid down *obiter:* Black *v.* Zacharie, 3 How. (U. S.) 483 (1845); U. S. *v.* Cutts, 1 Sumn. 133 (1832); s. c., 25 Fed. Cas. 745 (this was, however, a case of government debt, not of corporate stock); Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879); Otis *v.* Gardner, 105 Ill. 436 (*semble*) (1883); and see Kellogg *v.* Stockwell, 75 Ill. 68 (1874); People's Bank *v.* Gridley, 91 Ill. 457 (1879); Bruce *v.* Smith, 44 Ind. 1 (1873); State *v.* First Nat. Bank, 89 Ind. 302 (1883); Shaw *v.* Spencer, 100 Mass. 382 (1868); Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515 (1882); White *v.* Salisbury, 33 Mo. 150 (1862); Boatmen's Ins. Co. *v.* Able, 48 Mo. 136 (1871); . . . Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); U. S. *v.* Vaughan, 3 Binn. (Pa.) 394 (*semble*) (1811); Bank of Commerce's Appeal, 73 Pa. St. 59 (1873); Fraser *v.* Charleston, 11 S. C. 486 (*semble*) (1878)." As to the reason for the distinction between the legal and equitable title, see 1 University Law Rev. 218 (1894).

by a trustee, executor, or agent formerly holding that particular stock; or fraud whereby a former owner was deprived of that same stock; or legal proceedings, such as attachment, execution, *mandamus*, and decrees of the court; or any other fact or equitable right between former owners of the stock which he purchases, can affect him, a *bona fide* purchaser for value and without notice of those rights. These questions cannot be solved or answered by any general rules or theories, since certificates of stock have a law, an origin, and a nature different from other kinds of securities. The fact that a registry of transfer is required to be made on the corporate books adds further complication to the rights of a holder. General rules derived from and applicable to other instruments or securities cannot, with any certainty, clearness, or satisfactory results, be applied to certificates of stock. They should be considered by themselves. The future character and status of certificates of stock will be much clearer, better, and more satisfactory to the investing public if the law governing them be formed on its own basis.

§ 416. *The particular rules protecting a bona fide purchaser of certificates of stock are based on estoppel.*— Nearly all of the rules whereby a purchaser of stock is protected against the rights of previous holders grow out of the fact that such previous holder or holders have enabled persons to sell the stock, and consequently are estopped from claiming that they did not intend so to do.[1] This law of estoppel protects the purchaser against not only the rights of previous holders, but against the claims of the corporation itself.[2] Indeed, to such an extent has the law of estoppel been applied to protect a *bona fide* purchaser of stock, that, excepting in cases of certificates transferred in blank and lost or stolen without negli-

[1] Wood's Appeal, 92 Pa. St. 379, 390 (1880); McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, 329 (1871); Weaver *v.* Barden, 49 N. Y. 286, 288 (1872); Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41, 47 (1873); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Walker *v.* Detroit Transit Ry., 47 Mich. 338, 347 (1882). See also Fatman *v.* Lobach, 1 Duer, 354 (1852); Moodie *v.* Seventh Nat. Bank, 3 W. N. Cas. 118 (1876); Matthews *v.* Massachusetts Nat. Bank, Holmes, 396 (1884); s. c., 16 Fed. Cas. 1113. The agreement of a stockholder to surrender his stock in liquidation of an unpaid assessment is without consideration, and does not bind a purchaser of the certificate. Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo. 1893). Other phases of this case are passed on in 124 Mo. 153.

[2] Many instances of the liability of the corporation on certificates of stock which it has issued, and which have been sold or pledged to an innocent person for value, are given in chs. XVII, XIX, XXI, XXII, XXIII, *supra*, and ch. XXVI, *infra*. The purchaser, however, is not *bona fide*, unless he actually parted with the consideration before he knew of defects as to the stock. See § 767, *infra*, as to *bona fides*, and Hayden *v.* Charter Oak, etc. Park, 63 Conn. 142 (1893).

gence on the part of the owner, a *bona fide* purchaser is protected now in almost every instance where he would be protected if he were purchasing a promissory note or other negotiable instrument.[1] Thus the New York court of appeals has recently held that where certificates of stock issued by a New Jersey corporation are within the state of New York, an attachment may be levied upon them and the interest of the owner or pledgor therein sold, such certificates being a property right within the state.[2] Again, even though in anticipation of an increase of the capital stock the stockholders agree among themselves to waive their prior right to subscribe for such increased capital stock, yet a *bona fide* purchaser of a certificate of stock prior to such increase is not bound by such agreement and may claim his *pro rata* share of the increased capital stock at par.[3] And again, where four shares of stock are transferred to a person by the corporation to qualify him as a director, and he agrees to return the same to the corporation when ceasing to be a director, but thereafter and before he ceases to be a director he agrees with the indorsers of his note that they shall have the stock as collateral security, they are protected, even though the stock was actually delivered to them after they had notice of the first agreement, it being shown, however, that they had no notice of such agreement at the time they became sureties.[4] Where no certificates of stock have been issued, a purchaser of a subscriber's right to the stock is not protected as a purchaser of a certificate of stock is protected.[5]

[1] Quoted and approved in Cincinnati, etc. Ry. *v.* Citizens' Nat. Bank, 56 Ohio St. 351 (1897). The supreme court of Maryland in the case of Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899), after quoting the above, commented thereon as follows: "Without intending to unite in the prophecy of the learned author as to what may yet be done, the fact is that courts have felt called on, *ex necessitate rei*, to free certificates of stock from many of the burdens that most non-negotiable instruments are required in law to carry. If a negotiable instrument is, as has been said of it by a distinguished jurist, 'a courier without luggage,' a certificate of stock in the form now usually followed might at least be said to be 'a courier without much luggage.'"

[2] Simpson *v.* Jersey City, etc. Co., 165 N. Y. 193 (1900), the court distinguishing the case of Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), on the ground that the certificates of stock in that case were not within the state. The court said: "Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny."

[3] Real Estate, etc. Co. *v.* Bird, 90 Md. 229 (1899).

[4] Dueber, etc. Co. *v.* Daugherty, 62 Ohio St. 589 (1900).

[5] Manchester St. Ry. *v.* Williams, 52 Atl. Rep. 461 (N. H. 1902).

B. DANGERS INCURRED IN PURCHASING STOCK.

§ 417. *Liabilities, risks, and rights of one who owns or purchases a certificate of stock.*— It is proposed to state separately and in detail the liabilities on the subscription price and by statute incurred by one who owns or purchases a certificate of stock; also the risks or dangers incurred by a purchase of stock as affected by the rights of previous holders of that stock; also a few of the rights of an owner or purchaser of a certificate of stock as regards the general incidents appertaining to stockholdership. These subjects are discussed in full in other parts of this work, and consequently the authority for rules laid down herein must be sought for in those parts. The purpose here is to state succinctly and in language free from technical phraseology the position occupied by a *bona fide* purchaser of a certificate of stock.

§ 418. *Liability on unpaid par value, that is, the unpaid subscription price of the stock.*[1]— In general the purchaser of a certificate of stock is immediately liable on the subscription price of the stock so far as it has not been paid by previous holders of the stock purchased and has not been called by the corporation. The transferrer is bound to pay all calls made before the transferee purchases. If the transferee does not immediately register his transfer on the corporate books, he is liable to pay to the transferrer such calls as are made after the transfer and which the corporation compels the latter to pay. The transferee who buys stock supposing it to be full paid is not liable for uncalled and unpaid parts of the subscription, even though the certificate is silent as to whether the par value of the stock has been paid in or not. Especially is this the rule where the certificate states that the stock is paid-up stock, or the transferee, before purchasing, inquires of the corporation and is told that the stock is paid up. He may purchase in reliance thereon, and cannot afterwards be held liable, even though the stock turns out not to have been fully paid up.

§ 419. *Forfeiture for non-payment of calls.*[2]— Where the corporation is given by its charter or by statute the right to forfeit and sell stock for non-payment of the subscription price when called in by the corporation, a notice to the stockholder of the intended forfeiture is always required. This notice, however, is given always to him who appears by the corporate registry to be the stockholder. Accordingly, a transferee or owner of stock who has not obtained a registry of his transfer on the corporate books is liable to lose his stock by a forfeiture for non-payment of calls, and may lose it without knowledge of the call or forfeiture, unless he appears on the registry of the corporation as the owner of the stock.

[1] See ch. XV, *supra*.

[2] See ch. VIII, *supra*.

§ 420. *Statutory liability.*[1] — The liability by statute of a purchaser of certificates of stock to corporate creditors, in addition to the subscription price which is treated of above, exists in a great many cases. In the first place this liability may not exist at all against any one, either transferrer or transferee. It rarely exists in the case of railroad corporations. Where the statutory liability exists, the liability of a purchaser of stock is as follows: If the transferee immediately registers his transfer on the corporate books, he becomes at once liable by statute for debts of the corporation contracted after such registry, and the transferrer is not liable thereon. The transferee may or may not be liable on corporate debts contracted before he purchased, according to the words of the statute creating the liability. The transferrer is liable on corporate debts contracted after he sold the stock but before the transfer was registered. In the latter case the transferrer has recourse to the transferee.

§ 421. *Liability where the purchaser has the transfer made to a nominal holder.*[2] — Where a person purchases stock and takes it in the name of a "dummy," the stock never having been registered in the name of the real owner, the latter is not liable on such stock, according to the English rule. In America a contrary rule prevails, and the courts hold him liable on the ground that he is a principal, and as such is liable as an undisclosed principal for the acts of his agent, the "dummy."

§ 422. *No liability for assessments after the par value of the stock has been paid in.*[3] — By well-established principles of law stockholders are liable on their stock only to the extent of the unpaid par value of the stock, unless the statute expressly provides otherwise. Neither the directors, nor all the other stockholders combined, in corporate meeting assembled or otherwise, can compel a dissenting stockholder to pay any more money into the corporation or subject him to further liability on his stock. Nor can the legislature, subsequently to his purchase of the stock, pass a law increasing his liability, unless the power to alter or amend the charter is reserved to it, in which case such a law would be constitutional.

§ 423. *Liability when stock was issued for property.*[4] — Shares of stock may be issued under an agreement that payment is to be made in labor, services, material, or contract work. If so issued, and the labor or material received by the corporation is fairly equal in value to the par value of the stock, both the original holder and the transferee of such stock take it as full-paid stock, and

[1] See ch. XII, *supra.*

[2] See §§ 253, 265, *supra.*

[3] See ch. XIII, *supra.*

[4] See chs. II and III, *supra.*

cannot be held liable for any further amount, even though the value of the property turns out subsequently to have been overestimated but was made in good faith. Where, however, the property is intentionally overvalued and stock is issued for it, the persons originally receiving the stock are liable to have the transaction set aside, the value of the property or work done credited to them, and the real value of the stock, not necessarily the par value, charged to them, or be compelled to return the stock. As to the transferees the case may be different. If they purchased with notice of the fraud they are not protected; but if they purchased without notice or knowledge that the property was intentionally overvalued, but supposed that the stock was issued as paid up by payment in property or work taken at a *bona fide* value, or if they have no knowledge of how the stock was paid for, but take it as paid-up stock, they may retain the stock, and are not liable for any further amount thereon.

§ 424. *Liability as partners by reason of defective incorporation or for other reasons.*[1]— Where a supposed corporation has not been duly incorporated, or where a corporation for that business is not provided for, the supposed corporation has been held to be but a partnership, and all the stockholders held liable as partners. But a failure to file the articles of association, or to sign and publish them, or the omission from them of any of the essential facts required to be stated, does not ordinarily defeat the attempted incorporation and render the stockholders liable as partners. Again, the stockholders are, in some jurisdictions, liable to be held to be partners, as regards creditors of the enterprise, where the corporation organizes in one place and proceeds to do all its business in another place. In most such cases, however, the corporation has been recognized and upheld, and the stockholders protected in their limited liability. The latter class of decisions is the stronger, and certainly more to be commended and followed. In any case a transferee is not liable for all precedent debts of the concern, but only for those incurred subsequently to the registry of his transfer.

§ 425. *Danger of corporate lien.*[2]— Frequently corporations are given by charter or statute a lien on a stockholder's stock for debts due from him to the corporation. When such lien exists, a purchaser of the certificate in open market buys subject to the risk that the one from whom he buys owes the corporation a debt, and that the corporation will not allow the transferee of the certificate to obtain a registry until such debt is paid. In many of the states the lien of the corporation cannot be created by by-law. Generally

[1] See ch. XIII, *supra*.

[2] See ch. XXXI, *infra*.

it exists by reason of a provision of the charter. When it does legally exist it extends to all debts owed by the last registered stockholder, whether the debt be due or not due, and includes uncalled parts of the subscription price of the stock. It does not, however, apply to debts due from one who has bought and sold the certificate without appearing on the registry as a stockholder. The corporation may waive the lien, and a registry without insisting on the lien is such a waiver. The lien of the corporation extends to debts incurred by the transferrer after the transfer, but before the corporation is notified thereof.

§ 426. *Overissued stock.*[1]— The capital stock of a corporation is fixed by statute. There is no power in the corporation itself to increase that amount. It can be done only by a legislative enactment. Accordingly, if the corporation issues certificates of stock when the whole capital stock has already been issued, the new issue, if an equivalent amount of outstanding certificates is not surrendered, is an overissue, and is void. Any issue of stock in excess of the amount of the capital stock as fixed by the charter is null and void. The purchaser of such certificates, however, is not without his remedy. His certificate is so much waste paper, and he is not a stockholder; but he may sue the corporation for damages, and recover to the extent of his injury. The purchaser may also sue the corporate officers who participated in the issue of the spurious stock, and may recover damages. He cannot, however, hold an innocent transferrer liable. The latter, if he knew nothing of the overissue, is not to be held as a guarantor of the validity of the stock which he sells.

§ 427. *Danger that transferrer or previous holder is an infant, married woman, or lunatic.*[2]— A purchase of stock from an infant is a dangerous investment. When the infant comes of age he may elect to disaffirm, and may hold the transferee liable for the stock. There is less danger, however, in accepting a transfer of stock from an infant who has previously purchased the stock which he sells. This previous purchase, and also his sale of the stock, are technically voidable acts; but after the stock has passed from his control the law disregards the doubtful medium of title, and considers the purchaser from the infant as the legal stockholder. As regards married women, the common law allowed the husband to sell her stock after he had reduced it to possession by registering it in his own name on the corporate books. In modern times, however, the right of a married woman to hold and convey personal property as though unmarried has been established in most states by statute. Her right to sell shares of stock owned by herself exists where she may

[1] See ch. XVII, *supra*.

[2] See §§ 66, 67, 250, 308, 310, 318, 319, *supra*.

sell other personal property similarly owned, and this right depends upon the law and statutes of her domicile. A purchase of stock from a lunatic is void.

§ 428. *Purchase of stock by or from a corporation.*[1]— In England a corporation cannot purchase shares of its own capital stock. In this country there is a difference of opinion as to the law. The statutes governing the corporation, however, sometimes prohibit such purchases. Such is the case with national banks. In any case, however, whether the corporation purchased the stock legally or illegally, a purchaser of the same stock from the corporation itself is not affected by the invalidity of the title of the corporation. Again, it is a general rule, both in England and America, that one corporation has no right to purchase stock in another corporation. Sometimes the statutes allow such purchases, but more often expressly provide to the contrary by prohibiting them. Nevertheless, whatever rule applies to a purchase by a corporation of stock in another corporation, the law is very clear that a purchaser of such stock from the corporation is protected in his purchase. The unauthorized act of the corporation in purchasing has no effect upon the legality of its sale of the stock.

§ 429. *Purchase from joint owners, partners, and agents.*[2]— One joint owner cannot sell stock standing in the name of two or more as joint owners. One partner may sell and convey stock standing in the partnership name. As regards purchases of stock from agents, greater difficulty occurs. If the purchaser does not know that the vendor is selling as an agent, but supposes he is buying stock owned by the person with whom he is dealing, the purchaser is always protected. The same rule, after considerable doubt and discussion, has been established, even though the purchaser knows that the agent is selling as agent. The sale is valid, and the purchaser is protected, provided he has no reason to suspect that the agent is selling in fraud of the owner's rights or in contradiction of his orders.

§ 430. *Purchase of stock at sheriff's execution sale, or from assignee in bankruptcy, or for benefit of creditors.*[3]— A purchase of stock at an execution sale by the sheriff is a dangerous investment. Almost always the judgment debtor has already sold and transferred his certificates of stock to a *bona fide* purchaser. If such *bona fide* purchaser has registered the transfer on the corporate books before the attachment or execution is levied, the purchaser at the execution sale gets nothing. If no such registry has been made, but the judgment debtor sold and transferred the certificate before the levy of attachment or execution, in most of the states, including New

[1] See ch. XIX, *supra*. [2] See ch. XIX, *supra*. [3] See ch. XXVII, *infra*.

York, such a purchaser takes title and the execution purchaser none. In Connecticut and a few other states a contrary rule prevails. If, however, the judgment debtor sells the certificate after the attachment or execution is levied, the purchaser takes no title — the execution purchaser is entitled to the stock. A purchaser of stock from an assignee in bankruptcy or insolvency, or for the benefit of creditors, takes a good title if he obtains the certificates of stock. If, however, the insolvent has sold such certificates to another, the latter is entitled to the stock.

§ 431. *Purchase from a pledgee.*[1]— A pledgee of stock has no right to sell or repledge the stock held as collateral by him, unless the pledgor agreed that he might do so. If, however, the pledgee sells or repledges the stock to one who takes it in good faith, for value, and without notice of the fact that he is dealing with a pledgee of the stock, such a *bona fide* purchaser is protected. He is protected absolutely, and can keep the stock if he purchased it. If, however, he merely took it in pledge from the pledgee, he is obliged to give up the stock to the real owner, where the latter tenders to the repledgee the amount of the debt owed by the pledgee to the repledgee, for which the stock was given as security. Where, however, a person buys or takes in pledge stock from one who makes known the fact that he is holding the stock as pledgee, the former is not a *bona fide* purchaser. Moreover, he is not a *bona fide* holder where he would not be a *bona fide* holder of a promissory note transferred under similar circumstances, as, for instance, where he loans the money at an usurious rate of interest; or where he knows that the person with whom he is dealing is but an agent, and is pledging his principal's stock. In all these cases, where the purchaser or pledgee of stock is not a *bona fide* holder, the real owner and original pledgor of the stock may reclaim his stock from the repledgee, or purchaser from the pledgee, where the original pledgor could recover it from the first pledgee. The repledgee or purchaser from the pledgee in such a case stands in the shoes of the first pledgee, and has no better rights than the latter.

§ 432. *Pledgee is protected in the same way as purchaser of stock.*[2] The rules contained in this chapter explain the rights, dangers, and liabilities incurred by the purchaser of stock. The same rules prevail for the most part in favor of one who receives stock in pledge. A purchaser and a pledgee are treated in the cases as being similarly protected or similarly not protected. There is, however, one important exception to this rule. If a person who is about to take stock from another knows that the latter is disposing of the stock

[1] See ch. XIX, *supra*, and ch. XXVI, *infra*.

[2] See chs. XIX, *supra*, and XXVI, *infra*.

as an agent, the former may purchase the stock and be protected, but cannot take it in pledge and be similarly protected. An agent to sell is not an agent to pledge. Another exception to the similarity of position of the vendee and pledgee of stock is that by statute, frequently, the latter is not liable on stock where the former is liable.

§ 433. *Danger of purchasing from an executor, administrator, or guardian.*[1]— There is practically little danger incurred in purchasing stock from any one of these. It is the duty and right of the executors or administrators to sell the personal property and convert it into money. As regards guardians, they have the right to change the funds from one investment to another, unless a statute prescribes otherwise. Accordingly, a purchaser of stock from any one of those is protected in his purchase, even though he knows that his vendor is selling in his official capacity. If, however, the vendee knows that a breach of trust is involved or contemplated, he is not a *bona fide* purchaser and is not protected. All the executors or administrators need not join in a sale of the stock owned by the estate. A sale and transfer by one is sufficient.

§ 434. *Purchase from a trustee.*[2]— An entirely different rule prevails as regards stock held by a trustee as trustee. A purchaser of stock which he knows the vendor holds as belonging to a trust estate is bound to ascertain whether, by the instrument creating the trust, the trustee has a power to sell. If he has no such power, and the vendee knows that he is buying trust-estate stock, the latter is not protected, but is a party to any breach of trust that may be involved by the sale. If, however, the purchaser has no notice or knowledge that his vendor is selling trust stock, the former is a *bona fide* purchaser to that extent. He is not bound to know that the stock is trust-estate stock, and consequently he is protected in his purchase. Any facts that would put an ordinarily intelligent man on inquiry as to whether the stock belongs to a trust estate is notice, and prevents the purchaser from claiming to be a *bona fide* purchaser. Thus, such a notice is held to be given by the fact that on the face of the certificate of stock, and following the name of the stockholder, the word "trustee" or equivalent words are written.

§ 435. *Sale by vendor to another purchaser without delivery of certificate of stock.*[3]— A purchaser of certificates of stock has no reason to fear that the vendor can sell the stock to another person and thereby defeat the rights of the purchaser with the certificates. If the purchaser without certificates does not obtain registry on the corporate books, he obtains nothing as against a *bona fide* pur-

[1] See ch. XIX, *supra*. [2] See ch. XIX, *supra*. [3] See ch. XXI, *supra*.

chaser of the certificates, even though the latter's transaction was subsequent in time to the former. If, however, the former obtains registry on the corporate books, the corporation is at fault, and is liable to the purchaser with the certificates. The corporation must either issue new certificates to the latter or pay damages.

§ 436. *Danger of forgery.*[1]— Forgery cannot be the source of a good title to any chose in action, whether a promissory note, bond and mortgage, or a certificate of stock. Consequently a purchaser of stock takes the risk that some previous owner of the stock, whose name appears on the certificate either as the registered owner or as transferee, was deprived of his title by forgery. If the forgery has been made, the purchaser cannot claim or hold the stock, although he had no actual knowledge of the forgery. He, however, has recourse to his vendor, and may compel him to repay the amount paid for the stock. Where, however, the forgery was committed prior to the last *registered* transfer of that stock, a *bona fide* purchaser from or subsequent to the last *registered* holder of that stock is protected. All rights and equities to particular shares of stock are cut off by a registry and sale of the new certificates. The party whose name was forged has recourse then only to the corporation, or to the party obtaining registry, or to previous holders. This limitation to the dangers incident to the purchase of stock extends to other rights and wrongs as well as to a case of forgery, and is of great importance in protecting a *bona fide* purchaser of stock.

§ 437. *Loss or theft of certificates indorsed in blank.*[2]— It is extremely doubtful whether a purchaser of a certificate of stock which was indorsed in blank, and which has been lost by the owner and found by another who sells it, or which has been stolen by the latter, would be protected in his purchase, even though he buys in good faith. In a case of negotiable paper, such a purchaser would, of course, be protected. But probably the purchaser of the certificate of stock would not be. No case holds that he would be protected, while many hold that he would not. If the real owner was guilty of gross negligence, perhaps the purchaser from the thief or finder of the certificate indorsed in blank would be protected. In one case this question of negligence was submittted to the jury. Again, sometimes a person sells stock without delivering the certificate, the vendor telling the vendee that the certificates have been lost. Such a title is very precarious. The purchaser should refuse to buy until new certificates are issued by the corporation to the vendor,— an issue which the corporation will make upon a suitable bond of indemnity being given to it by the person who alleges a

[1] See ch. XXI, *supra*.

[2] See ch. XXI, *supra*.

loss. If the purchaser does not take this precaution he buys subject to having his title defeated by another purchaser who obtained the certificates which are alleged to have been lost.

§ 438. *Danger that a previous holder has been deprived of that same stock by fraud.*[1]— Shares of stock are the same as other kinds of property, in that a person who has been deprived of his stock by fraud cannot follow the stock and take it from the hands of a *bona fide* purchaser for value. The remedy of the defrauded person is for damages against the person defrauding him, or for a retransfer of the stock, if the latter still holds it, together with an injunction against the transfer of the latter. But if the person obtaining the stock by fraud sells it, even in violation of an injunction, the *bona fide* purchaser for value and without notice is protected. The defrauded party may, however, sue the person defrauding him in the state of the corporation, and, by an attachment or execution, obtain the stock if it has not passed into *bona fide* hands. Such a danger, however, is the ordinary danger of an attachment or execution. A *lis pendens* of a suit involving stock never charges the vendor of the stock with notice, as is the case of a *lis pendens* affecting real estate. Cases of fraud in the sale of stock frequently arise in cases of sales by agents and an appropriation of the proceeds; also when fraudulent representations are made to the vendor.

§ 439. *Statute of frauds.*[1]— The statute of frauds requires that sales of personal property exceeding in value a certain amount, generally fifty dollars, shall be valid and enforceable only when the property is partly or wholly delivered, or partly or wholly paid for at the time of the sale, or the terms of the sale are reduced to writing. In this country a sale of stock must conform to this statute. Generally the sale is made by a delivery of the certificate indorsed in blank. Such a sale constitutes a delivery, and is legal, and is not void by the statute of frauds. The statute applies both to sales of stock which are considered as completed and to sales which are to be completed in the future.

§ 440. *Gambling sales of stock.*[2]— A gambling sale or contract to sell stock is void absolutely, and cannot be enforced. As a matter of practical experience, however, it is difficult to prove that a stock sale is a gambling sale. It is such only when both the vendor and vendee intend, not to actually have a delivery of the stock, but to wait and see whether the stock rises or falls in the market, and then to settle the contract by the loser paying the loss. An intent by one of the parties that there shall be no delivery will not make the sale a gambling one. It must be the intent of both.

[1] See ch. XX, *supra*.

[2] See ch. XX, *supra*.

§ 441. *Method of assigning a certificate of stock.*[1]— A certificate of stock is generally assigned by the owners signing the blank transfer and power of attorney on the back of the certificate. The transfer gives title to him whose name is afterwards filled into the blank transfer thus signed. The blank power of attorney is for an entirely different purpose. It enables the person whose name is filled in to register the transferee as a stockholder in the corporate books. Generally the power of attorney is filled in with the name of a clerk or agent of the transferee, or a clerk of the corporation who has charge of the registry books. After the registered holder has signed the transfer, leaving the transferee's name in blank, the certificate passes from hand to hand until some holder cares to fill his name into the blank. He may then obtain registry, or he may execute another transfer and sell the certificate. Transfers need not be under seal in this country. In England, by statute, they generally are required so to be.

§ 442. *Registry of transfer.*[1]— A registry of transfer is made by surrendering an old certificate of stock to the corporation, making an entry of the transfer on the corporate registry and taking from the corporation a new certificate issued in the name of the transferee. The object of obtaining the registry is to obtain a right to vote, to receive dividends, and various other incidental stockholders' rights; also to cut off corporate liens and the rights of third parties who may attach or claim the stock. If there is a reasonable legal doubt as to the right of the applicant to obtain registry, the corporation may refuse it, and thus obtain the protection of being compelled to make it by legal proceedings. If two parties claim the stock, each denying the right of the other, the corporation may interplead, provided there is a reasonable legal doubt as to who is entitled to the stock. If the corporation improperly refuses to register a transfer when requested, the applicant may have his remedy in damages, but in most states cannot have a *mandamus*.

§ 443. *Purchaser not affected by rights of holders of that stock back of the last registry.*[2]— This rule is peculiar to stock certificates, and cuts off rights even of a former owner who has been deprived of the stock by forgery. The person who obtains a registry first, after the illegal act has been done, is not protected by this rule. But his *bona fide* purchaser of the new certificates and all subsequent purchasers are protected, and cannot be compelled to give up the stock to the prior owner who was deprived of it illegally.

§ 444. *Summary.*— It will be seen by a review of the sections of this chapter, that the dangers of loss incurred by the purchase of a

[1] See ch. XXII, *supra*.

[2] See §§ 367, 369, *supra*.

certificate of stock are not serious or numerous; and it is well that such is the result. Perhaps the most striking industrial feature of modern times is the accumulation of personal property, and the investment of that property, not in landed estates, but in the stocks and bonds of corporations. Such investments are made not alone by capitalists, but by thousands whose savings have no other satisfactory mode of disposition. In fact, it is curious to note how the different kinds of property have a different relative importance in the course of time. Five hundred years ago real estate was the only property that brought wealth and standing to its owner. Personal property was of little consequence, and not much of it was in existence. But during the past two hundred years personal property has risen to the ascendency. The banker, merchant, manufacturer, and capitalist have become wealthier than the land-owner. The banker millionaire is greater and more powerful than the nobility. Land, the old source of centralized wealth, inordinate power, caste privileges and hereditary rights, no longer maintains its preeminent importance.

And it is not alone the capitalist and banker that purchases and holds stock in corporations. The surplus wealth of the people at large is being invested in corporate stocks and bonds. Consolidations of railroad and manufacturing institutions are taking place on a colossal scale, and each consolidation involves the issue of new securities. A single company, The United States Steel Corporation, has issued bonds and stock aggregating over one and a half billions of dollars. The great railroad systems are annually increasing their capitalization. Street railways, gas companies, electric-light companies and water-works companies are continually adding to the list of these securities. In the course of time all these securities pass into the hands of investors, *bona fide* holders. It would hardly be an exaggeration to say that the law governing stocks and bonds, in the magnitude of the interests, the number of persons affected, and the variety of legal principles involved, is more important than all other branches of law combined. Even real estate, so far as the cities are concerned, is being absorbed by corporations, which issue stock to represent it. In the great moneyed centres stock constitutes the chief basis of credit, as collateral for loans at banks and trust companies. Hundreds of millions of dollars are loaned with no other security than certificates of stock transferred in blank with no registry whatsoever on the corporate books. Hence it is with reason that the constant tendency of the courts is to protect the *bona fide* purchasers of certificates of stock. It is fitting, in these days of the formative period of the law governing corporations and stock, that the principles governing the transfer of certificates should favor the protection and security of

the investing public, and should be against secret liens, attachments, claims, and negligence of both the corporation and third persons. The circuit court of appeals of the United States has well said: "In the great majority of cases when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper."[1]

[1] Masury *v.* Arkansas Nat. Bank, 93 Fed. Rep. 603 (1899).

PART III.

MISCELLANEOUS RIGHTS OF STOCKHOLDERS.

CHAPTER XXV.

STOCK-BROKERS AND THEIR CONTRACTS.

§ 445. *Definitions and scope of the subject.*— By far the greater part of purchases and sales of stock is made, both in this country and in England, through organizations specially formed for that purpose and called stock exchanges. A stock exchange is a place of business where those who make up the membership of the exchange buy and sell stocks and bonds. These persons are called stock-brokers. A stock-broker is one who buys and sells stock as the agent of another, the latter being called a customer of the stock-broker.[1] Accordingly, in an ordinary purchase of stock through stock-brokers, there are generally four persons involved — the two brokers and their respective customers. Stock-brokers have a language of their own. They have coined and put into

[1] In Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378 (1881), Finch, J., favors the definition from Pott *v.* Turner, 6 Bing. 702, 706 (1830), where a broker is defined as "one who makes bargains for another and receives a commission for so doing." Story on Agency, § 28 (9th ed.), says: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation, for a compensation commonly called brokerage."

general circulation certain phrases and terms descriptive of their business. These terms have become so closely identified with the subject of stock and transactions in stock that the courts have defined their meaning and explained their application. Definitions of a "bull," "bear," "short" sale, "long" purchase, "put," "call," "straddle," "margin," and "corner," are given in the notes below.[1] A "loan" of stock returnable on demand transfers the title in one sense, inasmuch as the borrower may return similar

[1] A "bull" is a dealer who endeavors to make the price of stocks go higher. A "bear" is a dealer who endeavors to make the price of stocks go lower. A "short" sale is a sale of stocks which the seller does not possess, but which he expects to purchase later on at a lower figure, thus fulfilling his contract and making a profit by the decline. In the meantime the broker generally borrows the stock from other parties to deliver to the vendee, and to be returned to the person loaning the stock at the end of the transaction. The customer deposits with the broker a small amount of money as security, called a "margin," and he is bound to keep the margin good. Hess *v.* Rau, 95 N. Y. 359 (1884); White *v.* Smith, 54 N. Y. 522 (1874); Knowlton *v.* Fitch, 52 N. Y. 288 (1873); Appleman *v.* Fisher, 34 Md. 540 (1871); Sistare *v.* Best, 88 N. Y. 527, 533 (1882). A sale for future delivery, although a "short" sale, is not a gambling contract *per se.* Clews *v.* Jamieson, 182 U. S. 461, 489 (1901). A margin "means, in the broker's lexicon, additional collateral security against loss to the broker while . . . carrying stock for his employer." McNeil *v.* Tenth Nat. Bank, 55 Barb. 59 (1869). A "long" purchase of stock is a purchase in the expectation that the stock will rise in value.

Stock options are of three kinds—puts, calls, and straddles. A "put" is a contract whereby a person has the privilege of requiring another person to take from the former certain specified stock at a specified price at any time within a specified period of time, the former not being bound to sell. See Bigelow *v.* Benedict, 70 N. Y. 202 (1877). A "call" is a contract whereby a person has the privilege of requiring another person to sell and deliver to the former certain specified stock at a specified price at any time within a certain specified period, the former not being bound to purchase. A "call" is an agreement to sell. Treat *v.* White, 181 U. S. 264 (1901). A "straddle" or "spread-eagle" is a combination of a put and a call. It gives a person the double privilege of delivering to or demanding from another person certain stock at a certain price within a specified time. Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Story *v.* Salomon, 71 N. Y. 420 (1877). A "corner" exists where the "bears" have sold a large quantity of stock "short," and cannot borrow the stock to fill their contracts, but must buy it from those who have cornered the market on that stock. See Cameron *v.* Durkheim, 55 N. Y. 425, 438 (1874). As to the legality of these various transactions, and as to whether they are gambling contracts, see §§ 341–348, *supra*, especially § 344, n. It is not fraud for the owner of the larger part of the capital stock of a corporation to "corner" the market, that is, to enter into contracts with various parties to purchase stock of the corporation, although he knew that such contracts could not be fulfilled by such parties by reason of the fact that he himself held such stock, and it could not be obtained elsewhere. The same rule prevails although such person offered the stock for public subscrip-

stock of the same amount, in place of returning the identical stock which was loaned to him.[1]

This chapter treats of the rights, duties, and liabilities of stock-brokers.[2] There are various incidental subjects, however, which enter largely into brokers' contracts, such as pledges of stock[3] and gambling sales of stock.[4] These subjects are fully treated elsewhere.

§ 446. *Who may be a broker and customer.*— Any person may be a stock-broker who may make a contract, but it is beyond the power of a national bank to act as a broker.[5] Strict rules prevail as to who may be a customer. An infant is not bound by his contracts with or through a stock-broker, any more than he is bound by his other contracts. Moreover, if the broker carries on stock transactions for an infant he is liable to the latter for all moneys lost thereby.[6] Again, a broker who sells or buys stock in the name of an infant is himself liable to the other party in case the contract is not completed by reason of such infancy.[7] On the other hand, if the broker's customer hands in the name of a third person,

tion and purchased the greater part himself. Salaman *v.* Warner. 64 L. T. Rep. 598 (1891); aff'd, 65 L. T. Rep. 132 (1891).

[1] Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Dykers *v.* Allen, 7 Hill, 497 (1844). See also § 469, *infra.* When a man sells stock on the exchange he must deliver it, and if he does not own any he must borrow it of some one who does. When he borrows the stock he advances the market price of it to the lender, who pays interest on this money. The transaction is really a call loan. The lender of the stock can call for his stock at any time, and the borrower can call for his money. A contract to return borrowed money or pay for it is a debt. Dibble *v.* Richardson, 171 N. Y. 131 (1902).

[2] See also, on this subject, Lindley on Companies, 6th ed., pp. 688–709.

[3] Ch. XXVI, *infra.*

[4] See ch. XX, *supra.*

[5] First Nat. Bank *v.* Hoch, 89 Pa. St. 324 (1879); Weckler *v.* First Nat. Bank, 42 Md. 581 (1875). But Williamson *v.* Mason, 12 Hun, 97 (1877), holds that a bank has power to take stock from a customer and agree to sell it and credit the customer with the proceeds, and that the bank is liable for the conversion of such stock by its cashier.

[6] Ruchizky *v.* De Haven, 97 Pa. St. 202 (1881). The transactions in this case were held to be gambling contracts. Heath *v.* Mahoney, 12 Week. Dig. 404 (1881). The broker himself may be an infant and may repudiate his obligations. See 4 Law Notes, 314.

[7] Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875); Heritage *v.* Paine, L. R. 2 Ch. D. 594 (1876). The first case holds him liable although ignorant of the infancy of his customer. See same case, Merry *v.* Nickalls, L. R. 7 Ch. App. 733 (1872). The broker is liable although the name of the infant was passed to him by another broker. Dent *v.* Nickalls, 29 L. T. Rep. 536 (1873); aff'd, 30 L. T. Rep. 644 (1874). It is no defense to the broker that the infant's father was the real customer. Nickalls *v.* Eaton, 23 L. T. Rep. 689 (1871). See also § 250, *supra*, as to the liability to the corporation itself.

an infant, as the seller or purchaser, such customer is liable to the broker for liabilities thereby incurred by the latter.[1]

§ 447. *Facts making person a broker or customer unintentionally.* The relationship of broker and customer may be established and exist although one of the parties is personally ignorant of such a relationship.[2] A broker also may be liable as such in transactions where he had no intention of incurring any liability.[3] A broker is nothing more nor less than an agent for a special purpose. The agency may arise by the acts of the parties without any specific agreement.

§ 448. *Broker must obey specific orders of customer.*— A broker is bound to obey and carry out strictly the orders of his customer in the purchase or sale of stock. This rule is rigidly insisted upon by the courts. The orders of the customer may be such as he wishes to give, and when given they must be obeyed, or liability will be incurred by the broker.[4] When the customer fixes a limit at which the broker may purchase, the latter cannot bind the customer by a purchase at a higher figure.[5] Frequently the customer gives to

[1] Peppercorne *v.* Clench, 26 L. T. Rep. 656 (1872).

[2] Where the firm does a broker business through its agents, the transactions by the agents on their own private accounts, but ostensibly for the firm, will bind the firm. Wells, etc. Co. *v.* Welter, 15 Nev. 276 (1880). *Cf.* Masterton *v.* Boyce, 6 N. Y. Supp. 65 (1889). A customer's statement that he would like to make a dollar if he could is not sufficient authority for a broker to buy stocks for him. Hopkins *v.* Clark, 7 N. Y. App. Div. 207 (1896); aff'd, 158 N. Y. 299 (1899), holding also that the customer is not liable for an unreasonable use of discretion by the broker.

[3] As where he continues to allow his name to remain in the firm name after its dissolution. Hixon *v.* Pixley, 15 Nev. 475 (1880). Also where one of the firm is a trustee and defaults therein, the firm having charge of the trust estate's stocks. De Ribeyre *v.* Barclay, 23 Beav. 107 (1857). As a silent partner he cannot prevent a customer from setting off against a liability a debt personal to the ostensible sole broker. Read *v.* Jaudon, 35 How. Pr. 303 (1868). A stock-broker is bound to obey orders promptly. Galigher *v.* Jones, 129 U. S. 193 (1889).

[4] Parsons *v.* Martin, 77 Mass. 111 (1858). Thus, where the customer authorizes a sale if the stock goes down to 51, but the broker sells when it goes down to 52, he is liable for an unauthorized sale. Clarke *v.* Meigs, 10 Bosw. 337 (1863). *Cf.* Whelan *v.* Lynch, 60 N. Y. 469 (1875); Jones *v.* Marks, 40 Ill. 313 (1866). But the broker may correct a palpable error in the order given him by his customer. Luffman *v.* Hoy, 13 N. Y. Week. Dig. 324 (1881). Where the customer tells the broker that unless he sells at once he must bear any further loss, the customer is not liable for further losses. Zimmerman *v.* Heil, 86 Hun, 114 (1895).

[5] Whether a limit was fixed is a question for the jury, if the facts are disputed. *Cf.* Smith *v.* Bouvier, 70 Pa. St. 325 (1872). The customer may ratify the unauthorized purchase. Genin *v.* Isaacson, 6 N. Y. Leg. Obs. 213 (1848). If the power to sell depends on the construction of writings, it is a question of law only. Davis *v.* Gwynne, 57 N. Y. 676 (1874); s. c., 4 Daly, 218 (1871). But the written order may be subsequently modified by parol. Burkitt *v.* Taylor, 13

the broker a "stop order," which is an order to sell or buy, as the case may be, at a certain specified figure, or upon a specified contingency. Under this order the broker must sell or buy when the price or contingency occurs, but not until after it occurs. If the market changes too quickly for him, he must sell or buy at the market price immediately after the fixed price or contingency arises.[1] The customer may leave it in the discretion of the broker as to the best time for buying or selling.[2] When this is done the broker must exercise such discretion in good faith and with reasonably good judgment and care.[3] A stock-broker is not liable for contracts which he knew nothing about, and which were agreed to in his name by an assistant of one of his employees, especially where the customer knew such to be the fact.[4]

§ 449. *Must act in good faith and in reasonable time.*— The broker must make the purchase or sale in good faith on the best terms possible, and must give the customer the advantage of the transaction as actually made. Any material failure to do this, or to make the sale or purchase as directed, will release the customer from the transaction, although it was reported to him as made in accordance with orders.[5] The broker is allowed a reasonable time within

N. Y. Week. Dig. 75 (1881); Clarke *v.* Meigs, 10 Bosw. 337 (1863). Or be waived. Hope *v.* Lawrence, 50 Barb. 258 (1867).

[1] Porter *v.* Wormser, 94 N. Y. 431 (1884); Bertram *v.* Godfray, 1 Knapp P. C. 381 (1830). The latter case involved an absolute order to sell should the stock reach a certain price. Where a broker is carrying a "short" sale on a "stop order," and purchases before the price of the "stop order" is reached, and the customer, a week later, then orders the broker to purchase, the purchaser may recover the profit that a purchase at the latter date would have netted. Campbell *v.* Wright, 118 N. Y. 594 (1890). Brokers cannot disregard a "stop order," and act before that price is reached, even though prices are fluctuating rapidly. Campbell *v.* Wright, 118 N. Y. 594 (1890). See also § 459, *infra.*

[2] Such discretion, when given, is revoked only by clear notice of revocation. Davis *v.* Gwynne, 4 Daly, 218 (1871).

[3] Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Hopkins *v.* Clark, 158 N. Y. 299 (1899).

[4] Timpson *v.* Allen, 149 N. Y. 513 (1896). The customer may be bound by the acts of his clerk. Webb *v.* Challoner, 2 Fost. & F. 120 (1860). As to dealings with a stock-broker's clerk, see Spooner *v.* Browning, 78 L. T. Rep. 98 (1898).

[5] Where the broker buys in his own name at a price less than the price reported to the customer, sells without notice, and subsequently pretends to sell again, the whole transaction is void as to the customer. Levy *v.* Loeb, 85 N. Y. 365 (1881); 89 N. Y. 386. So, likewise, where he purchases an option instead of cash purchase, and reports a higher price than that paid. Voris *v.* McCredy, 16 How. Pr. 87 (1856). So, likewise, where the broker varies the order from a cash purchase to an option, he himself taking the risk of the option. Day *v.* Holmes, 103 Mass. 306 (1869); Pickering *v.* Demerritt, 100 Mass. 416 (1868). A broker who sells bonds and then reports no sale, but loans money to the customer on the

which to make the sale or purchase.[1] Where the principal gives an order to the broker to sell certain stock which the principal owns, and the broker, by fraudulent representations, dissuades him from selling, the principal may hold the broker liable in damages.[2] An agreement with brokers by which a person is to cause a legislative investigation, and, in case certain stock decline, such person was to share in the profits of short sales, is illegal and not enforcible.[3]

§ 450. *Cannot purchase from or sell to himself.*— A broker cannot, in behalf of his customer, buy from or sell to himself as the other principal. The law will not allow him to act both as agent and as principal at the same time. Such an act is a constructive fraud on account of his fiduciary relation, and will be set aside.[4]

bonds as collateral, may be held liable to account for the sale. Bischoffsheim *v.* Brown, 34 Fed. Rep. 156 (1888). Where an agent or broker is employed to buy stock for a "pool," and agrees to do so for a compensation consisting of a part of the profits, he is liable in damages for fraud if he charges the "pool" more than the stock cost him. Manville *v.* Lawton, 19 N. Y. Supp. 587 (1892).

[1] Fletcher *v.* Marshall, 15 M. & W. 755 (1846). *Cf.* Dickenson *v.* Lilwal, 1 Starkie, 128 (1815), which holds that the transaction must be carried out on the day of the order. The broker is entitled to his commission although his customer fails before the transaction is made. Inchbald *v.* Western, etc. Co., 34 L. J. (C. P.) 15 (1864). The contract is to be carried out within a reasonable time. A broker's custom is evidence as to what is reasonable time. Stewart *v.* Cauty, 8 M. & W. 160 (1841). A few hours' notice held insufficient. Johnson *v.* Mulvy, 51 N. Y. 634 (1872). "Usually the broker is entitled to a fair and reasonable opportunity to perform his obligation, subject of course to the right of the seller to sell independently. But that having been granted him, the right of the principal to terminate his authority is absolute and unrestricted, except only that he may not do it in bad faith and as a mere device to escape the payment of the broker's commissions." Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 384 (1881). A customer is under no obligation, when he learns that his broker has not sold stock as ordered, to notify the broker that he abandoned any claim to the stock and held the broker responsible for their value. Nor is he obliged to redeem the stock from the sub-broker. Allen *v.* McConihe, 124 N. Y. 342 (1890). In this case the court allowed as damages against a broker who delayed selling when ordered to sell, the difference between the price when the order was given and the price when the sale was actually made. Where for four years both the broker and the customer have apparently abandoned an alleged purchase of stock on a margin, it is a question for the jury whether there was an abandonment or whether the customer continued to be liable. Seligman *v.* Rogers, 113 Mo. 642 (1893). A broker ordered to purchase stock on a margin need not actually purchase at once. It is sufficient if he is ready to fulfill when called upon so to do at the price on the day of the giving of the order. Ingraham *v.* Taylor, 58 Conn. 503 (1889).

[2] Fottler *v.* Moseley, 179 Mass. 295 (1901).

[3] Veazey *v.* Allen, 173 N. Y. 359 (1903).

[4] Mayo *v.* Knowlton, 134 N. Y. 250 (1892); Conkey *v.* Bond, 36 N. Y. 427

Custom or usage cannot legalize such a transaction.[1] The broker may, however, show by parol evidence that he did not deal with himself, though writings indicate otherwise.[2] And there is no rule which prevents the broker from acting as agent both for the selling and the buying customer.[3] Where the broker turns over his own stock to the client's account instead of buying, and sells the client's stocks without orders so to do, and afterwards buys them back, all without his client's knowledge, he cannot recover commissions.[4]

§ 451. *Duties and liabilities of customer towards broker.*— A stock-broker is but the agent of his customer. As such he may bind his customer by acts within the scope of his authority, and compel the customer to respond to his liability. Thus, the broker may proceed to close the transaction, paying out his own money as

(1867); Brookman *v.* Rothschild, 3 Sim. 153 (1829); Marye *v.* Strouse, 5 Fed. Rep. 483 (1880); Robinson *v.* Mollett, L. R. 7 H. L. 802, 818, 826 (1875). Even though the purchase was in good faith and at a lower figure than the market price. Taussig *v.* Hart, 58 N. Y. 425 (1874); Giliett *v.* Peppercorne, 3 Beav. 78 (1840). In Bryan *v.* Baldwin, 52 N. Y. 232 (1873), the court said: "The plaintiff, being pledgee of the stock, and in that character exposing it for sale, could not become the purchaser unless the defendant assented to such purchase. Story on Bailments, § 319; Torrey *v.* Bank of Orleans, 9 Paige, 649 (1842); Hawley *v.* Cramer, 4 Cow. 717, 736 (1825). This sale to the plaintiff was not void, but voidable at the election of the defendant. Edwards on Bailments, 260, 261. The defendant was at liberty to ratify the sale, and had he done so it would have been valid for all purposes. The ratification would have made it lawful, and relieved it from any imputation of being tortious as to him. . . . But the defendant has not done this, but has elected to treat the purchase by the plaintiff as illegal. This avoids the sale, and, that being avoided by the defendant, the parties are remitted to their rights the same as though no sale had been attempted." It seems that where a broker has an order to sell from one customer and an order to buy from another, he may employ a fellow-broker to purchase on the exchange when the sale is made. Terry *v.* Birmingham, etc. Bank, 99 Ala. 566 (1893). Even though, in closing an account on the death of the customer, the broker sells to a jobber and agrees to repurchase at the same price later on, yet if the price is the fair market price the broker may recover from the customer the loss. Macoun *v.* Erskine, etc. Co., [1901] 2 K. B. 493. But where the broker immediately repurchases and obtains the stock at a less price than the price at which he sold, he must account to his customer for the profit. Erskine, etc. Co. *v.* Sachs, etc., [1901] 2 K. B. 504.

[1] Commonwealth *v.* Cooper, 130 Mass. 285 (1881). The custom of brokers to buy in large quantities and sell in small quantities is illegal. Robinson *v.* Mollett, L. R. 7 H. L. 802 (1875).

[2] Porter *v.* Wormser, 94 N. Y. 431 (1884).

[3] Knowlton *v.* Fitch, 52 N. Y. 288 (1873).

[4] Skelton *v.* Wood, 71 L. T. Rep. 616 (1894). Where a broker, instead of selling directly to a purchaser, sells through another person at a less figure in order to cheat his customer, he cannot collect commissions unless the customer knew of the fraud at the time he closed the transaction. Hafner *v.* Herron, 165 Ill. 242 (1896).

though it was his own business, and may then compel the customer to repay to him the money so expended in the customer's behalf.[1] Or, if his customer refuses to carry out the transaction, the broker may settle with the opposite party by paying the loss incurred by buying or selling the stock elsewhere, and may then sue his customer for the differences thus paid.[2] He may also recover his disbursements, commissions, and interest.[3] The customer is liable to the broker for stock purchased, although the stock turns out to be spurious or unauthorized.[4] If the broker seeks to recover the full value of stock which he has purchased for his customer, he must first tender the stock to the customer,[5] or he must sell it after due notice to the customer, and thus accurately ascertain the loss.[6] If he is seeking to recover for differences paid the opposite broker in settlement, *assumpsit* is his remedy.[7] He must clearly prove that the customer authorized the order.[8] The broker has a lien on

[1] Bayley *v.* Wilkins, 7 C. B. 886 (1849); Whitehouse *v.* Moore, 13 Abb. Pr. 142 (1861); Dails *v.* Lloyd, 12 Q. B. 531 (1848). *Cf. Ex parte* Neilson, 3 De G., M. & G. 556 (1853). See also § 461, *infra.*

[2] Durant *v.* Burt, 98 Mass. 161 (1867); Bayliffe *v.* Butterworth, 5 Railw. Cas. 283, per Parke, B. (1847); Marten *v.* Gibbon, 33 L. T. Rep. 561 (1876); Biederman *v.* Stone, L. R. 2 C. P. 504 (1867).

[3] Where the commissions and interest were paid to other brokers, they may be charged to the customer. Robinson *v.* Norris, 51 How. Pr. 442 (1874). Even though the interest was usurious. Smith *v.* Heath, 4 Daly, 123 (1871). On commissions, see Inchbald *v.* Western, etc. Co., 34 L. J. (C. P.) 15 (1864). Excessive expenses will not be allowed, although customary. Marye *v.* Strouse, 5 Fed. Rep. 483 (1880). The broker is entitled to commissions only when he has rendered some service to the customer. Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378 (1881); Hoffman *v.* Livingston, 46 N. Y. Super. Ct. 552 (1880). The case of Hatch *v.* Douglas, 48 Conn. 116 (1880), holds that the broker's customary monthly charges and interest thereon are not usurious. *Cf.* Robinson *v.* Norris, 6 Hun, 233 (1875). The broker may recover from the principal the purchase price of stocks bought by the broker, but not delivered, before the corporation became insolvent. Chapman *v.* Shepherd, L. R. 2 C. P. 228 (1867). Members of a syndicate are jointly liable to a broker employed by them. Sternberger *v.* Bernheimer, 121 N. Y. 194 (1890).

[4] See Adamson *v.* Jarvis, 4 Bing. 66 (1827); Peckham *v.* Ketchum, 5 Bosw. 506 (1859). So, also, for spurious stock innocently given to the broker to sell. Westropp *v.* Solomon, 8 C. B. 345 (1849). See also § 452, *infra.*

[5] Merwin *v.* Hamilton, 6 Duer, 244 (1856); Bowlby *v.* Bell, 3 C. B. 284 (1846). But after once tendering it he need not continually keep it on hand. Wynkoop *v.* Seal, 64 Pa. St. 361 (1870).

[6] Monroe *v.* Peck, 3 Daly, 128 (1869). In Rosenstock *v.* Tormey, 32 Md. 169 (1869), the necessary allegations were held to be a purchase of stock according to an order, at fair market price, which was paid, and the customer notified and payment demanded; willingness to deliver the stock; refusal of customer to pay; notice of sale; a proper sale; and loss.

[7] Pollock *v.* Stables, 12 Q. B. 765 (1848). *Contra*, Child *v.* Morley, 8 T. R. 610 (1800).

[8] Ward *v.* Van Duser, 2 Hall (N. Y.), 162 (1829). In White *v.* Baxter, 71 N. Y.

the customer's property in his hands for all debts due to the former.[1]

§ 452. *Duties and liabilities of a broker towards customer.*— The broker also owes certain duties and incurs certain liabilities in his relations with his customer. It is said that he cannot sell on credit, since that is not the usual course of his business.[2] He is liable in damages for failure to buy or sell in accordance with his express orders.[3] Where the customer fails to carry out the transaction, but the broker does carry it out at a profit, the profit belongs to the customer.[4] But the customer is not entitled to stock held for him by the broker until he pays the broker all his reasonable disbursements thereon.[5] The broker may deposit a margin with the opposite broker, according to custom, and not be responsible to his customer if it is lost,[6] although the rule may be otherwise as to a delivery of the stocks themselves.[7] The broker is required to exercise reasonable diligence and care, and no more.[8] But he has no such lien if he knows that the customer is acting as agent for another.[9] It is a question of doubt whether a broker who has received in good faith commissions from a person guilty of embezzlement is liable to pay over to the persons injured by his customer commissions so received.[10] Where a broker has with notice dealt

254 (1877), the court held that a customer's contract with his broker to protect the latter against loss by expulsion from the stock exchange for non-compliance with its rules is a valid and enforceable contract.

[1] Jones *v.* Peppercorne, Johns. (V.-C.) (1858). Brokers have a general lien upon all securities of their customers which come into their hands in the ordinary course of business for all sums due to them from such customers. *Re* London, etc. Corp., 87 L. T. Rep. 49 (1902).

[2] 2 Kent, Com. 622 (b), 14th ed.

[3] Speyer *v.* Colgate, 4 Hun, 622 (1875); Whelan *v.* Lynch, 60 N. Y. 469 (1875), the case of a wool-broker. See also Jones *v.* Marks, 40 Ill. 313 (1866). The damages may sound in tort, thus preventing a release in bankruptcy from barring the action. Parker *v.* Crole, 5 Bing. 63 (1828). Under the New York code he may be arrested if he does not use the money for the purpose designated. Dubois *v.* Thompson, 1 Daly, 309 (1863). And in England he is liable criminally. Regina *v.* Cronmire, 54 L. T. Rep. 580 (1886).

[4] Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876).

[5] See McEwen *v.* Woods, 11 Q. B. 13 (1847), where the broker paid calls made on the stock after its sale.

[6] Gheen *v.* Johnson, 90 Pa. St. 38 (1879).

[7] Brown *v.* Boorman, 11 Cl. & F. 1 (1844).

[8] Phillips *v.* Moir, 69 Ill. 155 (1873); Gheen *v.* Johnson, 90 Pa. St. 38 (1879). As to the construction of a contract wherein the broker invests the customer's money as the broker sees fit, and the broker guarantees the return of the capital and interest and all profits made, see Vermilye's Case, 43 N. J. Eq. 146 (1887). As to the liability of stock-brokers and jobbers and vendees towards the vendors, see also 1 White & T. Lead. Cas., 6th Eng. ed., pp. 922–929.

[9] Fisher *v.* Brown, 104 Mass. 259 (1870); Pearson *v.* Scott, L. R. 9 Ch. D. 198 (1878).

[10] See Butler *v.* Finck, 21 Hun, 210

with a trustee who was using trust securities illegally, the broker may be held liable at law for conversion, or in equity to reach the securities and account for the dividends and their value.[1] A broker may, by bill of discovery, be compelled to disclose acts amounting to misconduct.[2] Where the brokers do not make actual purchases and sales as ordered, but carry the same on their books and report fictitious transactions, they are guilty of fraud, and the customer may recover back money paid, even though, if the transactions had been carried out, the customer would have lost his money. The records of the stock-exchange clearing-house may be competent evidence.[3] A broker is not responsible where he in good faith loans his customer's money, in compliance with his authority, on certificates of stock as collateral, even though they turn out to be forged, provided he was not guilty of negligence. The latter is a question for the jury, and the burden of proof is on the broker. The broker is not bound to present the certificates to the company for verification.[4] Where the broker deposits money in a bank, the bank has a banker's lien on it, although the money really belongs to the broker's client.[5] After a broker has purchased according to order, but his customer dies before the stock is paid for, it is the duty of the broker to sell immediately upon the death of his client, and not to carry the transaction along and afterwards sell.[6]

§ 453. *Brokers' customs and usages.*— It has been a greatly disputed question as to how far and when a custom or usage among stock-brokers or at stock exchanges may enter into and govern

(1880). The case of Taft *v.* Chapman, 50 N. Y. 445 (1872), seems to hold that the broker is not liable where he acted without knowledge of his customer's acts. See also S. C. *sub nom.* Brownson *v.* Chapman, 63 N. Y. 625 (1875). See also Porter *v.* Parks, 49 N. Y. 564 (1872); § 350, n., *supra.* The case of Kissam *v.* Anderson, 145 U. S. 435 (1892), reversed the decision below (Anderson *v.* Kissam, 35 Fed. Rep. 699, holding the broker liable) on the ground that it was for the jury to say whether the bank, whose funds were used by the president to pay the broker, had notice of payment by the broker to the president. A broker who takes money as a margin, knowing that the money comes from a trustee and is trust-estate money, is liable to the estate for money lost thereby. Leake *v.* Watson, 58 Conn. 332 (1890). A broker taking, in payment of losses by an individual, checks drawn by him as an officer of a corporation, must refund the money. Huie *v.* Allen, 87 Hun, 516 (1895).

[1] English *v.* McIntyre, 29 N. Y. App. Div. 439 (1898).

[2] Green *v.* Weaver, 1 Sim. 404 (1827). See Rawlings *v.* Hall, 1 Car. & P. 11 (1823).

[3] Prout *v.* Chisolm, 21 N. Y. App. Div. 54 (1897).

[4] Isham *v.* Post, 141 N. Y. 100 (1894). See also §§ 296, 369, 451, *supra*, and § 454, *infra*, and Andrews *v.* Clark, 72 Md. 396 (1890). As to a broker's liability on stolen and lost certificates of stock, see § 358, *supra.*

[5] Thomson *v.* Clydesdale Bank, [1893] A. C. 282.

[6] *Re* Overweg, [1900] 1 Ch. 209. *Cf.* § 459, *infra.*

stock-brokers' contracts. At an early day the rule was laid down by the English courts that he who buys or sells stock through a stock-broker must be considered as dealing with him according to the usages of the market in which he deals, and the customs which prevail in relation to that species of business.[1] A late decision, however, seems to hold that a stock-exchange custom does not bind the customer unless he knew of it and agreed to it.[2] The American rule allows usages of brokers to interpret the language of the contract, and where it is obscure to ascertain its nature and extent, but not to vary its terms, introduce new conditions, or authorize acts contrary to its provisions.[3] The customer may,

[1] In Biederman *v.* Stone, L. R. 2 C. P. 504 (1867), the court said: "It has been held in a great number of cases that persons buying or selling stock or shares through members of the stock exchange are bound by the rules which govern the transactions of that body." To the same effect, see Bayliffe *v.* Butterworth, 5 Railw. Cas. 283 (1847), per Parke, B.; Mitchell *v.* Newhall, 15 M. & W. 308 (1846); Maxted *v.* Paine, L. R. 6 Exch. 132 (1871); Grissell *v.* Bristowe, L. R. 4 C. P. 36, 47 (1868); Appleman *v.* Fisher, 34 Md. 540 (1871); Coles *v.* Bristowe, L. R. 4 Ch. App. 3 (1868); Stray *v.* Russell, 1 El. & El. 888 (1859); Davis *v.* Haycock, L. R. 4 Exch. 373 (1869); Nickalls *v.* Merry, L. R. 7 H. L. 530 (1875). *Cf.* Pollock *v.* Stables, 12 Q. B. 765 (1848); Taylor *v.* Stray, 2 C. B. (N. S.) 175 (1857); Morrice *v.* Hunter, 14 L. T. Rep. 897 (1866); Kingsbury *v.* Kirwin, 43 N. Y. Super. Ct. 451 (1878); aff'd, 77 N. Y. 612. But the usage must not be illegal. Robinson *v.* Mollett, L. R. 7 H. L. 802, 818, 826 (1875); Hodgkinson *v.* Kelly, L. R. 6 Eq. 496 (1868); Tayler *v.* Great Indian, etc. Ry., 4 De G. & J. 559, 573 (1859). Nor may the custom be established by that one transaction. Westropp *v.* Solomon, 8 C. B. 345 (1849). It must be reasonable. Goldschmidt *v.* Jones, 22 L. T. Rep. 220 (1870). A usage that is contrary to an act of parliament, requiring the broker to notify his customer of the particular numbers of the shares purchased on his account, is void. Perry *v.* Barnett, L. R. 15 Q. B. D. 388 (1885). *Cf.* Seymour *v.* Bridge, L. R. 14 Q. B. D. 460 (1885). Thus, a usage by which the ultimate purchaser's name is handed to the seller for the purpose of having the latter execute a transfer to the former is upheld. Sheppard *v.* Murphy, 16 W. R. 948 (1868).

[2] Blackburn *v.* Mason, 68 L. T. Rep. 510 (1893).

[3] "Usage can be admitted to interpret the language of a contract where it is obscure, but not to change its legal character, or derogate from the rights of parties, or authorize acts contrary to its provisions." German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894); Parsons *v.* Martin, 77 Mass. 111 (1858); Hopper *v.* Sage, 112 N. Y. 530 (1889); Lombardo *v.* Case, 30 How. Pr. 117 (1865); 1 Addison, Contracts (8th Eng. ed., 1883), *p. 60; 21 Am. L. Reg. (N. S.) 176, note; Marye *v.* Strouse, 5 Fed. Rep. 483 (1880). *Cf.* Winans *v.* Hassey, 48 Cal. 634 (1874). The case of Baker *v.* Drake, 66 N. Y. 518 (1876), holds that stock-brokers' usage cannot add to or make part of the contract. *Cf.* Horton *v.* Morgan, 19 N. Y. 170 (1859); Peckham *v.* Ketchum, 5 Bosw. 506 (1859); Whitehouse *v.* Moore, 13 Abb. Pr. 142 (1861). If there is doubt as to the existence of the usage the question is for the jury. Dent *v.* Nickalls, 29 L. T. Rep. 536 (1873); aff'd, 30 L. T. Rep. 644 (1874). The usage may be introduced in evidence to show how the business is to be transacted, but it must not be unreasonable. Rosenstock *v.* Tormey, 32 Md. 169 (1869),

however, by express agreement, waive his common-law rights and allow usage to govern the transaction.[1] A customer directing a purchase of stock in the New York Stock Exchange is bound by the usages and customs of that exchange.[2] Although a transfer of stock is on a separate piece of paper, and is not acknowledged as required by a rule of the stock exchange, nevertheless the pledgee may be a *bona fide* holder.[3]

§ 454. ***Privity of contract between broker and opposite parties.***— A broker who buys or sells stock does so subject to certain liabilities towards the parties to whom he sells or from whom he buys. If he does not send in the name of his customer, he is liable on the trans-

holding also that the broker's correspondence with his city broker is not competent to prove purchases and sales. Upon the effect of usage in other transactions, see Corn Exchange Bank *v.* Nassau Bank, 91 N. Y. 74 (1883); Richmond *v.* Union Steamboat Co., 87 N. Y. 240 (1881); Walls *v.* Bailey, 49 N. Y. 464 (1872); Vail *v.* Rice, 5 N. Y. 155 (1851); Delafield *v.* Illinois, 26 Wend. 192 (1841); Dawson *v.* Kittle, 4 Hill, 107 (1843); Boardman *v.* Gaillard, 1 Hun, 217 (1874); Minnesota Cent. Ry. *v.* Morgan, 52 Barb. 217 (1868); Sipperly *v.* Stewart, 50 Barb. 62, 68 (1867); Duguid *v.* Edwards, 50 Barb. 288 (1867); Haskins *v.* Warren, 115 Mass. 514, 536 (1874); Dickinson *v.* Gay, 89 Mass. 29 (1863); Parrott *v.* Thacher, 26 Mass. 426 (1830); Greenleaf *v.* Moody, 95 Mass. 363 (1866); Tilley *v.* Cook County, 103 U. S. 155 (1880); National Bank *v.* Burkhardt, 100 U. S. 686 (1879); Vermilye *v.* Adams Exp. Co., 21 Wall. 138 (1874); Forrestier *v.* Bordman, 1 Story, 43 (1839); s. c., 9 Fed. Cas. 459; Oelricks *v.* Ford, 23 How. 49 (1859); Renner *v.* Bank of Columbia, 9 Wheat. 581 (1824); Cope *v.* Dodd, 13 Pa. St. 33 (1850); Corbett *v.* Underwood, 83 Ill. 324 (1876); Phillips *v.* Moir, 69 Ill. 155 (1873); Bissell *v.* Ryan, 23 Ill. 566 (1860); Williams *v.* Gilman, 3 Me. 276 (1825); Partridge *v.* Forsyth, 29 Ala. 200 (1856); Halwerson *v.* Cole, 1 Spears (S. C.), 321 (1843); Hogg *v.* Snaith, 1 Taunt. 346 (1808); Gibson *v.* Crick, 1 Hurlst. & C. 142 (1862); Fleet *v.* Murton, L. R. 7 Q. B. 126 (1871). Brokers' usages cannot vary fixed principles of law. Hopper *v.* Sage, 112 N. Y. 530 (1889). The custom (in the oil trade) of giving the seller time to investigate and object to a purchaser may be insisted on by the seller. Sumner *v.* Stewart, 69 Pa. St. 321 (1871).

[1] In Robinson *v.* Norris, 51 How. Pr. 442 (1874), the court said: "It has been settled by our court of appeals that no custom among brokers can deprive parties of rights which the law gives them, but they have not decided that those rights may not be waived by agreement. I think it perfectly clear that if the broker informs his customer of the terms upon which he will act for him as his broker, and in view of that notice the customer gives an order, he is bound by the terms on which the broker proposed to act for him." See also Baker *v.* Drake, 66 N. Y. 518 (1876). See, in general, Colket *v.* Ellis, 10 Phila. 375 (1875); Sutton *v.* Tatham, 10 Ad. & El. 27 (1839); Bayley *v.* Wilkins, 7 C. B. 886 (1849); Duncan *v.* Hill, L. R. 6 Exch. 255 (1871); Sheppard *v.* Murphy, Ir. Rep. 2 Eq. 544 (1868); Bowring *v.* Shepherd, L. R. 6 Q. B. 309 (1871); Evans *v.* Waln, 71 Pa. St. 69 (1872); Sweeting *v.* Pearce, 7 C. B. (N. S.) 449 (1859); Shaw *v.* Spencer, 100 Mass. 382 (1868); Day *v.* Holmes, 103 Mass. 306 (1869). See also § 477, *infra;* 121 Fed. Rep. 376.

[2] Taylor *v.* Bailey, 169 Ill. 181 (1897).

[3] Smith *v.* Savin, 141 N. Y. 315 (1891).

action as though he were the principal himself.[1] He has been held liable for a forgery perpetrated by his customer.[2] Where stock stands in the name of two trustees and one of them signs a transfer and forges the name of the other trustee and sells the stock through a broker, the other trustee whose name was forged may hold the corporation liable for the stock, if it has allowed a transfer, and the corporation may hold the broker liable.[3] Where the broker hands in the name of his customer, and that name is accepted, the broker is thereby discharged,[4] unless, of course, the name is unauthorized, or is that of an infant.[5] Upon the disclosure by the broker of his customer's name, the opposite party has the option of holding either the broker or his customer responsible, but cannot hold both.[6] A broker who claims to be acting for an undisclosed principal in contracting for the purchase of bonds, and who stipulates that he shall not be personally liable, cannot enforce such contract, if in fact he was the principal himself.[7] Where the broker buying stock does not have it transferred on the books, and does not divulge the name of his principal, and the vendor is obliged to pay a statutory liability on the stock, the broker is personally

[1] Wynne *v.* Price, 3 De G. & Sm. 310 (1849). Where a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation. The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900).

[2] Royal Exch. Ins. Co. *v.* Moore, 11 W. R. 592 (1863). The broker herein sold in his own name, but the opposite party knew he acted as a broker. See also § 452, *supra.*

[3] Oliver *v.* Governor, etc., [1901] 1 Ch. 652; aff'd, Oliver *v.* Governor, etc., 86 L. T. Rep. 248 (1902).

[4] Maxted *v.* Paine, L. R. 6 Exch. 132 (1871), holding that the broker does not guarantee his customer's responsibility, nor that he is the real purchaser. So also of the stock-jobber. Grissell *v.* Bristowe, L. R. 4 C. P. 36 (1868). *Contra,* Cruse *v.* Paine, L. R. 6 Eq. 641 (1868).

[5] See § 446, *supra.* A broker handing in the name of a customer without authority is himself liable. Maxsted *v.* Morris, 21 L. T. Rep. 535 (1869). *Cf.* Shepherd *v.* Gillespie, L. R. 5 Eq. 293 (1867).

[6] Watson *v.* Miller, 11 W. N. 18 (1876). A custom or usage releasing the broker from this liability is void. Magee *v.* Atkinson, 2 M. & W. 440 (1837). *Cf.* Jones *v.* Littledale, 1 Nev. & P. 677 (1837), the sale being of hemp. Also Thomson *v.* Davenport, 9 B. & C. 78 (1829), holding that the purchaser's option remains open until the *name* of the undisclosed principal is given. It is for the jury to say which one the opposite customer gave credit to, irrespective of a stock-exchange custom. Mortimer *v.* McCallan, 6 M. & W. 58 (1840).

[7] Paine *v.* Loeb, 96 Fed. Rep. 164 (1899).

liable to him.[1] A stock-broker is liable to the owner for the value of mining shares received for sale from one who had stolen them, although he acted in good faith, without notice, and paid the proceeds to the thief, relying on his representations of ownership.[2] Where a person secretly speculates in stock in the name of another person, the latter having accounts with brokers, in some of which accounts the former is not interested, the former cannot maintain a bill for accounting against the brokers.[3]

§ 455. *Privity of contract between the opposite customers.*—When the broker of one customer has agreed with the broker of another customer on the terms of a purchase and sale of stock, there immediately arises a privity of contract between the two customers. A customer may be sued by a dealer from whom his broker has purchased specific stock, and the dealer may sell the stock after notice, and recover the loss.[4] The purchasing customer is liable to the selling customer for all calls and liabilities arising on the stock after the broker's contract is made, if the selling customer is obliged to pay such liabilities by reason of his being the registered stockholder.[5] So also the purchasing customer may hold the selling customer responsible for the carrying out of the contract.[6] It has

[1] Boultbee v. Gzowski, 29 Canada S. C. Rep. 54 (1898).

[2] Swim v. Wilson, 90 Cal. 126 (1891).

[3] MacKay v. Hudson, 118 Fed. Rep. 919 (1902).

[4] Anderson v. Beard, [1900] 2 Q. B. 260. A broker's client is not liable to a stock-jobber of whom the broker has purchased stock, a portion of such stock to go to the broker's client. No usage of the stock exchange can create such liability. Beckhuson v. Hamblet, [1900] 2 Q. B. 18; aff'd, [1901] 2 K. B. 73. Where a client buys stock on the stock exchange through his broker, and the broker fails before the delivery of the stock, the jobber selling the stock may hold the client liable for any loss due to the client refusing to accept the stock. Levitt v. Hamblet, [1901] 2 K. B. 53; compare Beckhuson v. Hamblet, [1901] 2 K. B. 73, aff'g [1900] 2 Q. B. 18.

[5] Hawkins v. Maltby, L. R. 4 Ch. App. 200 (1869), aff'g s. c., L. R. 6 Eq. 505; Evans v. Wood, L. R. 5 Eq. 9 (1867); Hodgkinson v. Kelly, L. R. 6 Eq. 496 (1868); Remfrey v. Butler, 1 E., B. & E. 887 (1858); Allan v. Graves, L. R. 5 Q. B. 478 (1870). A stock-exchange custom making the broker a principal does not prevent the customer suing as principal. Langton v. Waite, L. R. 6 Eq. 165 (1868). The refusal of the directors to register the sale does not enable the purchasing customer to recover back the purchase price. Stray v. Russell, 1 El. & El. 888 (1859). The purchaser may be compelled, by a bill in equity, to register the transfer made through brokers. Paine v. Hutchinson, L. R. 3 Eq. 257 (1866). Where a broker by instructions from his customer arranges with another party to carry the customer's stocks and also other stocks of the same kind carried by the broker, and the broker fails and the customer refuses to protect his own stock, the party carrying the same may hold him liable for the loss on his part. Scott, etc. v. Godfrey, [1901] 2 K. B. 726.

[6] Even though the selling customer did not authorize the use of his name, but knew of it and did not object. Shepherd v. Gillespie, L. R. 5 Eq. 293 (1867).

been held that the remedy may be an action at law [1] or in equity.[2] Even though brokers on the stock exchange are acting for undisclosed principals, yet one of the principals can sue the other principal for breach of the contract.[3] The right of set-off for other debts applies as between the two customers,[4] but not for debts due from one of the brokers to the opposite customer.[5]

§ 456. *Intervening sub-brokers and sub-customers.*— Where a customer's broker employs another broker to transact the business, the customer cannot compel the second broker to complete the contract as he might compel the first broker.[6] The second broker cannot claim a lien on the stock for debts due him from the first broker.[7] The broker cannot offset against the customer of the sub-broker a debt due the broker from the sub-broker. Not even a custom of the stock exchange to that effect binds the customer unless he agreed to it.[8] If the first broker merely introduces the parties he cannot charge a commission therefor, although custom allows it.[9] The real customer may hold an intermediate customer liable. A sub-broker or correspondent broker is not obliged to ascertain the relations and agreements between the chief broker and the customer. The sub-broker may hold all stocks as security for all accounts between himself and the chief broker, there being no notice given of the customer's rights. If there is any surplus after the sub-broker's debt is paid, a customer who placed his own stock in the chief broker's hands to sell is preferred to another customer who had purchased on a margin and left the stock as security.[10] Where the customer orders his broker to buy stock, and the broker does buy it through a sub-broker, and the broker then notifies the customer that the stock has been bought, the broker's title

[1] Street *v.* Morgan, L. R. 4 Exch. 384 (1869), cited in Davis *v.* Haycock, L. R. 4 Exch. 373 (1869).

[2] Sheppard *v.* Murphy, 16 W. R. 948 (1868).

[3] Clews *v.* Jamieson, 182 U. S. 461 (1901).

[4] Carr *v.* Hinchliff, 4 B. & C. 547 (1825).

[5] Fish *v.* Kempton, 7 C. B. 687 (1849). See also Sweeting *v.* Pearce, 7 C. B. (N. S.) 449 (1859). Unless, possibly, where the customer supposed the opposite broker was the principal. See Kelley *v.* Munson, 7 Mass. 319 (1811), and § 456, *infra.*

[6] Booth *v.* Fielding, 1 W. N. 245 (1866).

[7] Fisher *v.* Brown, 104 Mass. 259 (1870). See also § 455, *supra.*

[8] Blackburn *v.* Mason, 68 L. T. Rep. 510 (1893). He may hold an intermediate customer or agent liable for set-off due from the latter to the broker. Jaycox *v.* Cameron, 49 N. Y. 645 (1872).

[9] Gibson *v.* Crick, 1 Hurl. & C. 142 (1862).

[10] Willard *v.* White, 56 Hun, 581 (1890). See also §§ 460, 473, *infra.* A sub-broker who knows that the stock deposited as collateral with the chief broker belongs to the customer is liable in damages for conversion where he receives such stock on further orders, and it transpires that such use of the stock was unauthorized. Ryman *v.* Gerlach, 153 Pa. St. 197 (1893).

to the stock thereby passes to the customer, subject to any amount due from the customer to the broker and to any lien of the sub-broker. The subsequent insolvency of the broker does not prevent a customer notifying the sub-broker not to sell out the stock without notifying him, the customer; and the customer may insist that the sub-broker resort to other stocks belonging to the broker and remaining in the sub-broker's hands to pay the broker's debts to the sub-broker before resorting to the above stock.[1] If brokers in New York take orders through a local broker in another place, they are liable for false and fictitious orders given to them by him in the name of a customer.[2]

§ 457. *Purchases or sales on margins — Broker as a pledgee — Distribution of assets on failure of broker.*— By far the larger part of a stock-broker's business consists of purchases and sales of stock on what is called a "margin."[3] The customer deposits with the broker, as security, a sum of money equal to but a small part of the value of the stock involved. This sum of money is the "margin." If the customer's order is to purchase, then the broker keeps both the margin and the purchased stock as security against loss in the final closing of the transaction. If the customer's order is to sell, then the broker sells; but, having no stock to deliver, he borrows the same from other parties and delivers it to the purchaser, the broker still keeping the margin as security. Frequently no stock passes, nor is intended to pass, but merely the ultimate profit or loss, called "differences," is paid; the losing customer loses the whole or part of his margin, the winning customer getting back his margin and also the profits, less commissions. This in some of the states is held to be a gambling contract, and, like all gambling contracts, not enforceable.[4] But a purchase or sale of stock on margins, where there is no proof of an intent not to actually deliver the stock, is legal.[5] The relation between a customer and his broker, in cases where the broker buys for his

[1] Le Marchant v. Moore, 150 N. Y. 209 (1896).

[2] Caswell v. Putnam, 120 N. Y. 153 (1890).

[3] A margin "means, in the broker's lexicon, additional collateral security against loss to the broker while . . . carrying stock for his employer." McNeil v. Tenth Nat. Bank, 55 Barb. 59 (1869).

[4] McBurney v. Martin, 6 Rob. (N. Y.) 502 (1866). A broker cannot recover commissions or disbursements from his customer, where the transactions were gambling and intended so to be by both. Harvey v. Merrill, 150 Mass. 1 (1889).

[5] See ch. XX, *supra*, where the character, effect and non-enforceability of a broker's gambling contracts are fully treated. A "margin" transaction is not necessarily gambling and invalid. See § 344, *supra*. The important case of Hatch v. Douglas, 48 Conn. 116 (1880), clearly sets out the legality of such contracts. The court said: "It is pretty evident that the parties did not contemplate that the stock should be actually transferred to the defendant. . . .

customer and retains the stock as security, is in most jurisdictions held to be that of a pledgor towards a pledgee, the customer being the pledgor, the broker being the pledgee, and the stock being the article pledged.[1] In Massachusetts, however, a different rule prevails, and the rule is clearly laid down that a broker is not a pledgee of stocks which he buys for his customer on a margin, but that, on the contrary, the broker is the owner of the stock, and that he is not bound to keep the stock of one customer distinct from that of another, but may take a single certificate in his own name for several customers and may pledge the stock for advances made to himself, and that he is the person to be taxed on such stock.[2]

The defendant [customer], through his agents, the plaintiffs, actually purchased the stock, and there was an actual delivery — not to the principal, but to the agents for the principal." The brokers "knew that the defendant was speculating, and that they advanced him money for that purpose. But that was neither illegal nor immoral. . . . No case has been cited which declares such a contract illegal. If we should so hold, it would be difficult, if not impossible, to draw the line between legal and illegal transactions." The California constitution renders void a transaction wherein a broker buys stock for the customer with the broker's money and holds the stock as security and charges the customer interest and commissions. Cashman *v.* Root, 89 Cal. 373 (1891).

[1] Approved in Skiff *v.* Stoddard, 63 Conn. 198 (1893); Markham *v.* Jaudon, 41 N. Y. 235 (1869); Baker *v.* Drake, 66 N. Y. 518 (1876). The broker is bound to keep constantly on hand the amount of stock so held on margin, *i. e.*, pledged. Taussig *v.* Hart, 58 N. Y. 425 (1874); Rogers *v.* Gould, 6 Hun, 229 (1875). See also § 469, *infra.* In fact, the broker is obliged to conform to the rules governing pledges of stock — a subject treated in ch. XXVI, *infra.* The broker is a pledgee, and without express contract has a lien on the stock for the balance due under a purchase, but not for any general balance due. Leahy *v.* Lobdell, etc. Co., 80 Fed. Rep. 665 (1897). The customer as pledgor may claim his stock from the broker's assignee for the benefit of creditors if the customer can identify it. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). See Boylan *v.* Huguet, 8 Nev. 345 (1873). A broker holding as pledgee stock purchased for a customer on margin need not keep that identical stock on hand, and it is sufficient if he keeps an equal quantity on hand over and above stock of the same kind held by him for other customers. Caswell *v.* Putnam, 120 N. Y. 153 (1890). A broker holding stock as collateral security on a margin does not hold the stock in a fiduciary capacity. McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (1866); Lambertson *v.* Van Boskerk, 49 How. Pr. 266, 4 Hun, 628 (1875).

[2] The court realized, however, that its decision was not in accord with the current of authority, and said: "The English doctrine seems to be the same as that of this commonwealth, so that we are not left quite alone in a desert of logic." Chase *v.* City of Boston, 62 N. E. Rep. 1059 (Mass. 1902). In Massachusetts it is held that a broker carrying stocks on a margin is not a pledgee. Covell *v.* Loud, 135 Mass. 41 (1883). A broker who purchases stock for a customer on a margin is not a pledgee, but is merely under contract to deliver the stock on payment of the balance, and hence he may pledge the stock or sell it, and is not in default until the

In England a customer, by employing a broker to do business on the stock exchange, is presumed to have authorized him to do business on the terms of such exchange. Hence the broker may have the right to sell his customer's stock upon the customer's failure to pay therefor, without observing the rules applicable to pledgees of stock.[1] In England, also, where certificates of stock have not the quasi-negotiability that they have in America, a mortgage of stock is common and is enforced as a mortgage, and the mortgagee after a reasonable time may sell without notice to the mortgagor, the law being laid down as follows: "Express powers were not formerly necessary on mortgages of stock, or in the instruments of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realize his security by sale. If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and without commencing an action of foreclosure."[2] Some of the most important questions connected with brokers' contracts arise out of this pledgee relationship. This subject, however, is fully treated in the following chapter. Like an ordinary pledgee of stock, the broker may have the stock transferred into his own name;[3] he is not allowed to repledge the stock;[4] and he can put his customer in default only by tendering the stock and demand-

customer has tendered the balance and demanded the stock. If the broker is adjudicated a bankrupt the customer may treat this as a breach of contract and prove his claim. *In re* Swift, 105 Fed. Rep. 493 (1900). In a bankruptcy court sitting in Massachusetts the relation between a broker and a customer was defined to be that of debtor and creditor. *In re* Topliff, 114 Fed. Rep. 323 (1902). The relation between a broker and his customer in a purchase of stock on margin is not that of a pledgee and pledgor, but of parties to an executory contract for the sale and purchase of stock, whenever demand and payment is made by the purchaser, or after the broker has tendered the stock and made demand for payment after reasonable notice. The bankruptcy of the broker is a breach of the contract by him. *In re* Todd, 112 Fed. Rep. 315 (1901).

[1] Forget *v.* Baxter, [1900] A. C. 467. In England the carrying of stock by a broker on a margin is called "contango," and the broker is held to be the owner of the stock. In the case of Bentinck *v.* London, etc. Bank, [1893] 2 Ch. 120, the court said: "In all these transactions, therefore, when money is borrowed from a stock-broker in this way on 'contango' or continuation, whether the money is obtained from the dealer or from other stock-brokers, or from bankers, the result is the same: the arrangement is one by which the broker becomes, as between himself and his client, the owner of the shares in question, although he is under a contract to provide an equal amount of similar shares at a future date."

[2] Deverges *v.* Sandeman, etc. Co., [1901] 1 Ch. 70; aff'd, 86 L. T. Rep. 269 (1902).

[3] Horton *v.* Morgan, 19 N. Y. 170 (1859).

[4] See § 471, *infra*.

ing payment for their whole value less the margin.[1] A broker or pledgee need not sell the stock held as collateral before bringing an action against the pledgor for the amount due, and a brokers' custom cannot compel it.[2] Such stock may be redeemed from the assignee of the broker, provided the stock can be identified.[3] A customer who owns particular certificates of stock and pledges them with his broker may reclaim such certificates from the broker's assets upon the insolvency of the latter, but he cannot claim any particular stocks which the broker has *purchased* for him, even though he is able to identify them as being the ones which were purchased for him, inasmuch as his equities are no better than the equities of other customers.[4] Where a broker, by custom and authority im-

[1] Read *v.* Lambert, 10 Abb. Pr. (N. S.) 428 (1871).

[2] De Cordova *v.* Barnum, 130 N. Y. 615 (1892).

[3] Skiff *v.* Stoddard, 63 Conn. 198 (1893). Even though a broker repledges the stocks of various customers without authority from them, the pledgee is protected if he had no knowledge of the fact that the broker did not own the stocks; and if the pledgee, after selling out the stocks on notice, has a balance remaining both of money and stocks, the customers *prorate* as to such balance, even though the stocks of some of them were not sold by the pledgee. This rule is based on the principle that if they all had united in redeeming from the pledgee they would have borne the loss *pro rata*. Whitlock *v.* Seaboard Nat. Bank, 29 N. Y. Misc. Rep. 84 (1899).

[4] Sillcocks *v.* Gallaudet, 66 Hun, 522 (1892). Where the bank in which stock-brokers deposit their funds is a *bona fide* holder of cash so deposited and also of securities deposited by the brokers as security, and the brokers fail, and the bank applies the cash to the brokers' debts and then sells the securities to pay the balance, leaving a surplus, a customer of the brokers whose cash was deposited by the brokers in the bank may reclaim the same, even as against the owners of the securities. Mutton *v.* Peat, [1900] 2 Ch. 79. The rule that a customer who pays money to a broker to buy stocks or gives him securities to sell is a special creditor does not apply where the customer bought and sold stocks through the broker and kept merely a general account. King *v.* Hutton, [1900] 2 Q. B. 504. The right of a stock exchange, in accordance with its rules, to apply the assets on the exchange of an insolvent member to his obligations on the exchange is not affected by the bankruptcy act in England. *Re* Woodd, 82 L. T. Rep. 504 (1900). Where a broker purchases stock for a customer through another broker and then fails, and the sub-broker sells out all his securities to pay a debt and has a surplus, the customer may reach such surplus in preference to other creditors of his broker. *In re* Graff, 117 Fed. Rep. 343 (1902). Where a broker at the time of his failure has on hand a larger amount of a certain stock than he holds for a customer, the customer may claim that part of such stock is his own. *In re* Graff, 117 Fed. Rep. 343 (1902). A creditor of a defaulter on the stock exchange who has taken the benefit of the private distribution of stock exchange assets, made by the official assignee of the stock exchange under its rules, is not precluded from afterwards taking ordinary legal proceedings for the recovery of his debt, though he must give credit for what he has received from the official assignee. Ratcliff *v.* Mendelssohn, 87 L. T. Rep. 422 (1902). As to sub-brokers or correspond-

pliedly given, repledges stock carried by him on a margin, the customer cannot, upon the failure of the broker, have all the broker's stock of that class first applied in discharge of his claim.[1] Where a customer delivers stock to a broker, and the broker without his consent transfers it into his own name, the customer may claim the new certificate upon satisfactorily identifying the stock.[2] These questions, however, relative to marshaling the assets and controversies between various customers claiming the same securities are considered elsewhere.[3] A broker who wrongfully pledges his customer's stock is guilty of conversion and may be arrested therefor.[4]

§ 458. *Broker's rights and duties on failure of margin.*— When the "margin" which the customer deposits with his broker happens to become exhausted by the fluctuations of the market adversely to the customer, difficult questions arise as to the several rights and duties of the broker and of the customer. If the broker is under orders to close the transaction when the margin becomes exhausted, he of course is obliged to do so.[5] But, otherwise, the rule is that the broker cannot summarily close the transaction, even though he has fear of greater loss, involving a loss by himself. He is obliged to demand further margin from his customer, at the same time notifying him that the previous margin is exhausted; also that, in case the margin is not made good, he will close the transaction, holding the customer liable for the loss; also stating the time and place of such threatened sale.[6] The notice must be

ent brokers, see § 456, *supra*. See also § 473, *infra*.

[1] Skiff *v.* Stoddard, 63 Conn. 198 (1893).

[2] Mould *v.* Importers', etc. Bank, 72 N. Y. App. Div. 30 (1902).

[3] See § 473, *infra*.

[4] Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Barry *v.* Calder, 48 Hun, 449 (1888); aff'd, 111 N. Y. 684. See also § 576, *infra*. Brokers holding a certificate of stock as security for the balance of the purchase price due from the customer are pledgees, and if the broker, in violation of the express contract, repledges or sells such stock without authority from the customer, he is guilty of a conversion for which trover will lie. Chew *v.* Louchheim, 80 Fed. Rep. 500 (1897).

[5] See § 448, *supra*.

[6] In the usual short sale of stock through a broker on a margin, the brokers "were bound to carry the stock until plaintiff directed them to close the transaction, so long as he complied with the terms of the contract on his part, and to give the plaintiff reasonable notice of the want of sufficient margin, and of their intention to buy in the stock and cover his short account if the margin was not made good, in accordance with the terms of the notice." Rogers *v.* Wiley, 131 N. Y. 527 (1892). Where a customer who is selling on a margin desires to close the transaction, but his broker dissuades him by promising to carry the stock, the broker cannot close the transaction without notice. Rogers *v.* Wiley, 131 N. Y. 527 (1892). Brokers, before selling a customer's stock which they hold as pledgees, the stock having been purchased on a margin, are bound to demand further margin and give notice of intent and time and place of sale. If they fail to do so, but sell and then sue

given a reasonable time before such closing of the transaction, and notice sent by mail is sufficient if actually received.[1] If the broker fails to comply with these rules, and sells, he is guilty of conversion of the stock.[2] Where the broker is merely authorized to sell he is not bound to sell.[3]

§ 459. *What will excuse notice and demand for more margin.* All these rights of the customer to notice of failure of margin, demand of more margin, notice of intent to sell, and of time and place of sale, may be waived; and brokers generally require their customers to sign written contracts to that effect.[4] Where the cus-

the customer for the loss, they cannot recover anything. They cannot claim that their loss has been greater than defendant's loss due to their conversion. Gillett *v.* Whiting, 120 N. Y. 402 (1890); Markham *v.* Jaudon, 41 N. Y. 235 (1869), overruling Hanks *v.* Drake, 49 Barb. 186 (1867), and Sterling *v.* Jaudon, 48 Barb. 459 (1867). See also Kenfield *v.* Latham, 2 Cal. Leg. Rec. 235 (1879), and § 461, *infra. Cf.* Worthington *v.* Tormey, 34 Md. 182 (1870); and see ch. XXVI, *infra.* A formal demand for further margin is insufficient where, subsequently to that demand, the broker negotiates with the customer and tells him that he will consider what to do. McGinnis *v.* Smythe, 1 Silvern. 23 (1886). The broker's telegrams and conversations with his customers may amount to a waiver of his right to demand further margin. Rogers *v.* Wiley, 14 N. Y. Supp. 622 (1891); aff'd, 131 N. Y. 527 (1892). When called upon for further margin, a customer may make a "stop-order," the price fixed in such order being within the margin already furnished. Campbell *v.* Wright, 118 N. Y. 594 (1890). The giving of a note to a broker pledgee does not extend the time within which the pledgor was to deposit further margin. Gould *v.* Trask, 10 N. Y. Supp. 619 (1890); 121 Fed. 376.

[1] Worthington *v.* Tormey, 34 Md. 182 (1870). Leaving a notice at the office was held insufficient where it did not reach the customer. Bryan *v.* Baldwin, 52 N. Y. 232 (1873). Two days' notice held sufficient. Stewart *v.* Drake, 46 N. Y. 449 (1871). See also, in general, § 477, *infra.* A notice after the sale is insufficient, and the question of whether a notice was given is for the jury if it is denied. Gillett *v.* Whiting, 120 N. Y. 402 (1890). The broker is bound to give the customer reasonable notice to furnish more margin. Lazare *v.* Allen, 20 N. Y. App. Div. 616 (1897).

[2] Baker *v.* Drake, 66 N. Y. 518 (1876). *Cf.* Gregory *v.* Wendell, 40 Mich. 432 (1879), involving a purchase of corn. It is only in stock transactions that the relation of pledgor and pledgee arises. Where the broker closes the transaction without notice, and later the customer gives an order which, if the transaction had not been closed, would have yielded a profit, the customer may recover damages to the amount of that profit. Rogers *v.* Wiley, 131 N. Y. 527 (1892).

[3] Robinson *v.* Norris, 51 How. Pr. 442 (1874); Esser *v.* Linderman, 71 Pa. St. 76 (1872). *Cf.* Harris *v.* Tumbridge, 83 N. Y. 92 (1880). On a short sale of grain the broker is not bound to sell as soon as the principal refuses to advance more margin. Perin *v.* Parker, 126 Ill. 201 (1888).

[4] Thus a written authority to the brokers "to sell in their discretion, at public or private sale, . . . without any notice whatever, the stocks, bonds, or gold which they might be carrying [for the plaintiff] whenever my margin shall fall below" a certain figure, waives all the customer's rights herein. Wicks *v.* Hatch, 62 N. Y. 535 (1875). See

tomer, upon being presented with his account, does not object, but promises to pay the amount, he thereby waives his right to object to a sale as being without notice.[1] It is doubtful whether the death of the customer will authorize the broker to close the transaction without notice.[2] After a broker has purchaser according to order, but his customer dies before the stock is paid for, it is the duty of the broker to sell immediately upon the death of his client, and not to carry the transaction along and afterwards sell.[3] A custom of brokers to dispense with these notices is void, and not binding on the customer.[4] The fact that a panic occurs, or unusual fluctuations of the market happen, does not excuse a broker from giving such notice.[5]

§ 460. *Customer's remedies and damages herein.*— For an unauthorized sale by a broker of stock held upon a margin, the customer has ample remedies. He may claim the benefit of the sale, or may claim the value of the stock.[6] Or the customer may require

also Cameron *v.* Durkheim, 55 N. Y. 425 (1874). See also § 477, *infra.* The customer may waive his rights after the broker has made the unauthorized sale. Stewart *v.* Drake, 46 N. Y. 449 (1871); Milliken *v.* Dehon, 27 N. Y. 364 (1863). But authority "to close the account without notice, by purchase or sale, at public or private sale" does not waive right to notice of failure of margin and demand for more. Stenton *v.* Jerome, 54 N. Y. 480 (1873); Kenfield *v.* Latham, 2 Cal. Leg. Rec. 235 (1879). The demand for further margin may be waived, and waiver may be inferred from the negotiations and proposition. Harris *v.* Pryor, 18 N. Y. Supp. 128 (1892). A common form of the contract which the broker requires the customer to sign is the following:

"—— hereby agrees to maintain with you at all times a margin of —— per centum of the par value of all stocks and bonds against which you have made or may hereafter make advances to ——, and a like margin on stocks or bonds which —— have borrowed or may hereafter borrow through you to make deliveries on sales made for —— account or otherwise.

"In case —— margin should become impaired and the same is not promptly made good in response to personal notice or notice sent by wire or letter and directed to —— usual address, you are authorized in your discretion to buy or sell at the New York Stock Exchange or at public or private sale, without further notice, such securities as may be necessary to place the account in condition satisfactory to you, or to close the same entirely, as you may prefer.

"In case of my decease you are hereby authorized to close my account by purchase or sale of securities, as the same may require. ——."

[1] Gillett *v.* Whiting, 141 N. Y. 71 (1894).

[2] The broker will be protected in continuing the transaction until personal representatives are appointed. Hess *v.* Rau, 95 N. Y. 359 (1884). *Cf.* Lacey *v.* Hill, L. R. 8 Ch. App. 921 (1873).

[3] *Re* Overweg, [1900] 1 Ch. 209.

[4] Markham *v.* Jaudon, 41 N. Y. 235 (1869); Taylor *v.* Ketchum, 35 How. Pr. 289 (1867); s. c., 5 Rob. (N. Y.) 507. *Contra,* Appleman *v.* Fisher, 34 Md. 540 (1871), a case of a gold-broker; also Colket *v.* Ellis, 10 Phila. 375 (1875), where both parties were brokers and knew the custom. If the customs are expressly made a part of the contract, insolvency of the customer authorizes sale without notice, such being the custom. Lacey *v.* Hill, L. R. 18 Eq. 182 (1874).

[5] Markham *v.* Jaudon, 41 N. Y. 235 (1869); Brass *v.* Worth, 40 Barb. 648 (1863); Ritter *v.* Cushman, 7 Rob. (N. Y.) 294 (1867). See also § 448, *supra.*

[6] Taussig *v.* Hart, 58 N. Y. 425 (1874);

the broker to replace the stock, and, upon his failure so to do, the customer may replace it himself and charge the broker with the loss.[1] Or the customer may recover the advance in the market price from the time of the sale up to a reasonable time to replace the stock after notice of the sale.[2] The unauthorized sale by the broker herein is not necessarily a fraudulent sale.[3] The customer cannot enjoin the broker unless the latter is insolvent.[4] The suit should be at law,[5] and demand and tender need not be alleged.[6] A customer who has notified his broker that a sale was unauthorized does not waive the objection by retaining the account of the sale subsequently sent to him by the broker.[7] An illegal sale of the pledge by the pledgee is a conversion, and a complaint for such conversion will not be construed as a complaint for breach of contract.[8]

Where a broker buys or sells stock on his customer's account in

Strong *v.* National, etc. Assoc., 45 N. Y. 718 (1871).

1 Baker *v.* Drake, 53 N. Y. 211, 217 (1873); Colt *v.* Owens, 90 N. Y. 368 (1882).

2 Colt *v.* Owens, 90 N. Y. 368 (1882), holding that prices within thirty days after the sale is a reasonable rule. See also Gruman *v.* Smith, 81 N. Y. 25 (1880); Capron *v.* Thompson, 86 N. Y. 418 (1881). *Cf.* Andrews *v.* Clerke, 3 Bosw. 585 (1858). The measure of damages in a suit by a customer against a broker for an unauthorized sale of stock is the difference between the price at which it was sold and the highest price within a reasonable time thereafter, which, in this case, the court fixed at thirty days. Burhorn *v.* Lockwood, 71 N. Y. App. Div. 301 (1902). Where a broker sells his client's stock illegally, the measure of damages in a suit by the client is the difference between the price at which the stock was sold and the highest market price within a reasonable time thereafter. Wolff *v.* Lockwood, 70 N. Y. App. Div. 569 (1902). The measure of damages to a customer by reason of a broker illegally selling his stock, the broker having become bankrupt, is the value of the stock on the day of filing the petition in bankruptcy, the exact time of the sale not being ascertainable. *In re* Graff, 117 Fed. Rep. 343 (1902).

3 Stratford *v.* Jones, 97 N. Y. 586 (1885).

4 Park *v.* Musgrave, 2 Thomp. & C. 571 (1874).

5 Delevan *v.* Simonson, 35 N. Y. Super. Ct. 243 (1873). In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after default in payment of the debt for which property is pledged as security will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable."

6 Clarke *v.* Meigs, 22 How. Pr. 340, 13 Abb. Pr. 467 (1861).

7 Burhorn *v.* Lockwood, 71 N. Y. App. Div. 301 (1902). A customer after learning of an illegal sale cannot object if for six months he does not tender the amount due the broker and demand the stock. Swann *v.* Baxter, 36 N. Y. Misc. Rep. 233 (1901).

8 Smith *v.* Hall, 67 N. Y. 48 (1876), dis-

violation of the terms of his contract, and thereby makes a profit, the customer has his option either to repudiate the transaction altogether and sue for damages, or he may adopt it and claim for himself the benefit made by his agent.[1] It has been held that, where the broker fails to buy according to the instructions of his customer, and the customer suffers a loss by reason of the failure, the object of the purchase being to cover a short sale, the measure of damages is the difference between the price at which the stock was sold short and the market price upon the day when the order was given to the broker to buy in. In other words, the plaintiff may in such a case recover the profits which he would have made had his order been properly executed.[2] And the rule is the same when the loss to the customer results from the failure of the broker to sell as instructed, or where the broker sells at an improper or manifestly unfavorable time.[3] Where a broker agrees to carry

tinguishing Austin *v.* Rawdon, 44 N. Y. 63 (1870).

[1] Kimber *v.* Barber, L. R. 8 Ch. App. 56 (1872); Marsh *v.* Keating, 1 Bing. N. C. 198 (1834); Taussig *v.* Hart, 49 N. Y. 301 (1872); s. c., 58 N. Y. 425 (1874); Pickering *v.* Demerritt, 100 Mass. 416 (1868); Day *v.* Holmes, 103 Mass. 306 (1869). In the case of Clews *v.* Jamieson, 89 Fed. Rep. 63 (1898), where the broker was authorized to sell at 229 and actually did sell at 221, the court held that the principal could not adopt and enforce the contract, inasmuch as the broker was not authorized to sell at that price, and the contract not binding the principal when made did not bind the other parties. For the measure of damages where a broker converts his customer's securities, and then is unable by reason of his insolvency to replace them, see Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). Sometimes an advance in the price of the stock, within a reasonable time after notice of the conversion is received, is allowed. Gruman *v.* Smith, 81 N. Y. 25 (1880). See § 475. And what is a reasonable time in such a case is a question for the jury. Baker *v.* Drake, 66 N. Y. 518 (1876); Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Stewart *v.* Cauty, 8 M. & W. 160 (1841); Field *v.* Lelean, 6 H. & N. 617 (1861). *Cf.* Allen *v.* Dykers, 3 Hill, 593 (1842). As to the measure of damages in an action against a broker for fraud, inducing the plaintiff to invest in "Grant and Ward" securities, see James *v.* Work, 70 Hun, 296 (1893).

[2] In an action to recover damages, where a firm of stock-brokers sold for a customer, upon his order and for his account, three hundred shares of stock, short, at 186, and subsequently, without the customer's order or knowledge, bought in stock to cover the sale, and then a few days later, the stock having declined several points, the customer ordered them to cover their sale, to which order no attention was paid, it was held that the proper measure of damages was the difference between the price at which the stock was sold short and the market price upon the day when the order was received to purchase, with interest, deducting commissions, etc. White *v.* Smith, 54 N. Y. 522 (1874). See Magee *v.* Atkinson, 2 M. & W. 440 (1837). In Allen *v.* McConihe, 124 N. Y. 342 (1891), the court allowed as damages against a broker who delayed selling when ordered to sell, the difference between the price when the order was given and the price when the sale was actually made.

[3] In Harris *v.* Tumbridge, 83 N. Y. 92

stocks to a certain time, but he sells them before that time, the damage is based upon the prices at the time to which he agreed to carry the stocks.[1]

Where a party telegraphs to sell a certain stock, the sale to be "short" and speculative, the damages for failure of the telegraph company to deliver the message are too remote and speculative, even though the stock goes down on the market.[2] The question

(1880), it appears that the plaintiff purchased through the agency of the defendant a stock option, a privilege known as a "straddle," upon which the defendant guaranteed that the fluctuations in the stock during the pendency of the contract should amount to eight per cent. On the next day after the purchase defendant sold the stock short, which resulted in a loss to the plaintiff, who had at the time of the purchase authorized defendant, as her agent, to exercise the option. As to the measure of damages the court said: "An objection is taken to the rule of damages. It is insisted that, as plaintiff never gave any directions to 'put' or 'call' the stock, she should not have recovered as if she had. But in the absence of such directions it was defendant's duty, under the circumstances of this case, as we have already said, to have closed the 'straddle' contract by exercising the option at the most favorable time, and to have acted for her in that respect with reasonable care and skill. As he did not do so, she is entitled to recover what she has lost by his neglect; and the price of the stock from day to day during the running of the option having been shown, it was for the jury to determine that amount." *Cf.* Speyer *v.* Colgate, 4 Hun, 622 (1875). Where a broker sold stock for his customer without authority and in violation of an agreement not to sell, and it appeared that for thirty days after notice was given to the customer of the sale the stock could have been purchased in the market for the price at which it was sold or even for less, it was held, in an action to recover damages, that the customer, having had a reasonable time after he was notified of the sale of his stock to replace it at the same or a lower price, was entitled only to nominal damages. Colt *v.* Owens, 90 N. Y. 368 (1882). *Cf.* Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886). See also McArthur *v.* Seaforth, 2 Taunt. 257 (1810). But when the action of the broker is fraudulent the customer may, upon obtaining knowledge of the facts, repudiate the whole transaction and recover back the money paid. Levy *v.* Loeb, 89 N. Y. 386 (1882), reversing s. c., 47 N. Y. Super. Ct. 61. *Cf.* Stewart *v.* Drake, 46 N. Y. 449 (1871). In Baker *v.* Drake, 66 N. Y. 518 (1876), where a broker, unauthorized to do so, sold stock which he was carrying for his customer, it was held, in an action for damages, that the measure of damages was the advance in the market price from the time of the sale up to a reasonable time to replace it after notice of sale.

[1] Michael *v.* Hart & Co., 86 L. T. Rep. 474 (1902).

[2] Cahn *v.* Western U. Tel. Co., 48 Fed. Rep. 810 (1891), 46 Fed. Rep. 40. The measure of damages for error in the delivery of telegraph messages to buy stock "is the difference between the market value of the shares at the time when the dispatch should have been delivered and the sum paid for them in the market on the receipt of the message." Pearsall *v.* Western U. Tel. Co., 124 N. Y. 256 (1891).

of the customer's rights, where the broker has repledged the stock and then failed, is considered elsewhere.[1]

§§ 461, 462. *Brokers' remedies and damages herein.*— If a broker sells out his customer's stock without notice, he may recover any loss from the customer, where the broker's loss is greater than the customer's damages for the conversion.[2] But where the broker's act is strictly according to law, he is of course entitled to recover from his customer any loss that has been sustained in excess of the margin.[3] And where a broker purchases stock on an order and demands payment of the price, the broker may sell the stock for non-payment, after waiting a reasonable time, such being the custom of the market.[4] Where the customer fails to deliver to the broker stock which the former has ordered the latter to sell, the broker may purchase in the open market in order to fulfill the contract, and may hold the customer liable for the loss.[5]

It is a well-settled rule that if a broker, acting in good faith and without default, incurs personal loss or damage in the course of transacting the business of his agency, or in following the instructions of his principal, he may recover from the principal full compensation therefor.[6] Accordingly, where a broker buys stock upon

[1] See §§ 471–473, *infra.*

[2] Minor *v.* Beveridge, 141 N. Y. 399 (1894), practically overruling Gillett *v.* Whiting, 120 N. Y. 402, and holding that the broker *may* sue the customer for losses, even though he sold without notice, and that the customer is entitled to a counter-claim only. To same effect, see Gruman *v.* Smith, 81 N. Y. 25 (1880). See also Capron *v.* Thompson, 86 N. Y. 418 (1881); § 458, *supra;* and § 475, *infra.* Where the customer sues the broker for selling the stock illegally the broker may set up the amount due from the customer, not by way of recoupment, but by way of a lien on the stock. Farrar *v.* Paine, 173 Mass. 58 (1899). In Ellis *v.* Pond, 78 L. T. Rep. 125 (1897), the court held that even though a broker sold his principal's stock, which the broker held as pledgee, prior to the time to which the broker had agreed to carry the stock, yet that the broker might recover from his principal any loss in such sale as compared with the price at which the broker originally bought the stock, but that the client could counter-claim for the damage due to the sale being made prior to the agreed time. The court held, however, that where by the contract the broker was to accept delivery of certain stock at a certain time for his principal, but before that time the broker sold such stock, contrary to his agreement with his principal, the broker could not recover any damages for the loss.

[3] Schepeler *v.* Eisner, 3 Daly, 11 (1869).

[4] Taylor *v.* Bailey, 169 Ill. 181 (1897).

[5] Baily *v.* Cardnuff, 14 Colo. App. 169 (1899).

[6] Sedgwick on Damages (7th ed.), 86; Lindley on Companies (5th ed.), pp. 512–516; Sutton *v.* Tatham, 10 Ad. & E. 27 (1839); Bayliffe *v.* Butterworth, 1 Exch. 425 (1847); Bowlby *v.* Bell, 3 C. B. 284 (1846); Bayley *v.* Wilkins, 7 C. B. 886 (1849); McEwen *v.* Woods, 2 Car. & K. 330 (1846); Taylor *v.* Stray, 2 C. B. (N. S.) 175 (1857); Stray *v.* Russell, 1 El. & El. 888 (1859); Chapman *v.* Shepherd, L. R. 2 C. P. 228 (1867); Biederman *v.* Stone, L. R. 2 C. P. 504 (1867); Robinson

his customer's order and pays for it, and upon a decline in value the customer refuses to accept it, the broker may recover the price paid by him, and not merely the difference between that price and the market value on the day of his demand.[1] The guaranty by a third party of the customer's account may be enforced.[2] A broker cannot interplead between his customer and an indorser of the customer's note, in regard to stocks deposited with the broker by the customer, even though the administrator of the indorser claims that he has an interest in such stock.[3]

v. Mollett, L. R. 7 H. L. 802 (1875); s. c., L. R. 7 C. P. 84; L. R. 5 C. P. 646; Pollock *v.* Stables, 12 Q. B. 765 (1848); Lacey *v.* Hill, L. R. 8 Ch. App. 921 (1873). See also Dos Passos on Stockbrokers, pp. 123, 802; 80 N. Y. App. Div. 115.

[1] Giddings *v.* Sears, 103 Mass. 311 (1869). *Cf.* Field *v.* Kinnear, 4 Kan. 476 (1868). Where there is a rescission of a contract for the sale of stock, the measure of the damages is the value of the stock at the time and place of the proposed delivery. White *v.* Salisbury, 33 Mo. 150 (1862); Vance *v.* Tourne, 13 La. 225 (1839).

[2] Oppenheim *v.* Waterbury, 86 Hun, 122 (1895).

[3] Post *v.* Emmett, 40 N. Y. App. Div. 477 (1899).

CHAPTER XXVI.

PLEDGES AND MORTGAGES OF STOCK.

§ 463. *Definition of pledge, mortgage, and lien.*— A pledge may be defined to be a delivery of personal property as a security for some debt or engagement. A mortgage of personalty, on the other hand, is a sale with the condition attached that, if the mortgagor performs some act, the sale shall be void. In a pledge the title remains in the pledgor, and the pledgee has a special property in the thing pledged.[1] In a mortgage the title passes to the mortgagee, subject to being revested in the mortgagor upon payment of the debt. In pledges the thing pledged must be delivered to the pledgee. In mortgages, generally, the possession of the thing mortgaged remains with the mortgagor. A mortgage of stock is the same as a pledge of stock in that the mortgagee may sell the stock upon default and after proper notice.[2] In England a deposit

[1] See Pars. Cont., I, p. 569; II, p. 113; III, p. 272. Where an employee is by contract entitled to a certain salary so long as he should own certain stock, he does not break the contract by pledging his stock. McMullan *v.* Dickinson Co., 63 Minn. 405 (1896).

[2] Deverges *v.* Sandeman, etc. Co., 86 L. T. Rep. 269 (1902); aff'g [1901] 1 Ch. 70.

of certificates of stock is an equitable mortgage and not a pledge, and hence while foreclosure would not lie as regards a pledge, it does lie as regards such an equitable mortgage.[1]

A pledge differs also from a lien. A pledge, by implication, gives the pledgee a power to sell on due notice, in case the debt is not paid at maturity, while a lien gives merely the power of detention until the debt is paid.[2]

Where a corporation is in financial difficulties and its mortgage is due, and the stockholders make an agreement with the mortgagee whereby they turn over to him a majority of the stock to become his absolute property if the debts of the corporation are not then paid, in consideration of which he agrees to advance further additional moneys, such a contract is a conditional sale of the stock and is not a pledge.[3] A contract to return borrowed stock or pay for it is a debt.[4]

§ 464. *Mortgages and pledges of stock — Trust mortgages covering stocks.*— Shares of stock may be the subject of a mortgage or pledge.[5] A mortgage of stock, however, is not often made; and, unless there is a clear intent to the contrary, the courts will treat the transaction as a pledge rather than a mortgage.[6] In fact it is difficult to ascertain from the cases how shares of stock may be

[1] Harold *v.* Plenty, 85 L. T. Rep. 45 (1901).

[2] Donald *v.* Suckling, L. R. 1 Q. B. 585, 604 (1866). "A simple lien — that is to say, a right to detain chattel property until a given debt be paid, but without any right to sell and apply the proceeds in payment — is one thing; a pledge, since it implies the right in the depositary to sell the deposit and apply the proceeds to the debt it was given to secure, is another. Shares of stock put up as collateral security constitute a pledge." First Nat. Bank *v.* Illinois T. & S. Bank, 84 Fed. Rep. 34 (1897).

[3] Ware *v.* Hooper, 98 Fed. Rep. 160 (1899).

[4] Dibble *v.* Richardson, 171 N. Y. 131 (1902). A contract whereby a person receives stock and agrees to return it within a specified time or else pay a specified sum is not a bailment, and hence if the stock is not returned at the specified time the specified price may be recovered, even though the party at a later time desires to return the stock. Haskins *v.* Dern, 19 Utah, 89 (1899). See also § 445, *supra*, and § 469, *infra*.

[5] "Nothing is better settled than that shares in the capital stock of a corporation are the subject of pledge." Dayton Nat. Bank *v.* Merchants' Nat. Bank, 37 Ohio St. 208 (1881). "It was formerly doubted whether it [stock] could be the subject of a pledge, but it is now held that it can be." Newton *v.* Fay, 92 Mass. 505 (1865). As to pledges to secure parties who advance money to the company, see ch. XX and § 76, *supra*.

[6] Newton *v.* Fay, 92 Mass. 505 (1865); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Merchants' Bank *v.* Cook, 21 Mass. 405 (1826); Mechanics', etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862); Doak *v.* Bank of the State, 6 Ired. L. (N. C.) 309 (1846). In England security is given by a process called a sale with a contract of repurchase. The court holds that this is not a pledge. "An essential term of a pledge is that on fulfillment by the pledgor of the conditions of the bargain, commonly called redemption, the

mortgaged; and transactions which, in a few early decisions, were held to be mortgages, would to-day be held to be pledges.[1] There are but few clear cases of a mortgage of stock to be found. It seems that a formal instrument of chattel mortgage of stock, duly executed and registered at the municipal clerk's office, as required by law in case of chattel mortgages, would not constitute an effectual mortgage of stock, and the mortgagee would not be protected

pledgee is bound to hand back to the pledgor the very thing deposited with with him," whereas in a sale and contract of repurchase, the identical property in numbers, etc., need not be returned. Simmons *v.* London J. S. Bank, [1891] 1 Ch. 270.

[1] Quoted and approved in Irving, etc. Assoc. *v.* Watson, 67 Pac. Rep. 945 (Oreg. 1902). Thus, in Huntington *v.* Mather, 2 Barb. 538 (1848), the court said: "There are two leading considerations to be regarded in determining whether the transaction is a pledge or a mortgage: namely, the title and the possession. If it is a mortgage, the legal title passes to and is vested in the creditor. With a pledge it is different; the legal title, until a sale on default of payment or redemption, continuing in the pledgor. . . . The essential difference as to matter of right is that in one the title passes and in the other it does not. But the difference in substance and fact is that, in the case of a pawn or pledge, the possession must pass out of the pawner, but in the case of a mortgage it need not." The court, however, influenced probably by the equities of the case, held the transaction to be a mortgage, and that the right of the debtor to redeem was barred by the ten-year statute of limitations. In the case of Smith *v.* Forty-nine and Fifty-six Quartz Min. Co., 14 Cal. 242 (1859), the court held the transaction to be a mortgage rather than a conditional sale of the stock. The question of pledge was not considered. Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881), speaks of the transaction as a mortgage; and Williamson *v.* New Jersey, etc. R. R., 26 N. J. Eq. 398 (1875), says that such a mortgage need not be recorded in the municipal clerk's office, as required by the chattel-mortgage act. In both cases the transaction might better have been treated as a pledge. In Adderly *v.* Storm, 6 Hill (N. Y.), 624 (1844), the court said: "I have already said that this was not a pawn or pledge of the stock; neither was it strictly a mortgage." At the present day it would be held to be a pledge. Wilson *v.* Little, 2 N. Y. 443 (1849); Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850). In Brewster *v.* Hartley, 37 Cal. 15 (1869), the court said: "The transfer in writing of shares of stock not only does not prove that the transaction is not a pledge, but the stock, unless it is expressly made assignable by the delivery of the certificates, cannot be pledged in any other manner." In Thompson *v.* Holladay, 15 Oreg. 34 (1887), a chattel mortgage on shares of stock was involved. It was declared void because it was given to a receiver who previously held the stock as receiver. Sometimes a chattel mortgage of stock arises where a railroad mortgage covers not only real estate, but also all personal property, bonds, and stock which are or shall be owned by the mortgagor corporation. A deposit of bonds as security for the payment for rolling stock, but to be used only to pay any deficiency after the rolling stock had been sold and the proceeds credited, is a pledge and not a mortgage, and hence if the pledgee takes back the rolling stock without selling it the pledge ceases. Herrmann *v.* Central, etc. Co., 101 Fed. Rep. 41 (1900).

where he does not receive the certificate of stock from the mortgagor, or does not obtain a registry of transfer on the corporate books.[1] Where a railroad company owns shares of stock in an elevator company, such stock is not subject to the general mortgage executed by the railroad company.[2] A pledge of stock without

[1] The clearest and most satisfactory case is Spalding *v.* Paine, 81 Ky. 416 (1883), where a chattel mortgage of a share of stock was duly recorded in the proper county, the mortgagor retaining the certificate of stock. The mortgagor subsequently sold and transferred the certificate of stock to a *bona fide* purchaser. The court held that the recording of the mortgage was of no avail; that there could be no mortgage of choses in action, and that the *bona fide* transferee took the stock. Pryor, J., well said: "Much of the business of the country is conducted on the faith of the pledge of such stock as collaterals; and to adjudge that the holder of the stock by transfer on the books of the corporation, or by indorsement and delivery by the owner, is subordinate in his claim to the mortgagee, upon the doctrine of constructive notice, would paralyze trade and open a wide field for the fraudulent disposition of such valuable interests at the expense of honest and confiding purchasers." Inasmuch as a mortgage on shares of stock is not a recordable instrument, the record thereof does not operate as constructive notice. Shuster *v.* Jones, 58 S. W. Rep. 595 (Ky. 1900). Stocks are not goods and chattels within the meaning of the act concerning chattel mortgages. State *v.* King County Super. Ct., 13 Wash. 607 (1896). The right of a subscriber to demand a certificate of stock may be attached before such certificate is issued and delivered, and such attachment has precedence over a mortgage even though the mortgage is recorded with the register of deeds, no notice, however, of such mortgage being given to the corporation itself. Cates *v.* Baxter, 97 Tenn. 443 (1896). *Cf.* Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881); Foster *v.* Potter, 37 Mo. 525 (1866); Vowell *v.* Thompson, 3 Cranch, 428 (1829); s. c., 28 Fed. Cas. 1308. See also Holyoke *v.* McMurtry, 33 Neb. 548 (1891). A mortgage of stock is valid as between mortgagor and mortgagee without a transfer of certificates. The mortgagee after foreclosure may compel the corporation to transfer without making the transferee a party. Tregear *v.* Etiwanda Water Co., 76 Cal. 537 (1888). Stock may be mortgaged and no delivery of the certificates need be made. Though a foreclosure is made irregularly the mortgagor may ratify it, or may be barred by the six-year statute of limitations. Campbell *v.* Woodstock Iron Co., 83 Ala. 351 (1887). The pledgor may, by an instrument in writing, assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage and is not fraudulent, even though it be kept secret from the other creditors of the pledgor. National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898). Where an unincorporated partnership issues so-called certificates of stock representing a specified interest in such partnership, and one of the partners assigns his certificates as collateral security, and afterwards sells them, the purchaser is entitled to his share of the partnership property and to demand an accounting, even though the certificates provided that they were not transferable. The transfer of such certificates as security need not be recorded as a chattel mortgage. Rommerdahl *v.* Jackson, 102 Wis. 444 (1899).

[2] Humphreys *v.* McKissock, 140 U. S. 304 (1891). A chattel mortgage does not include shares of stock, although

a delivery is not strictly and legally a pledge.[1] It "may have amounted to a mortgage, but it could amount to nothing more; and if a mortgage, it did not place the mortgagee in possession, but gave him merely a naked right to have the property appropriated and applied to the payment of his debt."[2]

Where, on the other hand, the certificate of stock is delivered to the creditor as security, it is evident that possession of the property is given to the creditor, but that the debtor still considers the stock to be his. Such a transaction is a pledge and not a mortgage; and consequently, since the giving of stock certificates as security is almost invariably effected by a delivery of the certificates, a mortgage of stock may be said to be possible, but is not technically a correct use of the word. The delivery of a certificate of stock with a blank power of attorney, as collateral security, constitutes a pledge and not a mortgage;[3] and the same rule prevails even though an absolute transfer or registry is made on the corporate books.[4] A mortgage on shares of stock is sometimes made by transferring the stock to the trustee of the mortgage.[5] The rights and duties of the trustee in such cases are considered elsewhere.[6] A mortgage on shares of stock does not prevent the corporation controlled by such stock from issuing a mortgage on its property; and it is no breach of trust for the trustee of the first mortgage to be the trustee of the

broad enough in its terms to do so, where both parties testify that it was not the intent to include the stock, and the mortgagee allowed the mortgagor's assignee to take away the stock. Younkin *v.* Collier, 47 Fed. Rep. 571 (1891). See also § 317, *supra.*

[1] See § 465, *infra.*

[2] Christian *v.* Atlantic, etc. R. R., 133 U. S. 233, 242 (1890).

[3] Mechanics', etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); Irving, etc. Assoc. *v.* Watson, 67 Pac. Rep. 945 (Oreg. 1902). But see Greene *v.* Dispeau, 14 R. I. 575 (1884). A delivery of the certificates as security is a pledge and not a mortgage. George, etc. Co. *v.* Range, etc. Co., 16 Utah, 59 (1897).

[4] Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Wilson *v.* Little, 2 N. Y. 443 (1849). The question of whether a sale or pledge was involved in the relations between a contractor and the party who financed the matter for him was discussed in Griggs *v.* Day, 58 N. Y. Super. Ct. 385 (1890), finally decided in 158 N. Y. 1 (1899).

[5] See § 317, *supra*, and §§ 777, 852, *infra.* Where stock is mortgaged and delivered to the trustee of the mortgage, this is a mortgage and not a pledge. Toler *v.* East Tennessee, etc. Ry., 67 Fed. Rep. 168, 178 (1894).

[6] See § 317, *supra.* Where stock is deposited with one trust company as additional security for a mortgage given to another trust company, and upon default the former company refuses to deliver the stock, and the latter trust company then commences a suit in equity to compel the former trust company to deliver the stock, and during that suit the stock declines in value, a bondholder secured by such mortgage cannot hold liable the trust company holding the stock, on account of the decline in value, inasmuch as the suit in equity determined all questions, including the amount of damage. Bracken *v.* Atlantic T. Co., 167 N. Y. 510 (1901).

second mortgage, where the first mortgage does not prohibit such second mortgage, the stock, by the terms of the mortgage, remaining in the name of the mortgagor.[1] A contract whereby a stockholder delivers certain stock for money to be paid to the corporation, the money to be repaid out of dividends and in other ways and the stock then to be returned, is a conditional sale, and not a loan to the corporation.[2] It seems that a stockholder may lease his stock. He may for a certain sum assign to another all dividends during the specified time, and give to the lessee the right to vote the stock during that time.[3]

In England, where certificates of stock have not the quasi-negotiability that they have in America, a mortgage of stock is common and is enforced as a mortgage, and the mortgagee after a reasonable time may sell without notice to the mortgagor.[4]

§ 465. *How a pledge of stock arises or is made — Pledge, by the corporation itself, of its own stock.*— A pledge of stock is generally made by a delivery of the certificates of stock indorsed in blank to the pledgee, and a memorandum in writing to the effect that the stock is held in pledge is generally signed and given by the pledgor to the pledgee. The pledge may be to a third person for the benefit of the creditor.[5] A mere direction to the corporation cannot constitute a pledge.[6] But where no certificate has been issued to

[1] Gasquet *v.* Fidelity, etc. Co., 75 Fed. Rep. 343 (1896).

[2] Crimp *v.* McCormick Const. Co., 71 Fed. Rep. 356 (1896).

[3] Zachry *v.* Nolan, 66 Fed. Rep. 467 (1895).

[4] "Express powers were not formerly necessary on mortgages of stock, or in the instruments of defeasance executed by the transferee; nor need a mortgagee of stock now rely on his statutory power in order to realize his security by sale. If stock is itself made the security for money, and the day appointed for payment is passed, the mortgagee may at once proceed to sell the stock, and repay himself principal and interest, without any authority from the mortgagor, and without commencing an action for foreclosure." Deverges *v.* Sanderman, etc. Co., [1901] 1 Ch. 70.

[5] See § 317, *supra*, also § 476, *infra*, as to stock placed under a mortgage deed of trust. A party receiving money paid on subscriptions for stock does not, merely because he places in a tin box in a safe-deposit company a declaration that certain securities owned by him are held as collateral security therefor, create a pledge for the benefit of the corporation to secure the paying over of such subscriptions to the corporation. Girard Trust Co. *v.* Mellor, 156 Pa. St. 579 (1893).

[6] Cumming *v.* Prescott, 2 Y. & C. Exch. 488 (1837); Lallande *v.* Ingram, 19 La. Ann. 364 (1867), the court saying: "In all cases of pledges the pledgee must be put in possession of the thing pledged; and, if it be a claim, the evidence of the obligation must be transferred and delivered. Shares in stock cannot be pledged unless they be evidenced by certificates, which must be transferred and delivered to the pledgee." If the certificates of stock are not delivered to the pledgee nor to any one for him there is no pledge. Succession of Lanaux, 46 La. Ann. 1036 (1894).

the stockholder he may pledge the stock by an instrument in writing.[1] Actual delivery is necessary to constitute a pledge.[2] It does not exist although the president of a railroad company has its bonds in his possession and states that he holds them in pledge for a syndicate of which he is a member. An equitable pledge may be enforced by the court, but only where there is a contract by the pledgor corporation applying to specific property.[3] A pledgee does not waive his pledge although he returns the stock to the pledgor to be sold.[4] A mere delivery of the certificate without a written

[1] First Nat. Bank *v.* Gifford, 47 Iowa, 575 (1877), where such a pledgee was protected against a third person who had advanced the money to the pledgor to purchase the stock. See also Brigham *v.* Mead, 92 Mass. 245 (1865); Thorp *v.* Woodhull, 1 Sandf. Ch. 411 (1844), and § 360, *supra.* Unissued stock may be pledged by the person entitled to it. When issued, it at once becomes a pledge. Harris's Appeal, 12 Atl. Rep. 743 (Pa. 1888).

[2] Christian *v.* Atlantic, etc. R. R., 133 U. S. 233 (1890), the court saying: "A pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. He may then, in default of payment of the debt for which the thing is pledged, sell it for the purpose of raising the amount, by merely giving proper notice to the pledgor. In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other documentary title, with a transfer executed to himself, or in blank (unless payable to bearer), so as to give him the control and power of disposal of it. Such things are then called pledges, but more generally collaterals, and they may be used in the same manner as pledges properly so called. If there is no transfer attached to or accompanying the document, it is imperfect as a pledge, and requires a resort to a court of equity to give it effect." An agreement that certain bonds in the possession of a third party shall be held in pledge is not a good pledge. Actual delivery is necessary to constitute a pledge. Seymour *v.* Hendee, 54 Fed. Rep. 563 (Vt. 1893). Where stock is placed in a trustee's hands, and a trustee's certificate is taken therefor, a pledge of the trustees's certificate is not a pledge of the stock sufficient to cut off subsequent attachments of the stock. Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891). Where one party loans money to another party to buy stock in a certain company, such stock to be delivered to the former party in pledge, and the latter party uses the stock for another purpose, the loan of the money is not a mere loan, but the money is impressed with a trust, and this trust follows the stock except as against *bona fide* holders. Barnard *v.* Hawks, 111 N. C. 333 (1892). A pledge made by a separate written assignment of the stock, the certificates remaining in the pledgor's possession and continuing to stand in his name on the corporate books, is not good as against the pledgor's receiver who takes possession of the certificates. Atkinson *v.* Foster, 134 Ill. 472 (1890).

[3] Hook *v.* Ayers, 80 Fed. Rep. 978 (1897). On the question of the necessity of a delivery in order to constitute a pledge, see also Fidelity, etc. T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439 (1896).

[4] Winslow *v.* Harriman Iron Co., 42 S. W. Rep. 698 (Tenn. 1897). Even though a pledgee who holds the certificates indorsed in blank sends them to the pledgor to be executed for new certificates in a consolidated company, and even though the pledgor takes out such new certificates in his own name,

transfer is sufficient to constitute a pledge, but such a pledge is imperfect, and to enforce it a suit in equity is necessary.[1] A delivery of the certificate of stock indorsed in blank is sufficient to constitute a pledge, without any memorandum in writing to that effect and without a registry of the same being made on the corporate books.[2] Not even a provision of the charter or a by-law of the cor-

yet this is not a waiver of the pledge entitling attaching creditors of the pledgor to precedence over the pledgee. McClung v. Colwell, 107 Tenn. 592 (1901). A transaction whereby a debtor delivers certificates of stock to its creditor in pledge, and the creditor immediately returns them to the debtor, is not a valid pledge, even though the debtor told the corporate officers of the pledge, but said he did not want the transaction to appear on the books, and even though the secretary makes a note of the fact on the stubs of the certificate of stock book. An execution subsequently levied upon the stock as the property of the debtor takes precedence over the alleged pledge. McFall v. Buckeye, etc. Assoc., 122 Cal. 468 (1898). A pledge to secure the debt of another is not waived by temporarily allowing that other to have the pledge for a short time. Wing v. Holland T. Co., 5 N. Y. Supp. 384 (1889).

[1] See Brewster v. Hartley, 37 Cal. 15 (1869); Robinson v. Hurley, 11 Iowa, 410 (1860); Christian v. Atlantic, etc. R. R. 133 U. S. 233, 242 (1898). See also § 476, *infra*; but see Lallande v. Ingram, 19 La. Ann. 364 (1867). *Contra*, Nisbit v. Macon, etc. Co., 12 Fed. Rep. 686 (1882). See also § 375, *supra*. A pledge of the certificates of stock is effective without notice to the corporation. Crescent City, etc. Co. v. Deblieux, 40 La. Ann. 155 (1888). A pledge without a transfer confers no legal title. Wagner v. Marple, 10 Tex. Civ. App. 505 (1895). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson v. Davis, 170 U. S. 36 (1898). In a suit by the pledgee to have a judicial sale of the stock, an assignee of the pledgor's interest is a necessary party, where the pledgee knows of such assignment, and the pledge was made merely by delivery of the certificate without any transfer on the back thereof. Brown v. Hotel Assoc., 88 N. W. Rep. 175 (Neb. 1901). A pledge of policies of fire insurance may be made by delivery. *In re* Little River, etc. Co., 92 Fed. Rep. 585 (1899).

[2] Spreckels v. Nevada Bank, 113 Cal. 272 (1896); Masury v. Arkansas National Bank, 93 Fed. Rep. 603 (1899); Mount Holly, etc. Co. v. Ferree, 17 N. J. Eq. 117 (1864); Finney's Appeal, 59 Pa. St. 398 (1868); Jarvis v. Rogers, 13 Mass. 105 (1816); Blouin v. Hart, 30 La. Ann. 714 (1878); Merchants' Nat. Bank v. Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77; Broadway Bank v. McElrath, 13 N. J. Eq. 24 (1860); Cornick v. Richards, 3 Lea (Tenn.), 1 (1879); Baldwin v. Canfield, 26 Minn. 43 (1879); Pitot v. Johnson, 33 La. Ann. 1286 (1881); New Orleans, etc. Assoc. v. Wiltz, 10 Fed. Rep. 330 (1881); Continental Nat. Bank v. Eliot Nat. Bank, 7 Fed. Rep. 369 (1881); U. S. v. Cutts, 1 Sumner, 133 (1832); s. c., 25 Fed. Cas. 745. *Cf.* State v. Jeffersonville Nat. Bank, 89 Ind. 302 (1883). A pledge may be made by signing in blank on the back of the certificate and pinning the certificate to the note. McClintock v. Central Bank, 120 Mo. 127 (1894). As to how a pledge may be made, see also Winslow v. Harriman Iron Co., 42 S. W. Rep. 698 (Tenn. 1897). The pledgor may, by word of mouth,

poration to the effect that transfers are not valid until registered on the corporate books can prevent a pledge of stock being made by a mere delivery of the certificates indorsed in blank, or indorsed to the pledgee, without such registry.[1] The provision requiring such registry would seem not to concern the pledgee in any way, except that without the registry he could not claim the dividends from the corporation;[2] and in a few states, where an attachment of the stock for the pledgor's debts would cut off a previous unregistered vendee's or pledgee's rights, he by not registering encounters that risk.[3] Although a transfer is on a separate piece of paper, and is not acknowledged as required by a rule of the stock

extend stock already pledged to further advancements by the pledgee. Van Blarcom *v.* Broadway Bank, 9 Bosw. 532 (1862).

[1] McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871); Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Fraser *v.* Charleston, 11 S. C. 486 (1878); Factors', etc. Ins. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879); Pitot *v.* Johnson, 33 La. Ann. 1286 (1881); Continental Nat. Bank *v.* Eliot Nat. Bank, 12 Rep. 35 (1881); s. c., 7 Fed. Rep. 369; Lowry *v.* Commercial, etc. Bank, Taney, 310 (1848); s. c., 15 Fed. Cas. 1040; Blouin *v.* Hart, 30 La. Ann. 714 (1878); Lightner's Appeal, 82 Pa. St. 301 (1876); U. S. *v.* Cutts, 1 Sumner, 133 (1832); s. c., 25 Fed. Cas. 745; Leitch *v.* Wells, 48 N. Y. 585 (1872); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839), aff'g 20 Wend. 91; Otis *v.* Gardner, 105 Ill. 436 (1883). As regards such provisions requiring registry, a pledge of stock stands on the same footing as a sale of stock. See also §§ 379, 432, *supra.* Where a person, as preliminary to making a loan with stock as collateral, indorses his stock over to the lender and leaves it with the corporate secretary, and then the loan is abandoned, the secretary is bound to deliver back the stock. Galvin *v.* Mac Mining, etc. Co., 14 Mont. 508 (1894). The unregistered pledge is protected against the pledgor's assignee in bankruptcy. *Re* Shelley, 34 L. J. (Bankr.) 6 (1864). Under the New Hampshire statute a pledge of stock to secure a previously existing debt is void if made within three months of insolvency. Hackett *v.* Leominster, etc. Bank, 68 N. H. 274 (1895).

[2] See § 468, *infra.*

[3] Thus, in states where an attachment has precedence over not only transfers without registry made after the attachment is levied, but over unregistered transfers made before the levy of attachment, a pledge, like a sale of stock, is protected against attachment on the pledgor's debts only by registry. Weston *v.* Bear River, etc. Co., 5 Cal. 186 (1855); Williams *v.* Mechanics' Bank, 5 Blatchf. 59 (1862); s. c., 29 Fed. Cas. 1376; State Ins. Co. *v.* Sax, 2 Tenn. Ch. 507 (1875); State *v.* First Nat. Bank, 89 Ind. 302 (1883); Shipman *v.* Ætna Ins. Co., 29 Conn. 245 (1860); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Oxford Turnp. Co. *v.* Bunnell, 6 Conn. 552 (1827). *Cf.* Strout *v.* Natoma W. & M. Co., 9 Cal. 78 (1858). But the purchaser at the execution sale is not protected against the pledgee, if he purchased with notice. Weston *v.* Bear River, etc. Co., 6 Cal. 425 (1856). And if notice of the pledge is given to the corporation, the pledgee is protected against attachments, although no registry is had. State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874). See also § 486 *et seq., infra.* As to the dividends, the pledgee is entitled to them as against the pledgor, but of course can obtain them from the corporation only by obtaining registry.

exchange, nevertheless the pledgee may be a *bona fide* holder.[1] An apparently absolute transfer of stock, whether registered on the corporate books or not, may be shown to be a pledge, and parol evidence is admissible to prove that fact.[2]

[1] Smith *v.* Savin, 141 N. Y. 315 (1894).

[2] Brick *v.* Brick, 98 U. S. 514 (1878); Wilson *v.* Little, 2 N. Y. 443 (1849); Ginz *v.* Stumph, 73 Ind. 209 (1880); Newton *v.* Fay, 92 Mass. 505 (1865); McMahon *v.* Macy, 51 N. Y. 155 (1872); Becher *v.* Wells, etc. Co., 1 Fed. Rep. 276 (1880); Burgess *v.* Seligman, 107 U. S. 20 (1882); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Butman *v.* Howell, 144 Mass. 66 (1887); Ayer *v.* Seymour, 5 N. Y. Supp. 650 (1889). An absolute transfer of stock may be shown to have been in trust only, the stock to be returned upon the termination of a lease. Town of Mt. Morris *v.* Thomas, 158 N. Y. 450 (1899). A depositor in a bank who has been induced to take from the bank its stock as security may show by parol evidence that he took such stock as collateral security, and not in liquidation of his deposit. Williams *v.* American Nat. Bank, 85 Fed. Rep. 376 (1898); aff'd, 101 Fed. Rep. 943 (1900). A certificate of stock indorsed in blank may be shown to have been delivered in pledge. Riley *v.* Hampshire County Nat. Bank, 164 Mass. 482 (1895). It may be a question of fact whether the delivery of certificates of stock is made as a sale or as collateral security. The presumption is that it is collateral security where the facts show a prior debt, and there is no proof as to the purpose of the transfer. Borland *v.* Nevada Bank, 99 Cal. 89 (1893). This subject is somewhat similar to the claim of a person that another person purchasing stock did so as agent for the former. "Loose, vague, and indefinite expressions are insufficient to create such a trust. The intention must be evinced with clearness and certainty." Levi *v.* Evans, 57 Fed. Rep. 677 (1893). See § 321, *supra*. An apparent sale of stock is not proven to be a pledge on the evidence of plaintiff, contradicted by defendant, when the full value of the stock was paid and a receipt therefor given by the plaintiff. Travers *v.* Leopold, 124 Ill. 431 (1888). A pledgor may bring a suit for an accounting and to establish the fact that the transfer of stock was a pledge, and he may restrain a suit by the pledgee against the corporation for the stock. McDowell's Appeal, 123 Pa. St. 381 (1889). What appears to be an absolute sale may be shown to be a pledge, but the proof must be clear and conclusive. McLeod *v.* Weldon, 1 New Brunswick Eq. Rep. 181 (1895). The relation of pledgor and pledgee may be proved by oral testimony of the pledgee that he bought the stock in the name of the pledgor, and became surety on money borrowed for that purpose, and that the stock was deposited in a certain way as security. Schwind *v.* Boyce, 51 Atl. Rep. 45 (Md. 1902). Where a written contract constitutes a sale of stock it cannot be shown to be a pledge unless a mutual mistake or fraud or other inequitable conduct is shown. Miller *v.* Carpenter, 68 N. Y. App. Div. 346 (1902). An apparently absolute sale of stock cannot be shown to be merely a pledge, unless the proof is clear, plain and convincing. Wilson *v.* Cunningham, 67 Pac. Rep. 118 (Utah, 1901). Where the owner of stock has pledged all of it to different parties, and arranges with one of them to take up all the stock and the latter does so, and for several years treats it as his own, and the lower court finds that the agreement was that the pledgee should own it, the upper court will not disturb the decision, especially where the pledgor claims that he transferred the stock to avoid paying other creditors. Hukill *v.* Yoder, 189 Pa. St. 233 (1899). See also 79 N. Y. App. Div. 130.

A corporation may pledge its unissued stock,[1] and the pledgee is not liable as an absolute stockholder on such stock.[2] The question of usury in the note secured by a pledge of stock may affect the pledge itself.[3] A pledge is not illegal though it secures a greater

[1] Burgess *v.* Seligman, 107 U. S. 20 (1882); Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24 (1880); Melvin *v.* Lamar Ins. Co., 80 Ill. 446 (1875); Protection Life Ins. Co. *v.* Osgood, 93 Ill. 69 (1879); *Re* City Terminus Hotel Co., 14 Eq. 10 (1872); Union Sav. Assoc. *v.* Seligman, 92 Mo. 635 (1884), overruling Griswold *v.* Seligman, 72 Mo. 116. *Contra*, Brewster *v.* Hartley, 37 Cal. 15 (1869). See § 247, *supra*, p. 533, note 2. Where a corporation pledges its own stock, the pledgee may sell that stock for non-payment of the debt at less than par. This rule prevails even though the charter provides that the stock shall not be sold below par. Peterborough R. R. *v.* Nashua, etc. R. R., 59 N. H. 385 (1879). Unissued stock may be issued by the corporation as a pledge to secure a loan, and the corporation cannot set up that it was issued at less than par in violation of the constitution. The issue is good in the hands of the pledgee to the extent of the loan. Gasquet *v.* Crescent City B. Co., 49 Fed. Rep. 496 (1892). Where the company issues its stock as collateral security to notes given to it by its subscribers in payment for such stock, and then sells the notes, the stock follows the notes and may be subjected to the payment of judgments on the notes. If the corporation has issued the stock to others it must pay the judgments. Houston, etc. Ry. *v.* Bremond, 66 Tex. 159 (1886). A mortgage is valid as against the corporation giving it, although the officers give to the mortgagee their individual notes as additional security and cause the corporation to issue stock to themselves without payment, which they deposit also as collateral with the mortgagee. The giving of the mortgage is not an increase of indebtedness such as is prohibited by the Pennsylvania constitution. Powell *v.* Blair, 133 Pa. St. 550 (1890). The unissued stock of the corporation may be issued to one of its creditors as collateral security. Parberry *v.* Woodson Sheep Co., 18 Mont. 317 (1896). The appointment of a receiver does not affect the rights of a pledgee from the corporation prior to such appointment. The pledgee may sell. National, etc. Bank *v.* Benbrook, etc. Co., 27 S. W. Rep. 297 (Tex. 1894). A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement, and the stock turned over to the corporation. Kinsman *v.* Fisk, 83 Hun, 494 (1895). Questions relative to the pledge by a company of its own bonds are considered elsewhere. See § 763, *infra*. A corporation may pledge its bonds at less than par. Duncomb *v.* N. Y. etc. R. R., 84 N. Y. 190 (1881). In this case $34,000 of bonds were pledged to secure an overdue note for $5,000 and interest. The court said (p. 202) that the pledgee "had unquestionably the right to take as large a 'margin' for his loan as the borrower was willing to grant. Nor can we discern any valid reason why a railroad corporation may not dispose of its bonds by way of pledge as well as of sale; and in the absence of proof that the proceeds of the loan were, with the knowledge of both parties, to be applied to some purpose not authorized by the statute permitting their issue, we can see no reason, as has already been said, why they might not be used as a pledge to secure an indebtedness already existing."

[2] See §§ 247, 309–313, *supra*.

[3] See Little *v.* Barker, 1 Hoffm. Ch. 487 (1840); and see Frost *v.* Stokes, 55

amount than the pledgee bank is entitled to loan to one person.[1] A *bona fide* pledgee of stock is protected against claims of former owners of that stock to the same extent that an absolute purchaser of the stock would be protected, with the single exception that the power of a trustee or agent to sell stock does not give him power to pledge it.[2] The quasi-negotiability of certificates of stock protects a pledgee and a vendee alike.[3] The negotiability of a note is not destroyed by a provision that certain bonds are given as collateral security for its payment.[4] Where a trust company has orally agreed to hold certain bonds for delivery in accordance with certificates issued by another company, and subsequently the trust company loans money to such other company and takes such bonds as security, the holders of the certificates may hold the trust company liable for not protecting the certificates.[5]

Where a pledge is made by depositing stock in the hands of a third party, or where stock is delivered to a trustee of a mortgage deed of trust, various questions arise, which are considered elsewhere.[6]

§ 466. *Pledgee may have the stock registered in his own name or the name of another.*— Where certificates of stock indorsed in blank are delivered to a person in pledge as collateral security for a debt or for any other purpose, the pledgee has a right to fill in the blanks and have the stock registered in his own name on the corporate books;[7] or the pledgee may have the stock registered in the name

N. Y. Super. Ct. 76 (1887), holding that the New York statute of 1882 allows any interest if the debt is on demand and is over $5,000, and stock is pledged. The New York statute of 1882, as to bankers loaning on collateral, was applied in Thomas *v.* Coffin. 62 Fed. Rep. 665 (1894), a case in which the taking of commissions was also involved. If stock is pledged to secure an usurious note, the pledgor may, under the New York statute, sue to recover back the stock without paying the debt. Dickson *v.* Valentine, 6 N. Y. Supp. 540 (1889); Cousland *v.* Davis, 4 Bosw. 619 (1859). See also Birdseye's Statutes, 2d ed., p. 1696.

[1] McClintock *v.* Central Bank, etc., 120 Mo. 127 (1894).

[2] See §§ 326, 351, *supra.*

[3] See § 432, *supra.*

[4] Valley Nat. Bank *v.* Crowell, 148 Pa. St. 284 (1892). The fact that a promissory note negotiable in form recites that it is secured by collateral and that the latter may be sold does not destroy the negotiability of the note. 1 Daniel Neg. Inst., 4th ed., §§ 1774–1784.

[5] Hubbard *v.* Manhattan Trust Co., 87 Fed. Rep. 51 (1898).

[6] See § 317, *supra.*

[7] Skiff *v.* Stoddard, 63 Conn. 198 (1893); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882); *Re* Angelo, 5 De G. & S. 278 (1852); Horton *v.* Morgan, 19 N. Y. 170 (1859); Union, etc. Bank *v.* Farrington, 13 Lea (Tenn.), 333 (1884); Heath *v.* Griswold, 5 Fed. Rep. 573 (1881), holding also that a surety is not thereby discharged; Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891); Day *v.* Holmes, 103 Mass. 306 (1869); Fitchburg Sav. Bank *v.* Torrey, 134 Mass. 239 (1883), also holding that a release of the stock by the pledgee releases a surety; Fay *v.* Gray, 124 Mass. 500 (1878). *Cf.* State *v.* Smith, 15 Oreg.

of another person, in order that he may protect his special property in the stock and at the same time not be liable thereon.[1] It is proper and legal for a corporation to add to the name appearing on the stock certificate the words "as pledgee," or "as collateral security," or similar words.[2] In some states there are statutes as well as decisions to the effect that notice to the corporation that a person holds as pledgee certain certificates of stock, which stand on the books of the company in the pledgor's name, prevents an attachment against the pledgor from reaching more than the equity of redemption in such stock.[3]

§ 467. *Stock-broker purchasing stock for a customer on a margin is a pledgee of the stock.*—It has been well established that, where a stock-broker purchases stock on an order from his customer, and the customer does not pay for the stock, but deposits with the broker a sum of money called a "margin," to protect the broker against loss, the broker is bound to have on hand the stock so purchased during the entire time of the contract, and has the rights, duties, and liabilities of a pledgee, with the customer as a pledgor.[4] The broker under such circumstances must conform to all the rules governing a pledgee's attitude towards a pledgor. He cannot repledge, nor can he sell without due notice, unless such rights are given by the customer, the pledgor. A broker has no right to re-

98, 114 (but see p. 132) (1887). The pledgee may sue to have the pledge transferred to himself and determine the rights of other claimants. Newcombe *v.* Lottimer, 12 N. Y. Supp. 381 (1890). The corporation must allow the registry. Cornick *v.* Richards, 3 Lea (Tenn.), 1 (1879). Where a contract does not merely pledge stock, but gives the creditor the legal title and unlimited power of disposition, the creditor may, by suit in equity, compel the company to allow a transfer, and the transferrer need not be made a party to the suit. Skinner *v.* Fort Wayne, etc. R. R., 58 Fed. Rep. 55 (1893). In California a pledgor may enjoin a pledgee from transferring stock into his name for the purpose of controlling an election, which otherwise the pledgor would control, where the statutes of the state provide for recording such a pledge without a transfer of the stock itself. Spreckels *v.* Nevada Bank, 113 Cal. 272 (1896); Tom, etc. Co. *v.* Green, 11 Colo. App. 447 (1898). A pledgee has power to have the stock transferred on the corporate books, and if it has agreed to hold certain stock as security for a third person's note and fails to obtain a proper transfer, it is liable. First Nat. Bank *v.* Park, 91 N. W. Rep. 826 (Iowa, 1902).

[1] Day *v.* Holmes, 103 Mass. 306 (1869); Heath *v.* Griswold, 5 Fed. Rep. 573 (1881); Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479 (1884). See also § 470, *infra.*

[2] See § 247, *supra,* and ch. XXVII, *infra.*

[3] See ch. XXVII, *infra.*

[4] Baker *v.* Drake, 66 N. Y. 518 (1876); Markham *v.* Jaudon, 41 N. Y. 235 (1869); and see § 457, ch. XXV, *supra.* A broker holding stock as collateral security on a margin does not hold the stock in a fiduciary capacity. McBurney *v.* Martin, 6 Rob. (N. Y.) 502 (1866); Lambertson *v.* Van Boskerk, 49 How. 266, 4 Hun, 628 (1875).

pledge his customer's stocks or bonds, carried by the broker as collateral or on a margin, unless the debt is transferred at the same time, or unless an express contract authorizes such repledge.[1]

[1] Dykers *v.* Allen, 7 Hill, 497 (1844). A broker has no right to repledge stock held by him for a customer to secure margins, and, even if the customer authorizes him to repledge, this authority sustains a repledge only to the extent of the amount due from the customer, and the broker must be ready at all times to return the stock to the customer upon the latter paying the debt. The repledgee, under the usual transfer in blank on the back of the certificate, is not a *bona fide* pledgee. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894). Where it was understood between a firm of brokers and its customers, for whom and on whose order it bought stocks on the security of a margin, that the firm might, according to the usual course of business, pledge or hypothecate as security for loans to the firm the stocks thus bought, it was held that a mere pledge of such stocks would not be of itself a conversion. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878). See also Lawrence *v.* Maxwell, 58 Barb. 511 (1871); 6 Lans. 469; 53 N. Y. 19. In Wood *v.* Hayes, 81 Mass. 375 (1860), it was held that "a broker who advanced money to buy stock for another, and held it in his own name, might, so long as he had not been paid or tendered the amount of his advances, pledge it as security for his own debt to a third person, without making himself liable to an action by his employer; and this upon the ground that the contract was conditional to deliver the shares upon the payment of the money." Approved in Covell *v.* Loud, 135 Mass. 41 (1883), where it was held that, where the customer is unable to advance further margin, and tells the broker to do the best he can, he may sell without notice. The decided weight of authority, however, holds that, unless the power is expressly given to the broker to repledge the stock, he cannot legally repledge it. A broker has no right to repledge the stocks held by him as collateral to advances to a customer, especially so after the customer has repaid the advances. Van Voorhis *v.* Rea, 153 Pa. St. 19 (1893). Where a broker, a gratuitous bailee of corporate stock, delivers the same to the company without authority, and the stock is converted to the use of the company, the bailee is liable for its value, irrespective of what his intentions were in the premises. In such case the bailor may recover the value of the stock at the time of conversion, with all dividends paid from the time of delivery, together with interest on the value of the stock from date of conversion, and on the dividends from date of respective payments. Hubbell *v.* Blandy, 87 Mich. 209 (1891). A broker has no implied power to repledge. Skiff *v.* Stoddard, 63 Conn. 198 (1893). Where a broker repledges stock carried by him on a margin, the customer cannot, upon the failure of the broker, have all the broker's stock of that class first applied in discharge of the claim. Skiff *v.* Stoddard, 63 Conn. 198 (1893); Jamison's Assigned Estate, 3 Pa. Dist. 217 (1894). Where the pledgee converts the pledge by selling it, and then assigns for the benefit of creditors, the pledgor comes in as any other creditor, and not as a preferred creditor. *Re* Jamison's Estate, 163 Pa. St. 143 (1894), holding also that the debt due from the pledgor to the pledgee may be set off. Where the pledgee, without the knowledge of the pledgor, sells one of the notes, and gives with it a part of the collateral as security, the pledgor may pay that note and take all the security so given to the repledgee. The first pledgee cannot claim any lien on the part so repledged. McDonald *v.* Grant,

In Massachusetts different rules prevail. In that state the rule is clearly laid down that a broker is not a pledgee of stocks which he buys for his customer on a margin, but that, on the contrary, the broker is the owner of the stock and that he is not bound to keep the stock of one customer distinct from that of another, but may take a single certificate in his own name for several customers, and may pledge the stock for advances made to himself, and that he is the person to be taxed on such stock.[1] Where a broker sells his client's stock illegally, the measure of damages in a suit by the client is the difference between the price at which the stock was sold and the highest market price within a reasonable time thereafter.[2]

§ 468. *Miscellaneous rights of pledgee and pledgor — Dividends — Reorganizations — The equity of redemption.*— Dividends declared during the continuance of the pledge belong to the pledgee,[3] and even though the latter is not registered as owner on the corporate books, yet, if the corporation has notice of the pledge, it must pay the dividends to the pledgee.[4] Where a certificate of stock has

N. Y. L. J., July 16, 1895, Supr. Ct. Sp. T. A broker may pledge his customer's securities for an amount not exceeding the amount due from the customer, but the broker must not put the securities beyond the reach of the customer, nor mingle such securities with others and hypothecate all of them for a large amount; the reason of this decision being that, so long as the customer could go to the pledgee and redeem the securities without loss, he, the customer, was not injured. Douglas *v.* Carpenter, 17 N. Y. App. Div. 329 (1897). On this subject, see also § 471, *infra*, and § 457, *supra*.

[1] The court realized, however, that its decision was not in accord with the current of authority and said, "the English doctrine seems to be the same as that of this commonwealth, so that we are not left quite alone in a desert of logic." Chase *v.* City of Boston, 62 N. E. Rep. 1059 (Mass. 1902). In Massachusetts a broker who purchases stock for a customer on a margin is not a pledgee, but is merely under contract to deliver the stock on payment of the balance, and hence he may pledge the stock or sell it, and is not in default until the customer has tendered the balance and demanded the stock. If the broker is adjudicated a bankrupt the customer may treat this as a breach of contract and prove his claim. *In re* Swift, 105 Fed. Rep. 493 (1900). See also § 457, *supra*.

[2] Wolff *v.* Lockwood. 70 N. Y. App. Div. 569 (1902). The measure of damages in a suit by a customer against a broker for an unauthorized sale of stock is the difference between the price at which it was sold and the highest price within a reasonable time thereafter, which, in this case, the court fixed at thirty days. Burhorn *v.* Lockwood, 71 N. Y. App. Div. 301 (1902).

[3] Herrman *v.* Maxwell, 47 N. Y. Super. Ct. 347 (1881). And the pledgor who collects them holds them in trust for the pledgee. Hill *v.* Newichawanick Co., 8 Hun, 459; affirmed, 71 N. Y. 593 (1877). Where a pledge of stock is renewed and a new note given, dividends accruing before the renewal go to the pledgor. Fairbank *v.* Merchants' Nat. Bank, 132 Ill. 120 (1889).

[4] In Central, etc. Bank *v.* Wilder, 32 Neb. 454 (1891), it was held that not only was the pledgee entitled to the

been pledged, but no transfer has been made on the corporate books, and a dividend is paid to the pledgor, the pledgee may bring

dividends, but was entitled to them although the stock stood on the corporate books in the name of the pledgor, where the officers knew all about the pledge. A pledgee is entitled to collect the dividends, and in some instances may do so even though the stock is not transferred to him on the books, it being shown that the officers knew of the pledge. Guarantee Co. *v.* East Rome Town Co., 96 Ga. 511 (1895). A pledgee of stock, even though not recorded as a stockholder, is entitled to dividends declared after the pledge was made, as against a claim of the corporation against the pledgor as an offset. Gemmell *v.* Davis, 75 Md. 546 (1892). Where a stockholder of record pledges his certificates of stock, and no transfer is made on the books, and subsequently a dividend is declared, and after such dividend is payable, but before it is actually paid, the pledgee presents to the company the stock for transfer, with a written request of the pledgor to the same effect, together with an assignment by the pledgor to the pledgee of the dividend, it is no defense to the company that it has a claim against the pledgor for a personal debt, or for a debt of a firm in which he is interested. American, etc. Bank *v.* Nashville, etc. Co., 36 S. W. Rep. 960 (Tenn. 1896). The corporation is liable to a pledgee, to whom the stock has been transferred on the books, for dividends paid to the pledgor. The acceptance of part payment, etc., by the pledgee from the pledgor does not waive his cause of action against the company. Boyd *v.* Conshohocken Worsted Mills, 149 Pa. St. 363 (1892). In Maine it has been held that while a corporation may pay an ordinary dividend to a stockholder of record, yet that a dividend paid in the liquidation and winding up of the corporation must be paid to the holder of the certificate, even though such holder be a transferee who has not been recorded as such on the books of the company, and that the company is liable to him for dividends in liquidation, even though it has paid them to the registered stockholder; and that this rule applies to a pledgee of a certificate of stock as well as a purchaser of a certificate of stock. Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500 (1897). Where a certificate is issued by the corporation to the pledgee as pledgee, on the face of the certificate, the dividends must be paid to him, and if the corporation pays the dividends to the pledgor it is liable therefor to the pledgee. Hunt *v.* Laconia, etc. Ry., 68 N. H. 561 (1896). In insolvency proceedings a pledgee is entitled to dividends without giving up his security, and the federal court will not follow the state decisions on this point in receivership cases. London, etc. Bank *v.* Willamette, etc. Co., 80 Fed. Rep. 226 (1897). See § 763, *infra*, on this point. The pledgee is entitled to the dividends, even though the stock stands in the name of the pledgor on the books of the company. George, etc. Co. *v.* Range, etc. Co., 16 Utah, 59 (1897). Where stock still stands in the name of the pledgor and an attachment is levied upon it, dividends that accrue thereafter belong to the pledgee, both as against the pledgor and his creditors. Farmers,' etc. Bank *v.* Mosher, 88 N. W. Rep. 552 (Neb. 1901). Where the stock still stands in the name of the pledgor there is no duty imposed on the pledgee to collect the dividends declared thereon. McAulay *v.* Moody, 128 Cal. 202 (1900). A pledgee is not entitled to past-due coupons which were detached from the bonds before they were pledged, even though such coupons are entitled to payment in priority to the bonds themselves. Rhawn *v.* Edge Hill, etc. Co., 201 Pa. St. 637 (1902).

suit against the pledgor for such dividend.[1] The pledgee, however, must account for dividends when the pledge is redeemed.[2] A pledgee has a legal right to surrender the certificate to the corporation and take a new certificate therefor, running either to himself or to any other person whom he may designate.[3]

Where the pledgor has pledged stock to secure the debts of another at a bank, and renewals thereof, the pledge continues though the pledgor dies.[4] But a pledge of stock to secure another person's debt is released by an extension of that debt.[5] If a note is secured by collateral, an accommodation indorser is not liable if the collateral is released from its deposit as security for the note.[6] An indorser, however, is not released by a change in the security, except to the extent that the security is decreased.[7] If a note secured by collateral has been paid by a surety, and the surety claims the collateral, and the collateral is also claimed by another person, the pledgee may interplead.[8] Where the pledgor delivers to the pledgee a certificate of stock in order that a part thereof may be transferred to the pledgee, and the latter endeavors to keep all of the stock and sues the corporation for not transferring the same to him, the corporation may bring the pledgor into the suit and have all rights adjudicated.[9] Where a pledge is deposited in third parties' hands for the benefit of both parties, the creditor is not bound to see to the return of the pledge.[10] A pledge to secure indebtedness of specified parties is not security for their individual debts.[11] A pledge to secure the note of another person, past due, is not binding, where there is no extension of the time of payment.[12] If a per-

[1] Meredith, etc. Bank *v.* Marshall, 68 N. H. 417 (1896).

[2] Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850); Edw. Bailm., § 300.

[3] See § 247, *supra;* Donnell *v.* Wyckoff, 49 N. J. L. 48 (1887). A pledgee of bonds has a right to have them registered in his own name. Ritchie *v.* Burke, 109 Fed. Rep. 16 (1901).

[4] Cotton *v.* Atlas Nat. Bank, 145 Mass. 43 (1887).

[5] Price *v.* Dime Sav. Bank, 124 Ill. 317 (1888).

[6] Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891).

[7] Nelson *v.* First Nat. Bank, 69 Fed. Rep. 798 (1895). A pledgee may enforce his claim against the principal debtor, although the stock, which had been pledged by a third person to the pledgee to secure the debt, has been exchanged for stock in a reorganized company with the consent of the owner of the stock, but without the consent of the debtor or its receiver. McKusick *v.* O'Gorman, 69 N. W. Rep. 317 (Minn. 1896).

[8] Sioux Falls, etc. Bank *v.* Lien, 85 N. W. Rep. 924 (So. Dak. 1901).

[9] Tom Boy, etc. Co. *v.* Green, 11 Colo. App. 447 (1898).

[10] Robertson *v.* Sully, 2 N. Y. App. Div. 152 (1896), reversed on another point in 157 N. Y. 624.

[11] Haldeman *v.* German, etc. Bank, 44 S. W. Rep. 383 (Ky. 1898). Where one of the makers of a joint note gives collateral as security for that note, such collateral cannot be applied to another individual note given by him. First Nat. Bank *v.* Finck, 100 Wis. 446 (1898).

[12] Haldeman *v.* German, etc. Bank, 44 S. W. Rep. 383 (Ky. 1898).

son agrees to deposit stock to secure the debt of another, and fails to do so, he is liable, not for the debt, but for the value of the stock.[1] The pledge may be for a running liability, and is not released by an extension of any particular debt.[2] Stock may be given by the debtor to his creditor to sell for the benefit of the creditor, and the surplus to be returned to the debtor.[3] A deposit of bonds as security for the payment for rolling stock, but to be used only to pay any deficiency after the rolling stock has been sold and the proceeds credited, is a pledge and not a mortgage, and hence if the pledgee takes back the rolling stock without selling it the pledge ceases.[4] The pledge may be to secure the carrying out of a contract.[5] The agreement of the pledgor that the pledgee, a broker, should always thereafter have the brokerage business of the company, is enforcible, even after the pledge ceases, and for breach the pledgee may recover damages.[6] The pledge of stock may provide that, for part payments of the debt, the pledgor may withdraw part of the stock pledged.[7] A pledge, to secure a certain note and all other present or future demands of any kind, due or not due, is good as a pledge for the note specified, but does not apply as a pledge to another note due five years later, the payment of which is secured by real estate. Upon payment of the first note the pledgor may file a bill in equity to obtain the stock.[8] A person taking stock or bonds in pledge, with knowledge of the fact that the pledgor is under contract to deliver them to another person, may not be protected.[9] By a custom of banks in a particular local-

[1] Hite Nat. Gas Co.'s Appeal, 118 Pa. St. 436 (1888).

[2] Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338 (1881).

[3] Beckwith *v.* Burrough, 13 R. I. 294 (1881). Such action would probably make the creditor the agent of the debtor.

[4] Herrmann *v.* Central, etc. Co., 101 Fed. Rep. 41 (1900).

[5] Vaupell *v.* Woodward, 2 Sandf. Ch. 143 (1844).

[6] Carritt *v.* Bradley and another, [1901] 2 K. B. 550.

[7] First Nat. Bank *v.* Root, 107 Ind. 224 (1886).

[8] First Nat. Bank *v.* Illinois T. & S. Bank, 84 Fed. Rep. 34 (1897).

[9] See §§ 317, 766*c*, 852. Even though a party agrees to make future advances of money and is to receive bonds as security therefor, yet if, prior to such advances being made and the bonds received, the pledgor has contracted with another party to deliver to the latter said bonds, the latter is entitled to the bonds as against the first-named party who makes such advances subsequently and received the bonds with notice of such intervening contract. Columbia, etc. Co. *v.* Mercer, 57 S. W. Rep. 787 (Ky. 1900). Where a mortgage covers bonds to be thereafter delivered, and instead of such delivery the mortgagor deposits the bonds as security with the United States government, and then makes another mortgage covering such bonds, the first mortgagee is entitled to the bonds upon their being released by the United States government, even though such bonds are delivered under the second mortgage, unless the bonds or the notes secured by them under the second

ity, stock held by the bank against the pledgor as collateral for one loan may be held as collateral for all loans.[1] The statute of limitations may be a bar to the debt and yet not to the pledge.[2]

A pledgee has a right to vote on the pledged stock where he is registered as a stockholder,[3] but the pledgor may compel him, by legal proceedings, to give a proxy for voting purposes where there are equitable reasons for so doing.[4] A pledgee is not bound to protect the stock from forfeiture for non-payment of calls.[5] A pledgee may, however, pay assessments levied upon the stock, such assessments being a lien prior to his lien, and may charge such payments as expenses in preserving and protecting the title and making the security available on maturity.[6] A pledgee of certificates of stock is protected against further sales or pledges of the same stock by the pledgor, such other sales or pledges being without the delivery of any certificate, the same as the vendee of a certificate of stock is protected against another sale of the stock to a purchaser who takes without any certificate.[7] The possession of the certificate protects the pledgee herein. The pledgee is not liable for a loss of the pledge by theft, there being no negligence on his part.[8] But where the pledgee is a corporation, and the president, who has entire charge of its affairs, steals the securities, the corporation is liable to the pledgor for the value thereof, on the principle that a bailee for hire is liable for negligence in regard to the pledge.[9]

A pledgee of a certificate of stock is not bound by an agreement of all the stockholders to surrender to the corporation a part of

mortgage have passed into *bona fide* hands. Central T. Co. *v.* West India, etc. Co., 169 N. Y. 314 (1901).

1 Bacon's Adm'r *v.* Bacon's Trustees, 94 Va. 686 (1897).

2 See § 476, *infra.*

3 See § 612, *infra.*

4 See § 612, *infra.*

5 Southwestern R. R. Bank *v.* Douglas, 2 Spears (S. C.), 329 (1844). It has been held that where stock is only partly paid, and the corporation issues a certificate reciting on its face how much is still due, and the holder pledges it, and no transfer to the pledgee is made on the corporate books, the corporation can have a sale of the stock for non-payment of the balance remaining due, but such proportion of the proceeds will be paid to the pledgee as the amount already paid on the stock bears to the par value of the stock. Ingles, etc. Co. *v.* Knoxville, etc. Co., 53 S. W Rep. 1111 (Tenn. 1899).

6 Wells, etc. Co. *v.* Walker, 9 New Mex. 456 (1898).

7 Maybin *v.* Kirby, 4 Rich. Eq. (S. C.) 105 (1851). See §§ 321, 360, *supra.* The cases therein cited are partly cases of pledge and partly of sale of certificates of stock. The rule applies equally to both. A person to whom a pledgor fraudulently transfers his equity, and who redeems the stock and then sells it, is liable only for its actual value less the amount paid to so redeem. Hamilton Nat. Bank *v.* Halsted, 134 N. Y. 520 (1892).

8 Fleming *v.* Northampton Nat. Bank, 9 Fed. Cas. 264 (1881).

9 Cutting *v.* Marlor, 78 N. Y. 454 (1879). See also Ouderkirk *v.* Central National Bank, 119 N. Y. 263 (1890).

their stock, which part is to be then considered preferred stock and is to be sold by the corporation for the purpose of paying corporate debts.[1] The stockholders of a corporation may, together with the directors, cause the corporate property to be sold to a new corporation in exchange for the stock of the latter. A pledgee of stock in the former corporation cannot after the sale undo it, nor hold the latter corporation liable. His remedy is against the pledgor and the first corporation.[2] Although the pledgor of stock votes the stock in favor of a lease of the corporate property on such terms that no dividends on the stock are possible, yet, in the absence of fraud, the pledgee is bound.[3] A pledgor of bonds may take part in the purchase at the reorganization without any obligations

[1] Although all the other stock has had this agreement stamped on the certificates, yet the corporation cannot insist that the purchaser of the stock so pledged shall allow the same agreement to be stamped on the new certificates issued to such purchaser. The court will order a transfer free from the agreement. Campbell *v.* American Zylonite Co., 122 N. Y. 455 (1890). "A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding." National Foundry, etc. Works *v.* Oconto Water Co., 68 Fed. Rep. 1006 (1895), applying the rule to pledgees also. See also § 209, *supra.*

[2] Quoted and approved in Elyea *v.* Lehigh, etc. Co., 45 N. Y. App. Div. 231 (1899), holding that an unregistered pledgee of stock in a New Jersey corporation cannot prevent the stockholders, by unanimous consent, selling the entire assets of the company to a competing company in good faith, the business being unprofitable.

Where by the written consent of all the stockholders of a New Jersey corporation, and the action of its board of directors, a corporation sells all its property for stock and bonds of a new company to be distributed among the old stockholders, a pledgee of one of the old stockholders cannot object, especially where the statute authorizes the pledgor of stock to represent the stock and no notice had been given of the pledge. Elyea *v.* Lehigh, etc. Co., 169 N. Y. 29 (1901); Leathers *v.* Janney, 41 La. Ann. 1120 (1889). A pledgee of common stock cannot object to the merging of preferred stock into mortgage bonds. Havemeyer *v.* Bordeaux Co., 8 Nat. Corp. Rep. 127 (Ill. C. C., 1894). In Allis *v.* Jones, 45 Fed. Rep. 148 (1891), it is intimated that a pledgee has not the same right to attack an *ultra vires* corporate debt that the pledgor has, especially where the stock is worthless. *Cf.* § 735, *infra.* In McCaleb *v.* Goodwin, 114 Ala. 615 (1897), one street railway purchased all the stock of another street railway and paid the stockholders therefor by issuing the mortgage bonds of the latter street railway company. The former then placed the stock under its own mortgage, and, this mortgage having been foreclosed, the purchaser attacked the validity of the first-mentioned mortgage. The court sustained the mortgage, however, on the ground that all the stock had voted therefor. Where the pledgor of stock votes at a corporate meeting in favor of selling the property the pledgee is bound, the corporation having had no notice of the pledge. City of Spokane *v.* Amsterdamsch, etc., 22 Wash. 172 (1900).

[3] Gibson *v.* Richmond, etc. R. R., 37 Fed. Rep. 743 (1889).

towards the pledgee as to such purchase.[1] After default by the pledgor the pledgee may put the bonds which he holds as collateral under a reorganization plan, and may agree that part of the expense of foreclosure shall be a lien on the bonds, but he cannot do so where he is to receive new securities instead of cash on the reorganization.[2] The pledgee of securities, who turns them in to a reorganization and takes new securities without the consent of the pledgor, is liable to the pledgor, but the pledgor can recover only the actual value of the securities so turned in. The pledgee is not bound to aid the pledgor in using the pledge in a reorganization, nor is the pledgee bound to delay the reorganization on account of any demand of the pledgor.[3] Where a pledgee's debt has really been paid and yet he retains the stock, and by reason thereof the pledgor is unable to enter a reorganization, the pledgor can recover for the actual damages sustained, but such value must be shown by him; otherwise it will be inferred that it had little or no value.[4] Even though a pledgee of bonds accepts common stock in a reorganized company in place of the bonds, yet, if both the bonds and the common stock are worthless, the pledgor is not released from his debt, and even if the common stock had value it would be merely a substituted collateral.[5] Where the maker of a note secured by bonds as collateral causes the pledgee to exchange the bonds for bonds in a reorganized company, it is for the jury to say whether that amounts to an acknowledgment of the debt postponing the statute of limitations.[6] A pledgor of stock may enforce a claim against the corporation, even though thereby the corporation will become insolvent and the stock be rendered worthless. Although the pledgor has made an assignment for the benefit of creditors, yet his assignee cannot be enjoined by the pledgee from enforcing the claim against the corporation.[7]

The fact that the pledgee, a corporation, gave through its president incorrect information to the pledgor, whereby the pledgor did not sell the stock in pledge and liquidate the debt, is no defense to an action on the debt.[8] A person loaning money to an individual and taking bank stock as collateral security cannot hold the

[1] Brown *v.* Anderson, 104 Ga. 30 (1898).

[2] Field *v.* Sibley, 74 N. Y. App. Div. 81 (1902).

[3] Griggs *v.* Day, 136 N. Y. 152, 162 (1892).

[4] Griggs *v.* Day, 158 N. Y. 1 (1899). This case arose out of a controversy between a contractor in the construction of a railroad and the chief stockholder and promoter, who advanced money on the security of stock and corporate notes.

[5] *In re* Lorillard, 107 Fed. Rep. 677 (1901).

[6] Becker *v.* Oliver, 111 Fed. Rep. 672 (1901).

[7] Janney *v.* Merchants', etc. Bank, 98 Ala. 515 (1893).

[8] Investment Co. *v.* Eldridge, 175 Pa. St. 287 (1896).

bank liable, in an action for damages for deceit, on the ground that its published statements were false and fraudulent and that he relied on those statements.[1] Where stock has been pledged, and the pledgor makes a contract with a third person, by which the latter agrees to pay the debt and take the stock, the pledgor may enforce this contract without tendering the stock.[2] Where a bank states to a pledgee that it holds certain negotiable bonds in pledge to secure the debt, and the bonds are produced, shown, and handed back to the bank, the latter cannot afterwards claim that it held these bonds subject to a prior pledge by the same pledgor to another person.[3] Pledgees of a majority of the corporate stock, who by voting their stock cause men of their choice to be elected directors, are not liable for the misconduct of such directors.[4] Nevertheless "the bailee owes a direct duty to the pledgor to be reasonably careful that no harm shall come through his custody to the subject-matter of the pledge."[5]

[1] Merchants' Nat. Bank *v.* Armstrong, 65 Fed. Rep. 932 (1895). But see §§ 352–355, *supra*. A bank which as pledgee causes by its statements a party to purchase the stock held in pledge may be held liable in damages if such statements were false. Hindman *v.* First Nat. Bank, etc., 98 Fed. Rep. 562 (1899). Where a purchaser of goods misrepresents the value of stock which is to be given as a pledge for the purchase price and refers the vendor to a bank, which bank repeats the misrepresentations, the pledgee may sue the bank for damages, and may show that the bank at that time held stock in pledge and that the goods so purchased were substituted for the stock of the bank upon the transaction being closed. Am. Nat. Bank, etc. *v.* Hammond, 25 Colo. 367 (1898).

[2] Gilbert *v.* Adams, 99 Iowa, 519 (1896).

[3] Gibson *v.* Lenhart, 111 Pa. St. 624 (1886). Where a corporation guarantees certain bonds, and a person holding stock of the company indorses on the guaranty that he holds stock to secure the performance of the guaranty, he cannot afterwards claim that he has a prior lien as pledgee of the stock. Mercantile Trust Co. *v.* Atlantic Trust Co., 86 Hun, 213 (1895). For subsequent phases of this litigation, see Bracken *v.* Atlantic Trust Co., 167 N. Y. 510 (1901).

[4] Higgins *v.* Lansingh, 154 Ill. 301 (1895). Where stock is pledged and the pledgee is in control of the company, and instead of declaring dividends he honestly and intelligently applies the profits to improvements, the pledgor cannot hold him liable for not declaring dividends, and for not thus decreasing the debt for which the stock was given in pledge. Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). A pledgor of stock cannot, in a suit brought by his creditor to reach the equity in a pledge, raise an issue as to the mismanagement of the corporation. McMullen *v.* Ritchie, 57 Fed. Rep. 104 (1893). It is no defense to a note secured by stock that the pledgee, by means of the stock, controlled the company and managed it so badly that the stock became worthless. Dunham *v.* Boyd, 64 Conn. 397 (1894).

[5] Ritchie *v.* McMullen, 79 Fed. Rep. 522, 533 (1897). In this case the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits

The pledgor may by an instrument in writing assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage, and is not fraudulent even though it be kept secret from the other creditors of the pledgor.[1] A judgment creditor of the pledgor may file a bill to reach the equity of redemption in a pledge of stock,[2] or may levy an attachment or execution upon it.[3]

under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that although the damage was directly to the corporation, yet that indirectly it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

[1] National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898). An assignment by a pledgor of stock of his interest in the equity of redemption may be assigned by the assignee by merely writing his name on the back of the same, the entire transaction being in connection with the discounting of a note. Twelfth Ward Bank *v.* Samuels, 71 N. Y. App. Div. 168 (1902).

[2] Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). Where a judgment creditor of a person files a bill in equity to reach the equity of that person in a pledge of stock which he has made to other parties, and the pledgees are joined as parties defendant, the accounts and claims between the pledgor and pledgees may be adjusted in the same suit. Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). The equity of redemption of the pledgor may be reached by garnishee process, and the property sold by a receiver to pay the pledgee, and the balance to the other creditor, where the pledgee consents and his debt is past due. Kimbrough *v.* Orr Shoe Co., 98 Ga. 537 (1896). An attaching creditor cannot complain that the pledgee, who has prior rights, settled with the pledgor after the attachment and then sold the stock. The creditor must offer to redeem or have a sale subject to the pledge. McClintock *v.* Central Bank, etc., 120 Mo. 127 (1894). Where a worthless equity of redemption in land is turned in for stock, and then the stock is pledged with the mortgagee of the land, and then "scrip" is taken from the corporation by the parties pledging the stock, this scrip reciting that it represents the equity of the right to the certificates of stock after the mortgage is paid off, such scrip is valid and may be sold, it having been treated as valid for twenty years, even though it was issued without consideration. Higgins *v.* Lansingh, 154 Ill. 301 (1895). In Michigan garnishee process lies against the pledgee of stock in behalf of a creditor of the pledgor, and enables such creditor to reach the equity in the stock. Old Second Nat. Bank *v.* Williams, 112 Mich. 564 (1897). Where stock is placed in escrow, to become the property of a person in case he is obliged to pay a certain obligation, and he is so obliged to pay, the creditors of the party placing the stock in escrow cannot reach the stock nor redeem it. Pabst, etc. Co. *v.* Montana, etc. Co., 19 Mont. 294 (1897).

[3] See § 484, *infra*. The equity of redemption which a pledgor has in stocks which he has pledged to a national bank may be reached by garnishment

In a suit by the pledgee to have a judicial sale of the stock, an assignee of the pledgor's interest is a necessary party, where the pledgee knows of such assignment, and the pledge was made merely by delivery of the certificate without any transfer on the back thereof.[1] Where the pledgee is notified by a person that the latter is entitled to the collateral, subject to the pledge, and the pledgee upon payment of the debt returns the collateral to the pledgor, the pledgee is liable to such third person.[2] Where stock is tied up by attachment which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the attaching party if the stocks could and would have been sold before the depreciation, if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up, no damages can be recovered.[3]

Where the pledgee allows the pledgor to take the pledge and pledge it for another loan, and then the second pledgee allows the same thing to be done for a third loan, and the third pledgee sells out the pledge, and the second pledgee buys, the first pledgee may redeem from the second by paying both loans.[4] A pledgee may deduct from the proceeds of a sale reasonable expenses in keeping and caring for the pledge, paying taxes and liens, preserving title, or rendering it available.[5] The pledgee cannot set up the title of a

served on the bank after judgment against the debtor. The national bank act does not forbid such process. Commonwealth *v.* Chestnut, etc. Bank, 189 Pa. St. 606 (1899). Garnishee proceedings against a stockholder's interest in stock which has been pooled and has also been pledged does not affect such pool or pledge, but is made subject to them if they are legal. Hardin *v.* White, etc. Co., 26 Wash. 583 (1901). *Cf.* § 491, *infra.* The interest of the pledgor of stock may be levied upon under execution, and thereupon the officer will sell the pledge free from claims, and the court will direct the payment of the pledgee and the balance to the creditors, under the Georgia statute. People's Nat. Bank *v.* Wheedon, 42 S. E. Rep. 91 (Ga. 1902).

[1] Brown *v.* Hotel Assoc., 88 N. W. Rep. 175 (Neb. 1901).

[2] Hughes *v.* Settle, 36 S. W. Rep. 577 (Tenn. 1895). In a suit in equity by the pledgor to redeem, the pledgee cannot set up that the pledgor has sold his interest in the pledge to another party, and that another suit is pending brought by that other party for specific performance, and that in such suit the pledgee is a party defendant, no proof being given of such sale. Houston, etc. R. R. *v.* Conner, 67 S. W. Rep. 773 (Tex. 1902).

[3] Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897).

[4] Manhattan Trust Co. *v.* Sioux City, etc. R. R., 65 Fed. Rep. 559 (1895). See s. c., 171 U. S. 474 (1898).

[5] Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893). While the pledgee is entitled to defend his title, yet in his suit to foreclose the pledge he cannot be allowed disbursements made to counsel in defending his title in another suit brought by the real owner of the stock, the pledge being in fraud of such owner's rights, but the pledgee being *bona fide.* Work *v.* Tibbits, 87 Hun, 352 (1895). A pledgee of bonds is bound to

third person as against the pledgor, however tortious the possession of the latter, unless the owner has claimed the pledge and the pledgee has yielded to the claim.[1] A pledgee is not bound to prosecute suits to protect the pledge, nor to sell, and a provision that the pledgee may claim repayment of any sums expended in the prosecution of claims is not an agreement of the pledgee to prosecute.[2] The pledgee need not defend against a replevin suit brought by a person who claims to be owner of the stock, where the pledgee's attorney advises him that there is no defense.[3] A pledge for any "note or claim against me" applies to a claim against the pledgor's firm.[4] The pledgee cannot be taxed on the stock.[5] Questions relative to the right of pledgees to maintain suits the same as stockholders are considered elsewhere.[6]

§ 469. *Pledgee need not retain or return to the pledgor the identical certificates or shares of stock which were pledged, but must have equal quantity always on hand.*— One share of stock does not differ from another share of the same capital stock. Each is but an undivided interest in the corporate rights, privileges, and property. Accordingly, it is held that a pledgee of stock need not retain in his possession the identical shares of stock which were pledged to him, but that the rights of the pledgor are fully preserved if similar stock is retained by the pledgee until the termination of the pledge.[7] The pledgee must have on hand at all times the full

exercise due diligence in collecting the same and is entitled to be reimbursed for his expense, including attorney's fees. Hanover, etc. Bank *v.* Brown, 53 S. W. Rep. 206 (Tenn. 1899). An attorney who represents pledgors of stock in winding up the affairs of the company may have a lien on the fund realized on such stock prior to the lien of the pledgee. Shirk *v.* Sheridan, 10 Kan. App. 463 (1900). The expenses of a receiver appointed at the instance of a pledgee of pig iron may be prorated between the insolvent company and the pledgee. American, etc. Co. *v.* German, 126 Ala. 194 (1900); 88 L. T. Rep. 393.

[1] Sedgwick *v.* Macy, 24 N. Y. App. Div. 1 (1897), the court refusing to follow the English rule on this subject.

[2] Culver *v.* Wilkinson, 145 U. S. 205 (1892). The pledgee may claim credits for defending the pledge against attacks by law suits, and in some cases for adding to its value by aiding the subject of the pledge. Cridge's Appeal, 18 Atl. Rep. 1010 (Pa. 1890).

[3] Loomis *v.* Reimers, 93 N. W. Rep. 95 (Iowa, 1903).

[4] Hallowell *v.* Blackstone Nat. Bank, 154 Mass. 359 (1891). A pledge of stock to secure future liabilities does not apply to past liabilities. Franklin Bank *v.* Harris, 77 Md. 423 (1893).

[5] See § 564, note, *infra.*

[6] See § 735, *infra.*

[7] Caswell *v.* Putnam, 120 N. Y. 153 (1890); Skiff *v.* Stoddard, 63 Conn. 198 (1893); Nourse *v.* Prime, 4 Johns. Ch. 490 (1820); s. c., 7 Johns. Ch. 69 (1823); Horton *v.* Morgan, 19 N. Y. 170 (1859); Barclay *v.* Culver, 30 Hun, 1 (1883); Noyes *v.* Spaulding, 27 Vt. 420 (1855); Atkins *v.* Gamble, 42 Cal. 86 (1871); Price *v.* Grover, 40 Md. 102 (1874); Gilpin *v.* Howell, 5 Pa. St. 41 (1847); Hardenbergh *v.* Bacon, 33 Cal. 356 (1867); Taylor *v.* Ketchum, 35 How. Pr. 289 (1867); Thompson *v.* Toland, 48 Cal. 99 (1874); Le Croy

amount of the stock pledged, whether the debt secured is due or not, since the law will not allow the pledgee to speculate or deal with the stock of another as though it were his own.[1] It is not enough that he can at once procure the stock from one to whom it is loaned,[2] or that he had sufficient on hand for the plaintiff pledgor, but not enough for all the pledgors whom he had at any

v. Eastman, 10 Mod. 499 (1722); Harding *v.* Field, 1 N. Y. App. Div. 391 (1896); Douglas *v.* Carpenter, 17 N. Y. App. Div. 329 (1897); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882); Boylan *v.* Huguet, 8 Nev. 345 (1873). *Cf.* Langton *v.* Waite, L. R. 6 Eq. 165 (1868). In the case of Dykers *v.* Allen, 7 Hill, 497 (1844), the pledgee at one time seemed to have had no stock on hand. In selling the pledgor's stock on notice for non-payment of the debt, the pledgee need not sell the identical stock pledged. Berlin *v.* Eddy, 33 Mo. 426 (1863). Where a depository of stock to vote the same for five years agrees to return the stock at the end of that time, or an equal amount of stock, together with dividends, any future assessments on the stock to be paid by the person making the deposit, and, if not paid, then the depository, in case he pays the assessment, to be entitled to repayment from the dividends, with interest, and the assessments are not paid and the stock is sold, and at the end of five years the depository tenders back other stock with assessments paid, the depository is entitled to repayment of such assessments. Moore *v.* Bank of British Columbia, 106 Fed. Rep. 574 (1901). Where an agent with whom stock is deposited transferred in blank causes the same to be transferred to himself on the books of the company and then hypothecates the same, and afterwards dies, the real owner of the stock may claim other stock in the same corporation which such agent had at the time of his death. The identity of the certificates is immaterial. Marshall *v.* Marshall, 11 Colo. App. 505 (1898). In Mayo *v.* Knowlton, 134 N. Y. 250 (1892), the court said: "The stock had no ear-mark; one share was the same as another, and could not be identified or distinguished therefrom." Where a customer knows that the broker is insolvent, and has not kept on hand the stock which the customer had deposited on margin, and the broker purchases stock in order to satisfy the demand of the customer, the transaction is a preference, in violation of the statutes of Massachusetts. Weston *v.* Jordan, 168 Mass. 401 (1897). In Allen *v.* Dubois, 117 Mich. 115 (1898), it is held that a pledgee is bound to return to the pledgor the identical shares which are pledged, and is liable for conversion if he has sold them, and that it is immaterial that he had on hand at all times and tendered back an equal number of shares. So also in the case of Lamb, etc. Co. *v.* Lamb, 119 Mich. 568 (1899), where a party claiming to be the real owner of stock filed a bill to compel the holder of such stock to deliver up the same, but it appeared that the defendant had already disposed of the stock before the commencement of the suit, the court refused to grant relief, even though it further appeared that the defendant had other stock in the same corporation equal in amount to the stock in issue.

[1] *Ex parte* Dennison, 3 Ves. Jr. 552 (1797); Taussig *v.* Hart, 58 N. Y. 425 (1874); Thompson *v.* Toland, 48 Cal. 99 (1874); Hubbell *v.* Drexel, 11 Fed. Rep. 115 (1882). The pledgor may waive this restriction by express agreement. Ogden *v.* Lathrop, 65 N. Y. 158 (1875).

[2] Allen *v.* Dykers, 3 Hill, 593 (1842); aff'd, Dykers *v.* Allen, 7 Hill, 497 (1844); *Ex parte* Dennison, 3 Ves. Jr. 552 (1797).

particular time.[1] The law requires him to set aside as much stock as has been pledged to him. A "loan" of stock returnable on demand transfers the title in one sense, inasmuch as the borrower may return similar stock of the same amount, in place of returning the identical stock which was loaned to him.[2]

§ 470. *Pledgee's liability on subscription and statutory liability on stock.*[3]— A pledgee who has obtained registry on the corporate books appears to third parties as a full stockholder. Accordingly, in case the corporation becomes insolvent, the registered pledgee is held liable on his stock, as though he were an absolute stockholder. In order to avoid this danger, the law allows the pledgee to have the pledged stock registered on the corporate books in the name of a nominee of the pledgee.[4] Where such a registry is obtained, the pledgee has the advantage of the control of the stock, and at the same time escapes the danger of liability as a stockholder.

§ 471. *Pledgee has no right to sell or repledge the stock even temporarily, except upon notice, unless the debt is assigned with the stock.*— "Equity will not tolerate a separation of the pledge from the debt, and they must stand together, and will force upon a wrong-doer the character of a trustee, and thus compel him to do justice." Such is the language of the New York court of appeals.[5] The pledgee of stock cannot legally part with the possession of the stock by a sale or repledge of it, except as he transfers the debt which the stock secures. If he does so he is guilty of a conversion,[6]

[1] Fay *v.* Gray, 124 Mass. 500 (1878).

[2] Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Dykers *v.* Allen, 7 Hill 497 (1844). See also § 445, *supra.*

[3] See § 247, *supra.*

[4] Newry, etc. Ry. *v.* Moss, 14 Beav. 64 (1851). See § 466, *supra.*

[5] Bennett *v.* Austin, 81 N. Y. 308, 322 (1880). *Cf.* Easton *v.* Hodges, 18 Fed. Rep. 677 (1883).

[6] Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Gass *v.* Hampton, 16 Nev. 185 (1881). Brokers holding a certificate of stock as security for the balance of the purchase price due from the customer are pledgees, and if the broker, in violation of the express contract, repledges or sells such stock without authority from the customer, he is guilty of a conversion, for which trover will lie. Chew *v.* Louchheim, 80 Fed. Rep. 500 (1897). The case of *Ex parte* Sargent, L. R. 17 Eq. 273 (1874), contained a dictum giving a contrary rule; but France *v.* Clark, L. R. 22 Ch. D. 830 (1883), disapproves such dictum and says: "As a general rule the pawnee of chattels has no right to sell them, unless a time was originally fixed for their redemption, and that time has expired, or unless he has made a demand upon the pawnor for the payment of what is due him." Fay *v.* Gray, 124 Mass. 500 (1878), holds that the pledgee has no right to sell, lend, or repledge the stock. In the notes in 21 Am. Law Reg. (N. S.) 454–461, a contention is made that the pledgee should be allowed to repledge, but it is admitted that the weight of authority holds otherwise. The following cases are cited: Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. (Tenn.) 520 (1873); First Nat. Bank *v.* Bryce, 19 Am. L. Reg.

and in New York state may be arrested.[1] In Pennsylvania it is a penal offense for the pledgee to repledge the stock.[2] Even where, apparently, the pledgor would not be injured by the pledgee's separating the stock from the debt and transferring the stock pledged as collateral security, yet the law rigidly protects the interests of the debtor and pledgor, and will not compel him to submit to the danger of such transfers by the pledgee. There may, of course, be an express agreement or understanding to the contrary.[3] Where an agent has wrongfully pledged his principal's stock, and the pledgee then wrongfully converts the pledge, the

(N. S.) 503 (1880); Work *v.* Bennett, 70 Pa. St. 484 (1872); Wood *v.* Hayes, 81 Mass. 375 (1860); Thompson *v.* Patrick, 4 Watts (Pa.), 414 (1835); and see § 469, *supra*. In Lawrence *v.* Maxwell, 53 N. Y. 19 (1863), the court said: "Ordinarily, and in the absence of an agreement or assent by the pledgor, the pledgee would have no right to use the thing pledged, and a use of it would be illegal. But, under special circumstances depending somewhat upon the nature of the pledge, and in all cases with the assent of the pledgor, express or implied, the property pledged may be used by the pledgee in any way consistent with the general ownership and the ultimate rights of the pledgor." Where the pledgee has an option to purchase the stock, but, instead of purchasing, he repledges it illegally, the pledgor may consider this as an exercise of the option. Upham *v.* Barbour, 65 Minn. 364 (1896). Where the pledgee transfers the stock to another person as security that a proposed contract between the corporation and another corporation will be ratified at a stockholders' meeting, and such other person votes said stock at such stockholders' meeting, the pledgee is guilty of conversion of the stock. Upham *v.* Barbour, 65 Minn. 364 (1896). Where a pledge is made to secure the return of certain stock and bonds to a third party, and the pledgor dies, the pledgee may pledge the securities to bring about the return of such stock and bonds. M'Cartney *v.* Earle, 115 Fed. Rep. 462 (1902).

[1] Oregon, etc. Co. *v.* Hilmers, 20 Fed. Rep. 717 (1884); Barry *v.* Calder, 48 Hun, 449 (1888); aff'd, 111 N. Y. 684. See also § 457, *supra*, and § 576, *infra*. A pledgee of bonds may maintain an action for conversion thereof and may cause the arrest of a repledgee who has disposed of such bonds. Blanck *v.* Nelson, 39 N. Y. App. Div. 21 (1899).

[2] Act of May 25, 1878, modified as to purchases by broker on margin by act of June 10, 1881 (P. L. 1881, 107). Section 1784 of the code of Alabama forbids an assignment of a pledge without an assignment of the debt it secures. Dexter *v.* McClellan, 116 Ala. 37 (1897).

[3] Chouteau *v.* Allen, 70 Mo. 290 (1879). A broker has no right to repledge stock held by him for a customer to secure margins, and, even if the customer authorizes him to repledge, this authority sustains a repledge only to the extent of the amount due from the customer, and the broker must be ready at all times to return the stock to the customer upon the latter paying the debt. In this case it was held also that the repledgee, under the usual transfer in blank on the back of the certificate, is not a *bona fide* pledgee. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894). The right of the pledgee to repledge may exist by force of a custom understood by both parties. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878).

principal may ratify the act of his agent and sue the pledgee for conversion. The pledgee may offset the amount actually due him.[1]

A pledgee may assign the principal debt to a third person and "give him the benefit of the collateral securities to secure the payment of the principal debt. So long as nothing is done to deprive the pledgor of the right to redeem on payment of the amount due on the principal debt, the pledgor is not injured."[2] "Nothing is better settled than the right of a transferee of a pledge to hold it until the debt for which it was given is paid."[3] Where a pledgee repledges both the note and the stock, an agreement between the original pledgor and the second pledgee, whereby the second pledgee sells the stock and takes in payment notes of the purchaser, is illegal as regards the rights of the first pledgee. As against the second pledgee the first pledgee is entitled to be credited with the value of the stock at the time of the sale.[4] A broker has no right to pledge his customers' securities unless expressly authorized so to do.[5]

[1] Smith *v.* Savin, 141 N. Y. 315 (1894).

[2] Chapman *v.* Brooks, 31 N. Y. 75, 84 (1865); Duncomb *v.* New York, etc. R. R., 84 N. Y. 190, 208 (1881). The pledgee may assign his interest in the pledge and transfer the pledge to such assignee. Overton, Liens, §§ 168, 172; Schoul. Bailm. (2d ed.), § 218, etc. Story, Bailm., § 324, says the pawnee "may sell or assign all his interest in the pawn, or he may convey the same interest conditionally, by way of pawn to another person, without in either case destroying or invalidating his security." See also Talty *v.* Freedman's Sav. etc. Co., 93 U. S. 321 (1876); 2 Kent, Com. 579; Jarvis *v.* Rogers, 13 Mass. 105 (1816), 15 Mass. 389, 408; Mores *v.* Conham, Owen, 123 (1610); Ratcliffe *v.* Davis, 1 Bulst. 29 (1611); Anon., 2 Salk. 522 (1694). In Lewis *v.* Mott, 36 N. Y. 394 (1867), where, after the debt was due and unpaid, the pledgee turned over the debt and security to another without a foreclosure or sale on notice, the court held that the latter could hold the collateral stock until the pledgor tendered the amount of the debt. The latest English cases hold that, although the repledge may be wrong, yet that the pledgor cannot reclaim the stock from the repledgee until the former pays the debt for which the pledge was made. Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866); Halliday *v.* Holgate, L. R. 3 Exch. 299 (1868). Where a broker, holding stock in pledge on a margin, repledges it without the consent of his customer, it has been held that he cannot recover the value of the stock from the customer on a tender of the certificate. Clarkson *v.* Snider, 5 Can. L. T. 587 (1885). In Langton *v.* Waite, L. R. 6 Eq. 165 (1868), the court said that the law was clear that, in the absence of express contract to the contrary, a pawnee cannot sell without the express permission of the owner, and that if he does, the owner can charge him with the excess of the price over the loan. The court, however, seemed to think that the pledgee could repledge the stock. In Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880), the court said that the pledgee might repledge the stock so far as he had an interest in it.

[3] Philler *v.* Yardley, 62 Fed. Rep. 645, 649 (1894).

[4] Pauly *v.* Wilson, 57 Fed. Rep. 548 (1893).

[5] See § 467, *supra*.

The liability of a pledgee who turns in the pledge on a reorganization is considered elsewhere.[1]

§ 472. *Purchasers or pledgees of stock from pledgee with notice are not protected.*— A person who purchases or takes in pledge stock which he knows is held in pledge by the person from whom he takes it is not a *bona fide* holder of such stock, and is not entitled to the rights of such. At the best he stands merely in the place of the pledgee from whom he receives the stock. He must restore the stock to the owner in case the pledgee would be obliged to restore it, had no second sale or pledge been made.[2] The second pledgee or vendee, with notice that he was taking pledged stock, has no rights which the first pledgee has not. He is but an equitable assignee of the latter, and can be compelled by the owner to deliver the stock in any case where the first pledgee could be so compelled.[3] The same rule applies whether the pledgee assigns both the debt and the stock, or repledges the stock alone.[4] Where a pledgee has been fraudulently induced to sell the stock to a person, the pledgor may file a bill in equity against such person to obtain a retransfer of the stock to himself and also the dividends which have been

[1] See § 468, *supra.*

[2] Quoted and approved in German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894).

[3] Any fact, such as usury in the second transaction, which prevents the second pledgee or purchaser from being a *bona fide* purchaser, applies to a repledgee of stock. The repledgee is not protected. Felt *v.* Heye, 23 How. Pr. 359 (1862); Little *v.* Barker, 1 Hoffm. Ch. 487 (1840). So also in Pennsylvania, where the repledgee takes in consideration of a pre-existing indebtedness. Ashton's Appeal, 73 Pa. St. 153 (1873). In general, see also Duncan *v.* Jaudon, 15 Wall. 165 (1872); Shaw *v.* Spencer, 100 Mass. 382 (1868); Ellis's Appeal, 8 W. N. Cas. (Pa.) 538 (1880); Porter *v.* Parks, 49 N. Y. 564 (1872); Chouteau *v.* Allen, 70 Mo. 290 (1879). A pledgee taking with notice that the pledge is in breach of trust is not protected. Kern's Estate, 176 Pa. St. 373 (1896). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in payment, and the stock is taken in the name of its secretary, individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee having taken with knowledge of all the facts. Bear River, etc. Co. *v.* Hanley, 15 Utah, 506 (1897). In Hampton, etc. R. R. *v.* Bank, 48 S. C. 120 (1897), where a railroad had issued stock and bonds to a finance company for money to be paid in the future, and the finance company had not paid the money, but on the contrary had pledged some of the stock to a bank, the court held that the bank was bound to take notice of a provision in the charter to the effect that no sale of stock should relieve an original owner from his obligations to the company, and hence was not protected as pledgee.

[4] Felt *v.* Heye, 23 How. Pr. 359 (1862). The repledgee cannot claim the benefit of the debt not assigned to him. Felt *v.* Heye, 23 How. Pr. 359 (1862). See also Talty *v.* Freedman's, etc. Co., 93 U. S. 321 (1876).

paid, and need not join the pledgee as a party.[1] A person who receives stock with notice that the holder is under contract obligations to deliver it to another may not be protected.[2]

Where a bank takes in pledge from a broker stock which the bank knows belongs to a customer of the broker, the bank cannot hold such stock as against the customer, even though the stock was indorsed in blank on the back of the certificates.[3] A pledgee who knows that the pledgor is acting as agent, or that the pledgor holds the stock in pledge, must take notice of the powers of such pledgor.[4] Where the pledgee sells the debt and stock to another person, and the latter sells the stock without the debt, and the purchaser sells the stock to still another person, the various sales being a conspiracy, the pledgor may sue the various purchasers for conversion, and need not tender the debt or make any demand before commencing suit.[5] Where the owner of stock and bonds turns them over to a trust company to sell as it should deem best and return one-half of the proceeds, and the trust company in violation of the trust pledges them for a past-due debt, the remedy of the owner against the pledgee is not for conversion, but for an accounting.[6]

§ 473. *Bona fide repledgees or purchasers of pledged stock are protected — Pledgor's remedies — Marshaling the assets.*— Where, however, a pledgee of certificates of stock indorsed in blank takes the certificates and sells or pledges them to another, who takes such certificates in good faith and for value, and without notice that his vendor or pledgor held them as a pledge, the purchaser or pledgee from the pledgee is as fully protected in his rights as though the person with whom he dealt was the absolute owner of the stock.[7]

[1] Smith *v.* Lee, 77 Fed. Rep. 779 (1896).

[2] See §§ 766*c*, 852, *infra*, and § 317, *supra*.

[3] Westinghouse *v.* German Nat. Bank, etc., 188 Pa. St. 630 (1898).

[4] Matteson *v.* Dent, 112 Iowa, 551 (1900). See also § 321, *supra*.

[5] Usher *v.* Van Vranken, 48 N. Y. App. Div. 413 (1900).

[6] Smith *v.* American Nat. Bank, 89 Fed. Rep. 832 (1898).

[7] The important case of McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325 (1871), was on the rights of a *bona fide* repledgee of stock, and fully sustains the general rule. See also Fatman *v.* Lobach, 1 Duer, 354 (1852); Nelson *v.* Owen, 113 Ala. 372 (1896); Wood's Appeal, 92 Pa. St. 379 (1880); Gass *v.* Hampton, 16 Nev. 185 (1881); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864); Otis *v.* Gardner, 105 Ill. 436 (1883); *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); Cherry *v.* Frost, 7 Lea (Tenn.), 1 (1881), the court saying that in general a pledgee of personal property cannot convey a good title to another; but "if the owner intrusts to another not merely the possession of the property, but also written evidence over his own signature of title thereto and of unconditional power of disposition over it, the case is vastly different." Thus, a pledgee, without notice, of bonds from a pledgor, who turns out to have held the bonds as securities for the cancellation of a mortgage, is protected in his pledge. Saloy *v.* Hibernia Nat. Bank, 39 La. Ann. 90 (1887). Where the pledgee of stock

This rule arises, not on the ground that the certificate of stock is negotiable, but for the reason that the owner is held to have enabled his pledgee to sell the stock as the pledgee's own, and that as between the owner and the *bona fide* purchaser or pledgee from the pledgee the owner must bear the loss. The law of estoppel prevents his denying the right of his pledgee to sell or pledge, as against a *bona fide* purchaser or pledgee from the pledgee. So, also, this principle arises under the well-established rule that, where one of two innocent parties must suffer from the fraud of a third, the loss must fall upon him who enabled the third party to perpetrate the fraud. In Nebraska it has been held that a stockholder

transfers them into his own name on the books of the company and takes out new certificates, a *bona fide* purchaser or pledgee from him is protected. Westinghouse *v.* German, etc. Bank, 196 Pa. St. 249 (1900). A *bona fide* pledgee of a certificate of stock from an agent having power to pledge, but who had so pledged the stock for purposes not authorized by the owner, is nevertheless protected, and even though such pledgee sells the stock at private sale without notice he cannot be held liable if the stock was not worth more than the debt secured. Brittan *v.* Oakdale, etc., 124 Cal. 282 (1899). A *bona fide* pledgee of fraudulently issued warehouse receipts can enforce them only to the extent of the loan and interest. Corn, etc. Bank *v.* American, etc. Co., 163 N. Y. 332 (1900). In Ortigosa *v.* Brown, 47 L. J. (Ch.) 168 (1878), the court, following the English doctrine that an unregistered transferee of certificates of railway stock has no more rights than his transferrer, refused to protect the unregistered repledgee of stock. A *bona fide* purchaser of pledged stock is protected in his title. Krouse *v.* Woodward, 110 Cal. 638 (1895). Where stock is pledged as collateral, and the pledgee sells to a *bona fide* purchaser without notice, such purchaser is protected, even though he at the same time purchases the note for which the stock is collateral. Strickland *v.* Leggett, 21 N. Y. Supp. 356 (1892). A *bona fide* transferee, absolutely or in pledge from a broker, holding his customer's stock in pledge, is protected to the extent of the transfer, the transferee having no notice of the fact that the stock was held in pledge by the broker. Thompson *v.* Toland, 48 Cal. 99 (1874); Zulick *v.* Markham, 6 Daly, 129 (1875); and see many cases in § 321, *supra*. These cases apply equally whether the person transferring contrary to law is an agent or a pledgee, and equally, also, whether he sells or only repledges. In a decision in Maryland an important distinction is drawn between the rights of a *bona fide* purchaser and a *bona fide* pledgee. It is held that the usual form of transfer on the back of certificates of stock, signed by the stockholder, with the name of the transferee left blank, does not protect a *bona fide* pledgee. The pledgee is chargeable with notice of all the facts and equities. Under this decision it would seem to be necessary in Maryland to enlarge the terms and form of the usual assignment and power of attorney on the back of certificates of stock. German Sav. Bank *v.* Renshaw, 78 Md. 475 (1894), a case wherein a broker holding stock on a margin repledged it at a bank. Where the pledgee repledges stock to a *bona fide* pledgee, and the original pledgor sues the first pledgee for conversion, the original pledgor cannot then sue the repledgee on the theory that the repledge was not properly made. Colton *v.* Oakland Bank, etc., 70 Pac. Rep. 225 (Cal. 1902); 54 Atl. Rep. 785.

whose stock has been wrongfully pledged may enjoin the corporation from allowing a transfer by the pledgee who has applied for the same, and the pledgor need not allege that the pledgee took with notice. It is for the pledgee to intervene and prove that the pledge was *bona fide*.[1] If the pledgee has repledged the stock, the owner can obtain the stock only by paying to the repledgee the amount of the latter's advancement to the first pledgee.[2] In case of a wrongful repledge the pledgor may claim the proceeds or redeem the stock from the second pledgee.[3] Where the second pledgee has sold the stock for non-payment of his debt, the first pledgor may claim the excess, the amount retained by the repledgee being more than the first pledgor's debt.[4] The pledgor of stock, under these rules, has practically no protection as to his stock except the honesty and responsibility of his pledgee. The *bona fide* purchaser or pledgee from the pledgee is equally protected whether

[1] Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236 (1901).

[2] Wood's Appeal, 92 Pa. St. 379 (1880); Fatman *v.* Lobach, 1 Duer, 354 (1852); *Ex parte* Sargent, L. R. 17 Eq. 273 (1874); Cherry *v.* Frost, 7 Lea (Tenn.), 1 (1881), holding, however, that payments on the subscription by the owner subsequently to the repledge do not inure to the benefit of the repledgee. See, in general, Donald *v.* Suckling, L. R. 1 Q. B. 585 (1866); Moore *v.* Conham, Owen, 123 (1610); Ratcliff *v.* Davis, Yelv. 178 (1611); Jarvis *v.* Rogers, 15 Mass. 389 (1819).

[3] Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. 178 (1878).

[4] *Re* Bonner, 8 Daly, 75 (1878). See also Fowle *v.* Ward, 113 Mass. 548 (1873). Where a broker repledges stock held by him in pledge and then becomes insolvent, the original pledgors may claim a surplus remaining after a sale of the stock by the repledgee. Such surplus does not belong to the estate of the broker. Even though the broker had also pledged with such stock certain securities which had been deposited with him, not in pledge, but to sell, the owner of such securities can share proportionately in such surplus, but has no right superior to the pledgor's. Rhinelander *v.* National City Bank, 36 N. Y. App. Div. 11 (1899). Where the pledgee repledges the stock to a bank and then goes into bankruptcy, and the bank after selling all the securities held by it as pledgee of the bankrupt has a surplus equal to the amount of the stock so repledged, the original pledgor is entitled to such excess. *In re* Swift, 108 Fed. Rep. 212 (1901). Where the pledgee repledges the stock in breach of trust, the original pledgor is entitled to the surplus after the repledgee has sold his stock and paid his debt, even though the original pledgee is in bankruptcy. Hutchinson *v.* Le Roy, 113 Fed. Rep. 202 (1902). Even though a broker repledges the stocks of various customers without authority from them, the pledgee is protected if he had no knowledge of the fact that the broker did not own the stocks; and if the pledgee, after selling out the stocks on notice, has a balance remaining both of money and stocks, the customers pro-rate as to such balance, even though the stocks of some of them were not sold by the pledgee. This rule is based on the principle that if they all had united in redeeming from the pledgee they would have borne the loss *pro rata.* Whitlock *v.* Seaboard Nat. Bank, 29 N. Y. Misc. Rep. 84 (1899).

the certificates of stock are indorsed by the pledgor or vendor, or are indorsed in blank by some previous holder.[1] The repledgee or vendee is held to be a *bona fide* holder, however, only where he would be held so to be in cases of promissory notes and other similar cases.[2]

The general rule of law is that a pledgee holding various securities may resort to any one security which he chooses. He is not bound to resort to those securities upon which other creditors have no claim.[3] Under such circumstances, however, as give a court of equity power so to do, especially where a repledgee has other collateral for his debt, a court of equity may marshal the assets and compel resort to such other collateral first.[4] Where the

[1] Gass *v.* Hampton, 16 Nev. 185 (1881).

[2] See § 293, *supra.* The word "trustee" on the face of the certificate is notice, and deprives the pledgee of his character of being a *bona fide* holder. See § 325, *supra.* In New York a pledgee is not *bona fide* when he takes bonds in pledge for a precedent debt. Duncomb *v.* N. Y. etc. R. R., 84 N. Y. 190, 204 (1881); Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880). A pledgee of stock for an antecedent debt is not a *bona fide* holder. Shuster *v.* Jones, 58 S. W. Rep. 595 (Ky. 1900). A pledgee is not *bona fide* when the name of another pledgee in the certificate is erased and his own inserted. Denny *v.* Lyon, 38 Pa. St. 98 (1860). Where a party receives from his debtor certain stock as security for the purchase of other stock and holds it for the old debt, and sells it after being notified that it belongs to another party, he is liable to the latter party for conversion. Niles *v.* Edwards, 90 Cal. 10 (1891). A registered municipal bond with coupons attached is negotiable, where the name of the payee is left blank on the face of the bond, even though in books kept for that purpose the name of the registered owner is entered. Hence a purchaser in good faith of such a bond is protected, although the bond was stolen. A *bona fide* pledgee is likewise protected. Manhattan Sav. Inst. *v.* N. Y. etc. Bank, 170 N. Y. 58 (1902). A bank may be a *bona fide* pledgee of stock from its cashier, even though such stock is in the name of a third person and is indorsed by the latter. Brady *v.* Mount Morris Bank, 65 N. Y. App. Div. 212 (1901). See 94 N. W. Rep. 200.

[3] Jennings *v.* Loeffler, 184 Pa. St. 318 (1898). Where stock is pledged to secure several debts, some of which are secured in other ways, the pledgee may apply the proceeds of the pledge to those debts which are not secured by indorsements. Fall River Nat. Bank *v.* Slade, 153 Mass. 415 (1891). Where the pledgor gives the pledgee the right to say which debt or liability the pledge should be applied to, this right cannot be controlled by the court. Donnally *v.* Hearndon, 41 W. Va. 519 (1895). In a suit to foreclose a pledge of stock where the pledgee has other securities also, the court will not compel the pledgee to sell the other securities first. Work *v.* Ogden, N. Y. L. J., May 20, 1890. In a suit by the pledgee to have the pledge sold, it is no defense that he also has real-estate security; nor is it a defense that he has been given control of the company. Weiscopt *v.* Newman, 65 S. W. Rep. 808 (Ky. 1901). In New Jersey it has been held, however, that if the pledgee has also other security, an unsecured creditor of the pledgor may compel the pledgee to resort to such other security first. Bishop, etc. Assoc. *v.* Kennedy, 12 Atl. Rep. 141 (N. J. 1887).

[4] Gould *v.* Farmers' L. & T. Co., 23 Hun, 322 (1880); Herbert *v.* Mechanics'

pledgee has repledged the stock illegally to *bona fide* holders, the latter, upon being informed of the fact by the first pledgor, are bound to apply the proceeds of the other securities held by them before resorting to the stock owned by him, the first pledgor.[1]

Bldg. etc. Assoc., 17 N. J. Eq. 497 (1864), reversing, on this point, Mechanics', etc. Assoc. *v.* Conover, 14 N. J. Eq. 219 (1862). Where the pledgee repledges the stock illegally with other stock, the first pledgor may enjoin the second pledgee from selling the stock until the other stock of the pledgee is sold, and an account rendered, and notice of intent to sell the remainder given. Myers *v.* Merchants' Nat. Bank, 16 N. Y. Supp. 58 (1891). The pledgor himself cannot enjoin a sale by the pledgee, unless the pledgee is insolvent. The pledgor's remedy is at law. Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). Where a broker pledgee, with the assent of the pledgor, has repledged the stock, the second pledgor having no notice of who the first pledgor is, may hold all stocks until all the debts from the second pledgor to him are paid. A person who gave stock to the first broker to sell is preferred to one who purchased stock on a margin. Willard *v.* White, 56 Hun, 581 (1890). Where pledged stock is repledged and sold out by the repledgee, together with various other stock held as collateral by the repledgee, a court of equity will marshal the assets. Smith *v.* Savin, 9 N. Y. Supp. 106 (1890); aff'd, 69 Hun, 311, and 141 N. Y. 315 (1894). Where the pledgee sells the securities and has a surplus, he cannot interplead between two claimants where he is sued by one of them for more than he admits the surplus amounts to. Dodge *v.* Lawson, N. Y. L. J., April 20, 1892. A pledgee need not resort to the pledge in order to obtain payment, but if the pledgor becomes insolvent the court will marshal the assets. Chemical Nat. Bank *v.* Armstrong, 50 Fed. Rep. 798 (1892). See also §§ 476, 763, *infra*, and §§ 456, 460, *supra*.

[1] The latter cannot object to the mode of selling the other securities. Smith *v.* Savin, 141 N. Y. 315 (1894), holding, moreover, that the first pledgor may hold such second pledgee liable for a sale without notice, there being no waiver of notice. Where the pledgee wrongfully rehypothecates the pledge, together with other securities, the pledgor may pay the debt due to the repledgee and take all the securities and sell them all out, and may also sue the pledgee for conversion. The court will require the pledgor to indorse upon the judgment for conversion a suitable credit for the amount realized out of such sale of the securities by the pledgor. The court said that if a *bona fide* repledgee is informed of the conversion by the original pledgee, the repledgee is then bound, in case he sells out the securities, to turn over the surplus to the pledgor. The court also held that the repledgee, upon receiving notice, was bound to resort to other collateral before selling the collateral wrongfully repledged by the pledgee to the repledgee. A receiver of the pledgee has no greater rights than the pledgee himself. Union Pac. Ry. *v.* Schiff, 78 Fed. Rep. 216 (1897). Where the pledgee wrongfully repledges the securities, and the original pledgor takes up the securities from the repledgee and agrees to protect the repledgee, the original pledgor cannot subsequently repudiate the transaction and hold the repledgee liable for the securities originally repledged. Union Pac. Ry. *v.* Schiff, 74 Fed. Rep. 674 (1896). Where the pledgor sues the pledgee for conversion, in that the pledgee repledged the collateral, and the pledgor obtains judgment for the difference between the value of the stock and the amount due from the pledgor, and subsequently the pledgee or his receiver recovers back some of

Where, by custom, a broker repledges the stock of his customer, together with other stock, the customer cannot insist that the broker's stock be first applied to the debt. Where, however, the customer had not authorized the broker to repledge the stock, then the stock owned by the broker and pledged together with the stock of the customer will first be applied to the debt.[1] Where a customer delivers stock to a broker and the broker without his consent transfers it into his own name, the customer may claim the new certificate upon satisfactorily identifying the stock.[2] Where a customer pledges his stock with the broker, and the latter wrongfully repledges it and fails, and the customer notifies the repledgee of his claim and demands notice of any sale, the repledgee is liable if he sells without notice to the former and turns the surplus over to the assignee of the broker.[3]

Where a pledgor becomes insolvent the question often arises as to whether the pledgee may prove his entire claim against the estate, or whether the pledgee must first realize what he can from the pledge and then present a claim for the deficiency only. The rule is now well established, however, that the pledgee may prove his entire claim against the insolvent estate of the pledgor, and may demand his proportionate part of such estate, the same as though he had no collateral security whatsoever.[4] A creditor

the stock so repledged, the pledgor cannot reclaim such stock. Deitz *v.* Field, 10 N. Y. App. Div. 425 (1896).

[1] Skiff *v.* Stoddard, 63 Conn. 198 (1893), holding also that a customer who deposits stock with a broker to secure a marginal contract may redeem the same from the assignee of the broker for the benefit of the creditors, but the identity of the stock must be established, and that if there is not sufficient stock to satisfy all claims on that class of stock, the stock is prorated among all claimants.

[2] Mould *v.* Importers', etc. Bank, 72 N. Y. App. Div. 30 (1902).

[3] Le Marchant *v.* Moore, 79 Hun, 352 (1894); aff'd, 150 N. Y. 209.

[4] People *v.* Remington, 121 N. Y. 328 (1890). A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when, from them and from collaterals realized, the claim has been paid in full. Merrill *v.* National Bank, etc., 173 U. S. 131 (1899). A holder of collateral may enforce his claim in the ordinary way by judgment and execution against the debtor, without any deduction for his collateral. Chemical Nat. Bank *v.* Armstrong, 59 Fed. Rep. 372 (1893); Lewis *v.* United States, 92 U. S. 618 (1875). A creditor of a corporation who holds collateral security for his debt cannot be compelled to exhaust such security before resorting to the general assets of the corporation for payment. Doe *v.* Northwestern Coal, etc. Co., 78 Fed. Rep. 62 (1896). The pledgee may prove his entire claim against the insolvent pledgor's estate without first resorting to, surrendering, or accounting for the pledge. *Re* Ives, 11 N. Y. Supp. 655 (1890). See also § 763, *infra.* A pledgee is entitled to

holding collateral must first exhaust that before holding the stockholders liable on their subscription liability, there being other creditors.[1]

§ 474. *Pledges by agents, trustees, executors, etc., legally and in breach of trust.*— It is within the power of an executor or administrator to pledge shares of stock belonging to the estate, and the pledgee is protected even though he knew that the executor pledged it as an executor.[2] The fact that stock is specifically bequeathed

a dividend from the pledgor's estate without resorting to his pledge and without delivering it up to the estate. Wheeler *v.* Walton, etc. Co., 72 Fed. Rep. 966 (1896). See also § 476, *infra.* The fact that a creditor's claim is secured by mortgage or otherwise does not affect his right to prove for the full amount of the claim, nor does the fact that he has realized part thereof out of the collateral since the date of the receivership; but in the latter case he is entitled to dividends only until the balance of his debt is satisfied. New York Security, etc. Co. *v.* Lombard Inv. Co., 73 Fed. Rep. 537 (1896). The pledgee may file his claim in the probate court against the pledgor's estate, and may then sell the pledge, and will be entitled to participate in the estate without deduction of the amount realized on the sale, unless he would thereby receive more than the whole debt. Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893). Where a pledgee has realized on his security, he participates in the insolvent estate of the pledgor on only the balance remaining due to him. Philadelphia Warehouse Co. *v.* Anniston Pipe Works, 106 Ala. 357 (1895). In Nebraska, the court, after reviewing the conflicting rules in the different states, held that where a creditor held collateral he must deduct from his claim all that he realizes from the collateral, before he can get a dividend, and must also deliver up his collateral to the receiver. State *v.* Nebraska Sav. Bank, 40 Neb. 342 (1894).

Where a corporation assumes a mortgage and then becomes insolvent, the mortgagor is entitled to a dividend from its assets on the whole mortgage debt existing at the time of such assumption, even though the mortgagor has foreclosed and realized a part of the debt. Matter of Simpson, 36 N. Y. App. Div. 562 (1899). Collateral security furnished by the stockholders to a corporate creditor is not to be deducted before the claim participates in the assets of the insolvent corporation, although the rule is different in Maryland where the security was furnished to the corporation itself. Rogers *v.* Citizens', etc. Bank, 93 Md. 613 (1901). Where the stockholder has died and his estate is being distributed, the portion going to the corporation by reason of its lien will not be decreased by the amount of dividends. *In re* Hovey's Estate, 198 Pa. St. 385 (1901). Under the New Hampshire statutes the holder of a mortgage as security for a note cannot prove the full amount of the note in insolvency proceedings, but must first deduct the value of the security; but the rule is otherwise as to an indorsement made by the insolvent party. Bank Com'rs *v.* Security, etc. Co., 70 N. H. 536 (1901).

[1] Welch *v.* Sargent, 127 Cal. 72 (1899). Even though a corporate creditor has realized a part of his debt under the stockholders' statutory liability, yet he may participate in the assets of the corporation as though no part of his debt had been paid. Sacramento Bank *v.* Pacific Bank, 124 Cal. 147 (1899).

[2] Goodwin *v.* American Nat. Bank, 48 Conn. 550 (1881); Wood's Appeal, 92 Pa. St. 379 (1880); Carter *v.* Manufact-

to the executors as trustees does not prevent the executors selling or pledging such stock, and the pledgee or purchaser is protected and need not inquire into the necessity of the sale or pledge.[1] Where stock is specifically bequeathed to an executor as trustee, and five years thereafter the executor is discharged, but continues as trustee, and two years thereafter he fraudulently pledges the stock as executor, the pledgee is not protected, since the lapse of time was sufficient to put him on inquiry.[2] Where an executor pledges, for his personal debt, stock belonging to the estate, in breach of trust, the pledgee is not protected, even though the corporation issued a new certificate to the pledgee, by mistake, as absolute owner, and he cannot hold the corporation liable for retaining the new certificate, upon its being delivered for transfer to a purchaser with notice.[3] A trustee, on the other hand, has no implied power to pledge or sell corporate stock belonging to the trust.[4] Express power to a trustee to sell and reinvest does not give him power to pledge.[5] An agent's pledges of his principal's stock, in breach of his duty as agent, follow the same rules as where a pledgee repledges the stock given to him in pledge. A *bona fide* holder for value and without notice is protected, while one who takes with notice is not protected. Where, however, the one taking stock in pledge from an agent knows that the latter is acting as agent, he is bound to inquire whether the principal has authorized his agent to pledge the stock, since a power to pledge cannot be presumed from a power to sell.[6] The express power of an agent to sell securities is revoked by the death of the principal, and if he sells thereafter he is liable for damages in conversion.[7]

urers' Nat. Bank, 71 Me. 448 (1880); § 329, *supra;* Manhattan Bank *v.* Walker, 130 U. S. 267 (1889). A pledgee from an executor is protected. Gottberg *v.* U. S. Nat. Bank, 13 N. Y. Supp. 841 (1890). If a pledge of stock by an executor is illegal, the pledgee is not protected where, not trusting to the executor's power as executor, he causes the stock to be transferred first to a legatee. Moore *v.* American L. & T. Co., 115 N. Y. 65 (1889). Pledgees from the trustee for antecedent debts are not *bona fide* holders without notice, even though the form of a public sale was gone through. Darling *v.* Potts, 118 Mo. 506 (1893).

[1] Schell *v.* Deperven, 198 Pa. St. 600 (1901); Schell *v.* Deperven, 198 Pa. St. 591 (1901). See also § 329, *supra.*

[2] Schell *v.* Deperven, 198 Pa. St. 591 (1901). See also § 329, *supra.*

[3] Davis *v.* National, etc. Bank, 50 Atl. Rep. 530 (R. I. 1901). Where an executor pledges stock for his own debt, the pledgee knowing the fact so to be, the latter becomes trustee, and the statute of limitations does not run against redemption until after the pledgee has notified the *cestui que trust* of the estate that he holds the stock adversely. Marshall's Estate, 138 Pa. St. 285 (1890). As to who is a *bona fide* holder, see § 293, *supra.*

[4] See §§ 323-327, *supra.*

[5] First Nat. Bank *v.* Nat. Broadway Bank, 156 N. Y. 459 (1898).

[6] See ch. XIX, § 321, *supra.*

[7] Matter of Mitchell, 36 N. Y. App. Div. 542 (1899).

Where an agent wrongfully repledges the stock belonging to his principal and then assigns for the benefit of creditors, and his assignee obtains repossession of the stock by realizing on other securities which were pledged with it, the original owner of the stock may reclaim it.[1] The right of corporations and persons to give and take stock in pledge is considered elsewhere.[2] The authority of a guardian given by the court to sell stock does not authorize him to pledge the stock.[3] Power of an agent to sell does not give him power to pledge for his own use, and where the corporation with knowledge of the facts allows a transfer it is liable to the owner.[4] The power of a corporate agent to sell bonds does not give him power to pledge them even to secure corporate debts. Holders not *bona fide* are not protected.[5] A *bona fide* pledgee of stock indorsed in blank on the back is protected.[6]

§ 475. *Pledgor's remedies.*— The pledgor cannot enjoin a sale of the pledge by the pledgee or by a repledgee, unless the pledgee is insolvent. The pledgor's remedy is at law.[7] The fact that a plèdgor claims that the pledgee owes him more money than he owes the pledgee is not sufficient to sustain a bill in equity to enjoin the pledgee from selling the stock in order to pay the amount due. Some other ground of equitable jurisdiction must be set forth.[8] Where the pledgee of stock has been guilty of a conversion of it, the pledgor's remedy against him is generally by an action at law for

[1] Woodside *v.* Grafflin, 91 Md. 422 (1900).

[2] See ch. XIX, *supra.*

[3] O'Herron *v.* Gray, 168 Mass. 573 (1897).

[4] Read *v.* Cumberland Tel. etc. Co., 93 Tenn. 482 (1894).

[5] Shaw *v.* Saranac, etc. Co., 144 N. Y. 220 (1894). Where one party authorizes another party to pledge the former's stock for a certain purpose, and the latter pledges it for a different purpose, the pledgee is not protected if he took the stock with notice. Bowen *v.* Cleary, 35 S. W. Rep. 281 (Ky. 1896).

[6] Gilbert *v.* Erie Bldg. Assoc., 184 Pa. St. 554 (1898).

[7] Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). *Cf.* note 3, p. 971, *infra.* Even though the pledgee of bonds has repledged the bonds illegally, yet the pledgor cannot enjoin the repledgee from selling the bonds where there is no allegation that the original pledgee is insolvent. Syracuse, etc. Ry. *v.* Salt Springs, etc. Bank, 28 N. Y. Misc. Rep. 619 (1899).

[8] Elliott *v.* Sibley, 101 Ala. 344 (1893). In a suit in equity by a stockholder to enjoin a sale of his stock by the corporation for a debt due the corporation, the corporation is a necessary party defendant. The complainant must aver a readiness to pay whatever may be found due. Elliott *v.* Sibley, 101 Ala. 344 (1893). In a sale by a bank as pledgee, the bank cannot be enjoined on the ground that the president had secretly agreed that the collateral would not be resorted to. Breyfogle *v.* Walsh, 71 Fed. Rep. 898 (1894). Where the pledgee illegally includes another debt in his claims and advertises the stock for sale, and a bill is then filed to enjoin the sale and to redeem, and the pledgee then offers to take the amount justly due, but does not give the pledgor reasonable time in which to pay, and

damages. He need not tender to the pledgee the amount of the debt secured by the pledge, since the pledgee may recoup to that extent and thus decrease the damages of the pledgor.[1] Where the pledgee sells the debt and stock to another person and the latter sells the stock without the debt, and the purchaser sells the stock to still another person, the various sales being a conspiracy, the pledgor may sue the various purchasers for conversion, and need not tender the debt or make any demand before commencing

the sale takes place, and the pledgee buys the stock and then sells a part of it, the pledgor in the bill so filed may have damages for the value of all the stock with interest, less the amount justly due. Blood *v.* Erie, etc. Loan Co., 164 Pa. St. 95 (1894). An injunction against a pledgee disposing of stock owned by a certain party, or an attachment upon the interest of that party, does not prevent the pledgee selling the stock if such stock really belonged to the wife of that party. Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897).

[1] Allen *v.* Dykers, 3 Hill (N. Y.), 593 (1842); aff'd, Dykers *v.* Allen, 7 Hill (N. Y.), 497; New York, etc. R. R. *v.* Davies, 38 Hun, 477 (1886); Work *v.* Bennett, 70 Pa. St. 484 (1872); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Langton *v.* Waite, L. R. 6 Eq. 165 (1868); Felt *v.* Heye, 23 How. Pr. 359 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); Cortelyou *v.* Lansing, 2 Caines' Cas. 200 (1805); Fisher *v.* Brown, 104 Mass. 259 (1870). However, a later case in Massachusetts — Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342 (1886) — holds that a tender of payment of a debt is necessary to enable a pledgor to maintain trover for a conversion of property pledged, unless the lien created by the pledge has been otherwise discharged. "After the sale by the pledgee, the pledgor need not make a tender of the amount due nor a demand of the securities before bringing his action. . . . A formal tender of the amount of the notes would have been a useless ceremony, such as the law never requires." Fletcher *v.* Dickinson, 89 Mass. 23 (1863). Where the customer sues the broker for selling the stock illegally, the broker may set up the amount due from the customer, not by way of recoupment, but by way of a lien on the stock. Farrar *v.* Paine, 173 Mass. 58 (1899). A sale by a pledgee without notice is a conversion, and the pledgor may sue for the value of the stock without tendering the debt, but the pledgee may recoup to the extent of a debt. Feige *v.* Burt, 118 Mich. 243 (1898). A pledgor's vendee may tender the amount of the debt and demand the stock as a condition of payment. Trover lies for a refusal of pledgee to deliver. The pledgee is liable for depreciations of stock after such tender. An attachment of stock against the pledgor, but after sale by him, is no defense to the pledgee. Tender is sufficient without paying the money into court. Loughborough *v.* McNevin, 74 Cal. 250 (1887). See also Thompson *v.* St. Nicholas Nat. Bank, 113 N. Y. 325 (1889), and § 461, *supra.* The pledgee sued for conversion may set off the debt due him. Van Shaick *v.* Ramsey, 90 Hun, 550 (1895). Where the pledgee buys the security at the public sale and then sells it, and then sues the pledgor for the deficiency on the first sale, the pledgor may claim a set-off for the full value of the securities wrongfully resold, and need not make a tender. Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895), reviewing the authorities on tender in such cases.

suit.[1] The pledgor's damages are measured by the market value of the stock at the time of the conversion, together with interest and subsequent damages.[2] The pledgor may be barred from his action for damages by a waiver of the particular act of conversion by the pledgee.[3] He has the option of ratifying the transaction and claiming the proceeds, or he may repudiate the sale and sue for conversion,[4] and in New York state may arrest the pledgee.[5] The remedy at law may be on contract or in tort.[6] An illegal sale of the

[1] Usher *v.* Van Vranken, 48 N. Y. App. Div. 413 (1900).

[2] See ch. XXXV, *infra.* In Fowle *v.* Ward, 113 Mass. 548 (1873), the court said the damages should be "a sum of money which would enable him to purchase seventeen new shares to replace those which have been taken from him, with such additional sum as would indemnify him for the dividends which he has lost since the sale, and also an equitable allowance for interest." Where the pledgee refuses to deliver up the stock upon a tender of the debt he is liable in damages for the value of the stock on the day of the tender and demand, less the amount tendered. Franklin Bank *v.* Harris, 77 Md. 423 (1893).

[3] See cases in note 1, p. 974, *infra.*

[4] Atkins *v.* Gamble, 42 Cal. 86, 91 (1871). If there are several pledgors, and the pledge is redeemed, and the pledgee, at the request of one of the pledgors, transfers the stock to third parties, the pledgee is liable to the other pledgors for the loss incurred thereby. Magnus *v.* Queensland Nat. Bank, L. R. 36 Ch. D. 25 (1887).

[5] See § 471, *supra.*

[6] The form of a complaint or declaration in an action by a pledgor against a pledgee for the conversion of the stock held in pledge may be in tort or in *assumpsit*, but not in both. Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862). It is a conversion for the pledgee to retain the stock after the principal of the debt is paid, nothing being said about interest. Kullman *v.* Greenebaum, 92 Cal. 403 (1891). A complaint which, after stating that shares of stock had been pledged to defendant, avers that "defendant, in consideration of the premises, then and there undertook and promised to plaintiff" to hold the stock only as pledgee, but that, in violation of its promise, defendant sold and converted the stock to its own use, without giving plaintiff notice of the sale, and in which plaintiff seeks to recover as damages the full value of the shares alleged to have been converted, though informal, is good as a complaint in case. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). This case discussed also the difference between *assumpsit* and case in such an action. In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after default in payment of the debt for which property is pledged as security will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable." As to the complaint in an action by a pledgor against the pledgee for not returning goods pledged, see 2 Chitty, Pl. 69; Stanton *v.* Collier, 3 El. & Bl. 274 (1854). An answer is not good where it merely denies the conversion and does

pledge by the pledgee is a conversion, and a complaint for such conversion will not be construed as a complaint for breach of contract.[1] The pledgor may, if he prefers, begin suit in a court of equity, when the pledgee has converted the stock, and compel him either to replace the stock or give compensation in damages. The jurisdiction of a court of equity in such a case has been denied,[2] but in certain cases may be sustained on the ground that only a court of equity can compel a retransfer of the stock or an accounting of the dividends declared while the pledge was running, or an accounting by third persons to whom the pledgee has assigned the debt and pledge, or enjoin an illegal transfer of the stock.[3] A pledgor

not deny the possession by the defendant of certain stocks belonging to the plaintiff, nor the tender of the balance due, nor the demand for such stocks, nor the non-delivery of the same. Dubois *v.* Sistare, N. Y. L. J., Dec. 9, 1890. See Smith *v.* Savin, 141 N. Y. 315 (1894). Where the repledgee converts the stock the remedy for conversion is with the first pledgee, not with the first pledgor. Thompson *v.* Toland, 48 Cal. 99 (1874). *Contra*, Smith *v.* Savin, 69 Hun, 311 (1893). See s. c., 9 N. Y. Supp. 106, and 141 N. Y. 315. A pledge of stock to secure future liabilities does not secure past liabilities. If the pledgee refuses to surrender the stock on demand and tender, the pledgor may recover the value of the stock on that day, less the amount tendered. Franklin Bank *v.* Harris, 77 Md. 423 (1893). Where the pledgor learns of the illegality of the sale after he has commenced suit for the surplus, he will be allowed to amend and sue for conversion. Smith *v.* Savin, 141 N. Y. 315 (1894).

[1] Smith *v.* Hall, 67 N. Y. 48 (1876), distinguishing Austin *v.* Rawdon, 44 N. Y. 63 (1870).

[2] Lacombe *v.* Forstall's Sons, 123 U. S. 562 (1887); Genet *v.* Howland, 45 Barb. 560 (1866). The remedy of the pledgor is at law after a tender, not by bill in equity to redeem. Doak *v.* Bank of the State, 6 Ired. L. (N. C.) 309 (1846). Where the pledgee has sold the stock, the pledgor cannot compel him to restore it by a bill in equity, even though he alleges that the sale was to a person who holds the stock as trustee for the pledgee. The pledgor's remedy is at law. Hinckley *v.* Pfister, 83 Wis. 64 (1892). A bill in equity does not lie for damages due to an illegal sale of stock by a pledgee. Henry *v.* Travelers' Ins. Co., 45 Fed. Rep. 299 (1891). A pledgor cannot file a bill in equity to hold the pledgee liable for selling the stock in violation of the pledge, there being no disputed accounts. Roland *v.* Lancaster, etc. Bank, 135 Pa. St. 598 (1890); Angus *v.* Robinson, 62 Vt. 60 (1890). It is well settled that a bill in equity will not ordinarily lie to redeem property from a pledge. Kemp *v.* Westbrook, 1 Ves. Sr. 278 (1749); Story, Eq. Jur., § 1032. The reason is obvious. The legal title to the thing pledged does not pass to the pledgee, as it does to a mortgagee in possession in the case of a mortgage. The pledgor retains the legal title and parts only with possession and a special property. Jones, Pledges, § 552. He has therefore a legal right to redeem, and upon tendering the amount due to the pledgee he may bring replevin for the collateral or an action to recover its value. It is only when his legal remedies are insufficient that the pledgor can come into equity. Jones, Pledges, § 556, and cases cited.

[3] Bryson *v.* Rayner, 25 Md. 424 (1866); Conyngham's Appeal, 57 Pa. St. 474 (1868); Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850); Koons *v.* Jeffersonville Nat. Bank, 89 Ind. 178 (1883); Smith *v.*

may by suit in equity compel the pledgee to deliver up the stock in pledge, and if the pledgee has sold the pledged stock, but has sim-

Anderson, 8 Tex. Civ. App. 188 (1894); Maynard *v.* Tilden, 28 Fed. Rep. 688 (1886). An action to redeem may be sustained in equity where the transaction is a complicated one. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Where the pledgee has transferred the stock held in pledge, and is insolvent, the pledgor may file a bill in equity, and bring in all parties interested. Nelson *v.* Owen, 113 Ala. 372 (1896). Where the pledgor borrows the money from a third party to pay a debt, and the lender does pay the debt, but takes the collateral without authority and pledges it for its own debt, the original pledgor may file a bill to obtain the possession of the stock and also obtain the dividends that have been paid. If the second pledgee claims to be a *bona fide* holder of the stock, those facts must be specially pleaded in defense. Maxwell *v.* Foster, 41 S. E. Rep. 776 (S. C. 1902). In a suit in equity by the pledgor to redeem, the pledgee cannot set up that the pledgor has sold his interest in the pledge to another party, and that another suit is pending brought by that other party for specific performance, and that in such suit the pledgee is a party defendant, no proof being given of such sale. Houston, etc. R. R. *v.* Conner, 67 S. W. Rep. 773 (Tex. 1902). Where the pledge has been sold by the pledgee and the amount due is in dispute, the pledgor may file a bill in equity against the pledgee and the purchaser with notice and the corporation to redeem it, and he need not make any tender of the amount due, provided he offers in his complaint to pay any amount found due. Treadwell *v.* Clark, 73 N. Y. App. Div. 473 (1902). Where a transaction is adjudged to be a loan and not a sale, and the defendant is ordered to return the stock, it is error to add an alternative money judgment for the value of the stock. Fanny Rawlings Min. Co. *v.* Tribe, 68 Pac. Rep. 284 (Colo. 1902). A pledgor in contracting with the pledgee to obtain a release of the stock on a settlement of the debt for less than the full sum is not bound to disclose the fact that the corporation was about to be sold out at a high price which would have paid the whole debt. The pledgor may file a bill in equity to redeem the stock on the payment of the sum agreed upon. Chicora, etc. Co. *v.* Dunan, 91 Md. 144 (1900). A cross-bill in equity by a pledgee to have the debt determined and have a sale made was involved in Troendle *v.* Van Nortwick, 98 Fed. Rep. 785 (1900). Where a pledge of stock is deposited with a third party, according to the contract of pledge, such third party need not be joined in a suit by the pledgor against the pledgee to redeem. Baeck *v.* Meinken, 33 N. Y. Misc. Rep. 371 (1900). A broker cannot interplead between his customer and an indorser of the customer's note, in regard to stocks deposited with the broker by the customer, even though the administrator of the indorser claims that he has an interest in such stock. Post *v.* Emmett, 40 N. Y. App. Div. 477 (1899). Where the pledgor files a bill to redeem and the pledgee claims that the stock is sold and not pledged, and the court decides that the transaction was a pledge and decrees the amount to be paid by the pledgor to redeem, and the pledgee then appeals and pays assessments on the stock pending the appeal, the pledgee may recover back such assessments from the pledgor, even though the judgment was affirmed on appeal. Irvine *v.* Angus, 93 Fed. Rep. 629 (1899). The question of the ownership of bonds as between a pledgor and pledgee and subsequent holders cannot be contested in the foreclosure of the mortgage securing the same, prior to the decree,

ilar stock, he may be compelled to transfer the latter.[1] An unreasonable delay or laches on the part of the pledgor will bar his

but on the distribution of the proceeds of the foreclosure sale that question can then be litigated. Sioux City, etc. Ry. *v.* Manhattan T. Co., 92 Fed. Rep. 428 (1899). The pledgor may file a bill to reach the excess realized by the pledgee on a sale of the collateral, and in such suit may enjoin the assignee of the pledgee from using such excess to pay other debts of the pledgee. Adams *v.* Ball, 24 N. Y. App. Div. 69 (1897). A pledgor may maintain a suit in equity to redeem his stock, and the judgment may order the pledgee to deposit the certificate of stock in court. Colburn *v.* Riley, 11 Colo. App. 184 (1898). The pledgee must return the stock and stock dividends and account for money dividends. Vaughan *v.* Wood, 1 M. & K. 403 (1833). A court of equity has power to decree the return of pledged stock and money deposited as collateral. Post *v.* Simmons, 9 N. Y. Supp. 112 (1890); Brown *v.* Runals, 14 Wis. 693 (1861). A pledgor may file a bill in equity to have a surplus delivered up and the notes for which the collateral was given delivered up also. Cahoon *v.* Bank of Utica, 7 N. Y. 486 (1852), rev'g 7 How. Pr. 134. In England an action to redeem a pledge of stock is to be tried without a jury, even though the defendant sets up a counterclaim of false representations. Lynch *v.* Macdonald, L. R. 37 Ch. D. 227 (1887). Where the pledgee is about to sell the stock and denies the pledge, the pledgor may enjoin the sale. Thielens *v.* Dialogue, 19 Atl. Rep. 970 (N. J. 1890). For other cases sustaining the jurisdiction on the ground that an injunction was proper, see Hower *v.* Weiss, etc. Co., 55 Fed. Rep. 356 (1893); Myers *v.* Merchants' Nat. Bank, 16 N. Y. Supp. 58 (1891). The pledgor cannot enjoin a sale by the pledgee on the ground that the sale will be at a sacrifice. Park *v.* Musgrave, 2 Thomp. & C. (N. Y.) 571 (1874). Where a purchaser of stock agrees to give a long-time note with the stock as security, and subsequently, for the accommodation of the vendor, a short-time note with the stock as security is delivered to a third person named by the vendor, and the vendor then obtains possession of the stock and note, and, after the short-time note becomes due, proposes to collect the note and sell out the stock, the pledgor may enjoin the sale of the stock. In this case the stock was of uncertain value, and represented a controlling interest in the company, and damages for its conversion would not have been an adequate remedy. The court held that an action for replevin was not adequate, inasmuch as, in order to bring replevin, the pledgor would have to tender the debt, which, according to the original agreement, was not yet due. Hower *v.* Weiss, etc. Co., 55 Fed. Rep. 356 (1893). "If, for instance, the collaterals consist of shares of stock which have been transferred into the pledgee's name upon the books of a corporation, an action in equity will lie, for the reason that such an action is necessary to secure the retransfer of the shares. So equity may be invoked where an accounting or a discovery is needed or where the pledgee

[1] Krouse *v.* Woodward, 110 Cal. 638 (1895). Where an agent with whom stock is deposited transferred in blank causes the same to be transferred to himself on the books of the company and then hypothecates the same, and afterwards dies, the real owner of the stock may claim other stock in the same corporation which such agent had at the time of his death. The identity of the certificates is immaterial. Marshall *v.* Marshall, 11 Colo. App. 505 (1898). See also § 469, *supra.*

remedy against the pledgee.[1] But delay in bringing suit to redeem pledged property does not constitute laches, when the debt is kept alive until the suit is begun.[2]

has assigned the pledge." Stokes *v.* Stokes, N. Y. L. J., Nov. 15, 1892, p. 375. See also cases in note 1 below. A purchaser of stock who makes a partial payment and gives back the stock as collateral security cannot abandon the contract and claim such part of the stock as the payment already made would pay for, on the ground that the seller has obtained control of the corporation and is guilty of a breach of trust. The fact that the seller as pledgee has sold the stock and bought it in himself is immaterial, inasmuch as such sale is illegal. Reid *v.* Caldwell, 110 Ga. 481 (1900); s. c., 114 Ga. 676 (1902).

[1] Eight years' delay by the pledgor in complaining of the refusal of the pledgee to deliver up the stock on tender of the debt, the stock having subsequently declined in value, was held to be fatal in Merriam *v.* Childs, 93 Mo. 131 (1887). Where the pledgor's executor, for value received, sells the pledgor's interest to the pledgee, long lapse of time after full knowledge of the facts by all parties will raise a presumption in favor of the pledgee's complete ownership. Lockwood *v.* Brantly, 1 Silvern. 187 (1886); s. c., 103 N. Y. 680. As to the statute of limitations, see Maynard *v.* Tilden, 28 Fed. Rep. 688, 703 (1886); Child *v.* Hugg, 41 Cal. 519 (1891), where long delay was held to be a bar. In Greene *v.* Dispeau, 14 R. I. 575 (1884), a pledge of stock was treated as a mortgage, and the right to redeem was held to be barred six years after the date of the mortgage. A pledgor waives informality of the notice, where, after the sale, he, as an officer of the corporation, enters a transfer of the stock to the one who purchased at the sale. Downer *v.* Whittier, 144 Mass. 448 (1887). Four years' delay in complaining is fatal. Receiving the benefit of the sale is a waiver of objections. McDowell *v.* Chicago Steel Works, 124 Ill. 491 (1888). Although the pledgee gives no public notice of the sale, and although he purchases the stock at the sale, yet the pledgor ratifies the sale by acquiescing and by negotiating to buy the stock. Hill *v.* Finigan, 77 Cal. 267 (1888). The statute of limitations is no bar to an action to redeem a pledge of stock, unless the statute was set running by demand of payment and notice of intent to sell. Gilmer *v.* Morris, 35 Fed. Rep. 682 (1888). See s. c., 80 Ala. 78. In the case of a pledge of stock to secure future advances, the statute of limitations begins to run against the right of the pledgor to redeem from the time when the pledgee, by some positive act, repudiates the pledge and claims the property as his own, or improperly disposes of it. Gilmer *v.* Morris, 43 Fed. Rep. 456 (1890). If the pledge is recognized by extension to other debts, the statute of limitations runs from the latter date. Gilmer *v.* Morris, 46 Fed. Rep. 333 (1891). This case, Gilmer *v.* Morris, 80 Ala. 78, arose again in Billing *v.* Gilmer, 60 Fed. Rep. 332 (1894), rev'g Gilmer *v.* Billings, 55 Fed. Rep. 775. The statute of limitations runs against a receipt reciting a first payment on stock "standing in my name but owned by him, and he remaining responsible for the balance of the instalments when called in," there being no agreement as to the future disposition of the stock and of dividends. Cone *v.* Dunham, 59 Conn. 145 (1890). A pledge is not legally abandoned although no demand is made for it during a long lapse of time. Cridge's Appeal, 18 Atl. Rep. 1010 (Pa. 1890). As to redemption, laches, etc., see Schouler,

[2] Higgins *v.* Lansingh, 154 Ill. 301 (1895).

Tender of the debt when or after it becomes due releases the pledge.[1] Where the pledgor makes tender of the amount which he considers due and demands the pledge, and the pledgee refuses the tender and does not state that the amount is too small, the pledgee is guilty of a conversion.[2] A pledgor cannot compel his pledgee to sell the stock and apply the proceeds to the debt by a notice to make such a sale.[3] When the pledgee causes the stock to be sold, the pledgor is entitled to the surplus proceeds of the sale remaining after the debt and the expenses of the sale have been paid, and such surplus cannot be applied by the pledgee to another debt,[4] except possibly by way of set-off. If the officers of a pledgee bank refuse to deliver back the pledged stock upon a tender of the debt, they are liable personally in damages to the pledgor.[5] A pledgor cannot defeat an action by the pledgee on the debt by

Bailm. (2d ed.), § 250. As to the rule in New York, see Bailey *v.* Chamberlain, N. Y. D. Reg., July 23, 1888, and Miner *v.* Beekman, 50 N. Y. 337 (1872). The pledgee cannot claim that he has held the stock, adversely to the pledgor, for a time more than sufficient to give him title to it under the statute of limitations. He is not allowed to assert that he holds the stock adversely. Cross *v.* Eureka Lake, etc. Co., 73 Cal. 302 (1887). The ten years' statute of limitations applies and does not commence to run until the pledgor has demanded the stock, where the amount due is in dispute. Treadwell *v.* Clark, 73 N. Y. App. Div. 473 (1902).

[1] A tender of the amount due before sale redeems pledged stock and stops the sale. Winkler *v.* Magdeburg, 100 Wis. 421 (1898). An unconditional tender of the amount due the pledgee releases the pledge and entitles the pledgor to the stock. Tom Boy, etc. Co. *v.* Green, 11 Colo. App. 447 (1898); Hyams *v.* Bamberger, 10 Utah, 3 (1894).

[2] Latta *v.* Tutton, 122 Cal. 279 (1898).

[3] Lawrence *v.* Maxwell, 53 N. Y. 19 (1873); Robinson *v.* Hurley, 11 Iowa, 410 (1860); O'Neill *v.* Whigham, 87 Pa. St. 394 (1878); Rozet *v.* McClellan, 48 Ill. 345 (1868); Smouse *v.* Bail, 1 Grant (Pa.), 397 (1856); Taggard *v.* Curtenius, 15 Wend. 155 (1836); Fisher *v.* Fisher, 98 Mass. 303 (1867); Napier *v.* Central, etc. Bank, 68 Ga. 637 (1882), holding, however, that where the pledgee does not sell, because he and others were "bearing" the market, there may be an element of fraud which gives a cause of action. The pledgor cannot by request compel the pledgee to sell. Minneapolis, etc. Co. *v.* Betcher, 42 Minn. 210 (1889). If there is no agreement so to do, the pledgee is not bound to sell, although requested to do so by the pledgor. Furness *v.* Union Nat. Bank, 147 Ill. 570 (1893).

[4] And the pledgor's assignee for the benefit of creditors may claim it. The pledgee bank has no banker's lien on the surplus for other debts. Brown *v.* New Bedford Sav. Inst., 137 Mass. 262 (1884). A pledgee bank cannot refuse to deliver back the stock to pledgor who tenders the amount due, on the ground that the pledgee owes it still another debt. McIntire *v.* Blakeley, 12 Atl. Rep. 325 (Pa. 1888).

[5] McIntire *v.* Blakeley, 12 Atl. Rep. 325 (Pa. 1888). A pledgee cannot, on sale of the pledge, apply the excess to another debt due him from the pledgor, who died before the sale was made. Peters *v.* Nashville Sav. Bank, 86 Tenn. 224 (1887).

showing that the pledgee has converted the pledge.[1] The measure of damages on an illegal sale is considered elsewhere.[2]

§ 476. *Pledgee's remedies when debt secured is not paid — Sale and deficiency.*— Where shares of stock are pledged as collateral security for a debt, and the debt is not paid, and the pledgee wishes to apply the stock to the payment of the debt, he has the right to pursue either one of two remedies.

First. He may file a bill in equity for the foreclosure and sale of the pledge.[3] A suit to foreclose a pledge of stock need not be

[1] See §§ 461, 475, 458, note, *supra.* In an action by the pledgee for the debt, the pledgor may set up a conversion of the stock pledged. Donnell *v.* Wyckoff, 49 N. J. L. 48 (1886).

[2] See ch. XXXV, *infra.*

[3] The pledge may be made to secure the carrying out of a contract, and a court of equity will foreclose it although the damages are unliquidated. Vaupell *v.* Woodward, 2 Sandf. Ch. 143 (1844). A person holding and carrying stock for himself and others may file a bill in equity to bring about a sale and an adjustment of the accounts. Evans *v.* Goodwin, 132 Pa. St. 136 (1890). A suit to foreclose a pledge of stock may be in equity, and after judgment a suit cannot be maintained at law on the debt secured. Brigel *v.* Creed, 65 Ohio St. 40 (1901). In a suit by an attaching creditor to determine the priority of his rights over an unregistered pledgee, the court has no power to decree a sale of the pledge and the distribution of the assets. McClung *v.* Colwell, 64 S. W. Rep. 890 (Tenn. 1901). In a suit to foreclose a pledge of stock, a judgment for deficiency cannot be asked against a part of the defendants. Plankinton *v.* Hildebrand, 89 Wis. 209 (1895). In a suit by a corporation to foreclose a pledge of stock made to it to secure the payment of a call on the stock, the pledgor cannot set up in defense that secret commissions had been paid to some of the stockholders upon the purchase of property by the corporation. Irving, etc. Assoc. *v.* Watson, 67 Pac. Rep. 945 (Oreg. 1902). A contractor cannot by a bill in equity compel the company to allow him to complete his contract, even though the company is insolvent and is about to make a contract with other parties and to dispose of securities pledged to the first contractor. Strang *v.* Richmond R. R., 93 Fed. Rep. 71 (1899). In a suit by a pledgee to have a sale of bonds held in pledge, a defendant may file a cross-bill setting forth that the bonds were illegally issued and that the complainant is not a *bona fide* holder. Alessandro Irr. Dist. *v.* Savings & Trust Co., 88 Fed. Rep. 928 (1898). Where a firm has pledged stock and afterwards passes into the hands of a receiver, an action subsequently commenced by the pledgee to foreclose his lien must make the assignee a party defendant. Denny *v.* Cole, 22 Wash. 372 (1900). A suit lies for judgment on a note, and for a sale of the collateral and the application to the judgment of the amount realized on such sale. Farmers', etc. Bank *v.* Rogers, 1 N. Y. Supp. 757 (1888). There is a dictum in Ritchie *v.* McMullen, 79 Fed. Rep. 522, 535 (1897), to the effect that where a pledgee enters into a conspiracy to depreciate the pledged stock the pledgee cannot maintain a bill to foreclose the pledge. A mortgage given in pledge may be foreclosed by bill in equity. Anderson *v.* Olin, 145 Ill. 168 (1893). In a suit between the pledgor and the pledgee, each side demanding affirmative relief, the court may decree that stock is held as collateral and order a sale to satisfy the claim. Zellerbach *v.* Allenberg, 99 Cal.

brought at the domicile of the corporation, but may be brought at the domicile of the pledgor,[1] or wherever the certificates of stock are held in pledge. Certificates of stock represent the stock itself sufficiently to sustain a suit commenced by substituted service for the purpose of establishing and foreclosing a pledgee's lien, even though the corporation is located in another state.[2] In an action to foreclose a pledge of stock, persons claiming a lien thereon are proper parties defendant, and it is sufficient to allege that they claim some lien.[3]

Second. The pledgee may give notice to the pledgor of an intent to sell the stock, and may so sell it without any judicial proceedings, and apply the proceeds to the payment of the debt.[4] No ex-

57 (1893). Where the pledge was made without a written transfer of the certificate a suit in equity is the only remedy. Robinson *v.* Hurley, 11 Iowa, 410 (1860); Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338 (1881); Smith *v.* Coale, 34 Leg. Int. 58 (1877); Blouin *v.* Hart, 30 La. Ann. 714 (1878); Johnson *v.* Dexter, 2 MacArthur, 530 (1876), and § 465, *supra.* In England a deposit of a certificate of stock is an equitable mortgage and not a pledge, and hence while foreclosure would not lie as regards a pledge, it does lie as regards such an equitable mortgage. Harrold *v.* Plenty, 85 L. T. Rep. 45 (1901).

[1] State *v.* King County Super. Ct., 13 Wash. 607 (1896).

[2] Merritt *v.* American Steel Barge Co., 79 Fed. Rep. 228 (1897). See also § 363, *supra.*

[3] Plankinton *v.* Hildebrand, 89 Wis. 209 (1895).

[4] Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896); Story, Bailm., 9th ed. (1877), § 310, saying: "The law as at present established leaves an election to the pawnee. He may file a bill in equity against the pawnor for a foreclosure and sale; or he may proceed to sell *ex mero motu,* upon giving due notice of his intention to the pledgor. In the latter case, if the sale is *bona fide* and reasonably made, it will be equally obligatory as in the first case." The leading case, allowing this remedy of the pledgee against the pledge, is Tucker *v.* Wilson, 5 Bro. Parl. Cas. 193 (1714), rev'g 1 P. Wms. 261. In Brown *v.* Ward, 3 Duer, 660 (1854), the court said: "Since the time of the case of Hart *v.* Ten Eyck [2 Johns. Ch. 62 — 1816], before Chancellor Kent, the right of the pledgee to sell after the debt is due, upon reasonable notice, has been unquestioned, and a custom has grown up, and has been sanctioned by the courts, of selling stocks at the Merchants' Exchange." To same effect, Diller *v.* Brubaker, 52 Pa. St. 498 (1866); Finney's Appeal, 59 Pa. St. 398 (1868); Easton *v.* German-American Bank, 127 U. S. 532 (1888); Mount Holly, etc. Co. *v.* Ferree, 17 N. J. Eq. 117 (1864), where the court said: "A sale of a pledge by the pawnee, where reasonably and *bona fide* made, and after notice to the pawnor, is equally obligatory as if made by judicial process;" 2 Kent's Com. 582, saying that the pledgee "may file a bill in chancery and have a judicial sale under a regular decree of foreclosure, . . . and he may sell without judicial process, upon giving reasonable notice to the debtor to redeem;" Sitgreaves *v.* Farmers', etc. Bank, 49 Pa. St. 359 (1865); Stearns *v.* Marsh, 4 Denio, 227 (1847); Markham *v.* Jaudon, 41 N. Y. 235, 241 (1869); Drury *v.* Cross, 7 Wall. 299 (1868). The parties may provide for any manner of disposing of the pledge to satisfy the claim upon it which is not in contravention of statute, against public pol-

press power to sell need be contained in the memorandum of pledge in order to authorize the latter remedy. It exists by force of law.

The pledgee, however, is not bound to pursue either remedy merely because the debt is due and unpaid.[1] He need not sell the stock upon the maturity of the note secured, nor is he liable because the stock declines in value.[2] He may sue on the debt without tendering back the stock.[3] The pledgor cannot compel him

icy, or fraudulent. In McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325, 334 (1871), it is said: "The distinction between a lien and a pledge is said to be that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded." The pledgee's power of attorney to sell is coupled with an interest and is not revocable. Renshaw *v.* Creditors, 40 La. Ann. 37 (1888). A person secured by a pledge of stock in another's name may sue the latter for the amount received by the latter on a sale of the stock." Maynard *v.* Lumberman's Nat. Bank, 11 Atl. Rep. 529 (Pa. 1887). Although the pledgee has not advanced all that he agreed to, yet, where he ceased advances after the pledgor's default in paying the part already advanced, the pledgee may proceed to sell the pledge after notice. Midland Ry. *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. The pledgee cannot be enjoined from selling the pledge on notice, merely because by legal proceedings he has injured the value of the pledge. Midland Ry. *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. A pledgee who has brought an action to foreclose his pledge may nevertheless abandon the suit and resort to his remedy of a sale after notice. Midland Ry. *v.* Loan, etc. Co., N. Y. L. J., May 24, 1890. A sale by a pledgee will not be enjoined merely because the corporation is in insolvency proceedings in another state and the sale has been enjoined by courts of that state. Union Cattle Co. *v.* International Trust Co., 149 Mass. 492 (1889). A mortgage of stock is the same as a pledge of stock in that the mortgagee may sell the stock upon default and after proper notice. Deverges *v.* Sandeman, etc. Co., 86 L. T. Rep. 269 (1902). The agreement of the pledgee not to dispose of the pledge does not prevent a sale after default. Kelley *v.* Root, 74 N. Y. App. Div. 499 (1902). Even though the pledgee, after the note was due, told the pledgor that he wished payment within a few days, and the pledgor said he would pay whenever the pledgee wished, this is not a legal agreement to postpone the sale. Thornton *v.* Martin, 42 S. E. Rep. 348 (Ga. 1902).

[1] O'Neill *v.* Whigham, 87 Pa. St. 394 (1878); Rozet *v.* McClellan, 48 Ill. 345 (1868); Palmer *v.* Hawes, 73 Wis. 46 (1888).

[2] Simonton *v.* Sibley, 122 U. S. 220 (1887); Palmer *v.* Hawes, 73 Wis. 46 (1888). Where one company buys out another and assumes the debts of the latter, a creditor of the latter company may assign his claim as collateral security, but the pledgee is not bound to institute suit to collect such claim, and is not liable for failure so to do, even though the claim is finally lost. Sampson *v.* Fox, 109 Ala. 662 (1896). The pledgee is not liable for not selling the collateral, even though the collateral declines in value. especially where the pledgor made no request that such sale be made. Henry, etc. Co. *v.* Shæffer, 173 Mass. 443 (1899).

[3] Taylor *v.* Cheever, 72 Mass. 146 (1856); Butman *v.* Howell, 144 Mass. 66 (1887). A broker or pledgee need not sell the stock held as collateral before bringing an action against the pledgor for the amount due, nor does a broker's

to sell by merely giving him notice so to do.[1] Nor is the pledgee bound to sell on non-payment of the debt, although the memorandum of pledge expressly authorizes a sale, but he may file a bill in equity to foreclose instead of pursuing the other remedy.[2] In an action at law against a pledgor on a debt, the judgment need not provide for a return of the pledge upon payment of the debt.[3] The pledgee's remedy by attaching the stock and selling it at an execution sale is his remedy as a creditor and not as a pledgee of the person indebted to him.[4] Where the pledgee obtains judgment on a note which is secured by the stock and then causes the stock to be sold out by the sheriff under levy of execution, such sale, however, not being made in accordance with the statutes, this is the same as selling the stock without notice and amounts to a conversion thereof.[5] A

custom compel it. De Cordova *v.* Barnum, 130 N. Y. 615 (1892). A pledgee having sold the stock, and there still being a balance due him from the pledgor, may sue for such balance, and need not allege that the sale was on due notice and demand. Wallace *v.* Berdell, 24 Hun, 379 (1881). Where stock pledged to secure a note is to be transferred as payment in case the note is not paid, the pledgee may sue on the note if the pledgor has not transferred the stock. Fullerton *v.* Mobley, 15 Atl. Rep. 856 (Pa. 1888). The pledgee may sue on the debt before selling the collateral. Sinclair *v.* Weekes, 41 S. W. Rep. 107 (Tex. 1897). As to the duties of the pledgee towards an indorser of the note, see Payne *v.* Commercial Bank, 14 Miss. 24 (1846). Misrepresentations by a pledgee of stock as to the value of the stock, made after its pledge, are no defense for the pledgor when sued on the debt. Palmer *v.* Hawes, 73 Wis. 46 (1888). The maker of a note is liable personally, although it recites that it is secured by stock as collateral "without recourse." Rathburn *v.* Jones, 47 S. C. 206 (1896).

[1] See § 475, *supra*.

[2] Cornick *v.* Richards, 3 Lea (Tenn.), 1 (1879); Coffin *v.* Chicago, etc. Co., 4 Hun, 625 (1875).

[3] Robertson *v.* Sully, 2 N. Y. App. Div. 152 (1896), reversed on another point in 157 N. Y. 624. The pledgee may sue on the debt and obtain a judgment and need not tender the stock held in pledge, and the judgment need not contain a provision that the stock should be surrendered on payment of the judgment. French *v.* McCarthy, 125 Cal. 508 (1899). The purchaser of a note may enforce the same without producing collateral which is recited in the note itself, where it is shown that such collateral was to secure several notes and had been returned to the payor in connection with the other notes and new collateral substituted therefor. Haskell *v.* Africa, 68 N. H. 421 (1896). See § 335.

[4] Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298 (1872). His remedies as a pledgee are not released or affected by his pursuit of other remedies. See Sickles *v.* Richardson, 23 Hun, 559 (1881). Judgment on the debt does not release the stock pledged. "Until the debt is paid, the pledgor, under the terms of the bailment, has no right to have the pledge given up to him." Donnell *v.* Wyckoff, 49 N. J. L. 48 (1887). See also Hill *v.* Beebe, 13 N. Y. 556, 563, 567 (1856).

[5] Feige *v.* Burt, 118 Mich. 243 (1898). Where the pledgee causes the sheriff to sell the pledge on a judgment obtained upon the debt, the pledge relationship ceases to exist, even though it turn out that the sale was illegal and

pledgee cannot, by obtaining judgment on his claim, reach the pledge by a judgment creditor's bill.[1] A pledgee may prove his entire claim against the insolvent estate of the pledgor, and obtain his proportionate part thereof.[2] Or the pledgee may sell out the collateral in accordance with law and then sue for the deficiency.[3] A pledgee may sell at public sale on notice, even though a receiver of the pledgor has been appointed.[4] Even though bankruptcy proceedings are instituted against the pledgor, yet the bankruptcy court has no power to enjoin the pledgee from selling the pledge in accordance with the terms of the pledge itself.[5] The death of the pledgor does not entitle his administrator to take the stock from the pledgee, or to claim the dividends without payment of the debt.[6] Where stock is held as collateral to a debt, the statute of limitations does not run as against the pledge, and, although the debt itself is barred, the court may order the stock sold to satisfy the debt.[7] Complicated questions arise where stock is held by one

void. Latta *v.* Tutton, 122 Cal. 279 (1898). Where the pledgee brings suit on the debt and attaches the stock he thereby waives his lien, and even though the attachment is illegal and void for insufficient service, yet his rights as pledgee are not thereby restored. H. B. Claflin Co. *v.* Bretzfelder, 69 Ark. 271 (1901). Even though a pledgee brings suit on a debt and levies on the stock he does not thereby lose his rights as pledgee. Croft *v.* Colfax, etc. Co., 113 Iowa, 455 (1901). A person holding stock in pledge may waive his rights as pledgee and attach the property of his debtor. Parberry *v.* Woodson Sheep Co., 18 Mont. 317 (1896), citing Drake on Attachments, 7th ed., § 35.

[1] Shaw *v.* Monson, etc. Co., 96 Me. 41 (1901).

[2] See § 473, *supra.*

[3] See § 473, *supra.* See also § 763, *infra,* as to pledges of bonds.

[4] Fidelity, etc, T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439 (1896). See also Moore *v.* Potter, 155 N. Y. 481 (1898); Dudley *v.* Gould, 6 Hun, 97 (1875).

[5] *In re* Browne, 104 Fed. Rep. 762 (1900).

[6] Fulton *v.* National Bank, 62 S. W. Rep. 84 (Tex. 1901). See also § 473, *supra.*

[7] Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). Although the statute of limitations has run against the debt the pledgor cannot compel the pledgee to give up the pledge unless the debt is paid. Gage *v.* Riverside Trust Co., 86 Fed. Rep. 984 (1898). A lien may be enforced, even though the debt is barred by the statute of limitations. Commonwealth *v.* Standard, etc. Co., 50 Atl. Rep. 1003 (Pa. 1902). A pledgee may bring suit to realize upon his security, even though the principal debt is barred by the statute of limitations. London, etc. Bank *v.* Mitchell, [1899] 2 Ch. 161. The fact that stocks are deposited as collateral security to a note does not prevent the statute of limitations running against the note. *Re* Hartranft's Estate, 153 Pa. St. 530 (1893). Although the debt is barred by the statute of limitations, the pledgee may compel the corporation to transfer the stock to him on the books. Miller *v.* Houston City St. Ry., 55 Fed. Rep. 366 (1893). A pledgee may enforce payment of his debt by sale of stock held as collateral security therefor, even though the debt itself may be barred by the statute of limitations. Tombler *v.* Palestine Ice Co., 17 Tex. Civ. App. 596 (1897).

person as security for a debt due to another person. These questions, as well as those arising from a trustee of a mortgage holding stock under the mortgage, are considered elsewhere.[1]

§ 477. *Notice of sale of stock by pledgee to apply to debt secured — Waiver of notice.*— In case the pledgee pursues the remedy of selling the stock without any judicial proceedings, he must give the pledgor reasonable notice of the intent to sell and of the time and place of sale.[2] A sale without a notice is a conversion of the stock.[3] The pledgee must demand payment of the debt secured by the pledge of stock, and a waiver of notice of sale is not a waiver of a right to have such a demand made.[4] But where the time of payment is fixed by the note, no demand of payment need be made before sale of the pledge.[5] Where the indorser of a note deposits collateral as security, the collateral may be sold, although notice of non-payment of the note is not given to him.[6] A notice of intent to sell, however, is equivalent to a demand of payment.[7] A broker's custom to the effect that no notice is necessary is illegal and void.[8] The time and place of the proposed sale must be specified in the notice.[9] Where the note for which stock is pledged is made and

[1] See § 317, *supra.*

[2] "To authorize the defendants to sell the stock purchased, they were bound, first, to call upon the plaintiff to make good his margin; and, failing in that, he was entitled, secondly, to notice of the time and place where the stock would be sold; which time and place, thirdly, must be reasonable." Markham *v.* Jaudon, 41 N. Y. 235, 243 (1869). See also Stratford *v.* Jones, 97 N. Y. 586 (1885); Baker *v.* Drake, 66 N. Y. 518 (1876); Conyngham's Appeal, 57 Pa. St. 474 (1868); Stearns *v.* Marsh, 4 Denio, 227 (1847); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Cushman *v.* Hayes, 46 Ill. 145 (1867). A joint owner is entitled to notice. Clark *v.* Sparhawk, 2 W. N. Cas. 115 (1875); s. c., 5 Fed. Cas. 928.

[3] Fowle *v.* Ward, 113 Mass. 548 (1873); Hempfling *v.* Burr, 59 Mich. 294 (1886); Illinois Nat. Bank *v.* Baker, 128 Ill. 533 (1889); Feige *v.* Burt, 118 Mich. 243 (1898).

[4] Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); Brass *v.* Worth, 40 Barb. 648 (1863); Wilson *v.* Little, 2 N. Y. 443, 448 (1849), saying: "It is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pawnee cannot sell the pledge without a previous demand of payment, although the debt is technically due immediately." Genet *v.* Howland, 45 Barb. 560 (1866).

[5] Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294 (1896).

[6] Fiske *v.* Williams, 4 N. Y. App. Div. 487 (1896).

[7] Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877). So also of notice of intent to foreclose. Goodrich *v.* Willard, 68 Mass. 203 (1854). Demand of payment may be made by long urging for payment, even though the word "demand" is not used. Carson *v.* Iowa, etc. Co., 80 Iowa, 638 (1890). The giving of a note to a broker pledgee does not extend the time within which the pledgor was to deposit further margin. Gould *v.* Trask, 10 N. Y. Supp. 619 (1890).

[8] Markham *v.* Jaudon, 41 N. Y. 235 (1869).

[9] Conyngham's Appeal, 57 Pa. St. 474 (1868); Genet *v.* Howland, 45 Barb. 560 (1866); Canfield *v.* Minneapolis, etc. Assoc., 14 Fed. Rep. 801 (1883). See

delivered and payable in Massachusetts, and the pledge was also made there, and the stock is in a small Massachusetts corporation and is not known elsewhere, it is unreasonable for the pledgee to fix the place of sale in New York, even though the pledgee is a New York corporation; but where the pledgor, on receiving notice of the proposed sale, does not make any protest or objection to the place of sale, and takes no action whatsoever in regard to it, the pledgor waives any objection on this account.[1] The time between the service of the notice and the time when the sale is to take place must be reasonable in length, so as to give the debtor an opportunity to obtain money to pay the debt.[2] Four days' notice is sufficient, although the sale is made in New York and the pledgor resides in Boston.[3] A notice by a newspaper advertisement is insufficient.[4] It is not sufficient notice to the pledgor to send him a printed copy of the public notice of sale, the pledged stock being included in a large amount of other stock, and there being nothing to indicate an intent to sell nor to indicate that the pledgor was interested.[5] The notice must be served personally, and it seems that it cannot be served on one who has charge of the pledgor's office for the transaction of business.[6] A sale of bonds as collateral

Schouler, Bailm., 2d ed., § 229. It has been held in Maryland that a notice of the place is unnecessary. Worthington *v.* Tormey, 34 Md. 182 (1870). But such decision would be unsafe, and probably would not be followed elsewhere.

[1] Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896). The place of sale of a pledge may be in the county where the pledgee resides, even though the debt is payable in another county in which the pledgor resides. Thornton *v.* Martin, 42 S. E. Rep. 348 (Ga. 1902).

[2] In Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866), a week's notice was held sufficient. Lewis *v.* Graham, 4 Abb. Pr. 106 (1857), holding that thirty-four days, where the pledgor resides in Illinois and the sale is to be in New York, is sufficient; Bryan *v.* Baldwin, 7 Lans. 174 (1872); aff'd, 52 N. Y. 232, holding that two days was sufficient; Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862), holding that a sale on the same day is unreasonable and the notice insufficient. See other cases in §§ 457, 458, *supra;* Willoughby *v.* Comstock, 3 Hill, 389 (1842), where two days was held sufficient; Edwards, Bailm., § 285. Notice by the pledgee of merchandise that he will sell the same on the following day at half-past twelve o'clock is insufficient where such notice was merely mailed and is not received until ten o'clock the next morning by the pledgee, and the advertisement of the sale was on that morning and on the evening before. Such notice did not give the defendant an opportunity to redeem the property or save his equity. Jacoby *v.* S. Jacoby & Co., 103 Fed. Rep. 473 (1900). As to place of sale, see §§ 458, 476, *supra.*

[3] Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896).

[4] Lewis *v.* Graham, 4 Abb. Pr. 106 (1857); and see § 119, *supra.*

[5] McCutcheon *v.* Dittman, 23 N. Y. App. Div. 285 (1897), modified in 164 N. Y. 355.

[6] Bryan *v.* Baldwin, 52 N. Y. 232 (1873). *Cf.* Milliken *v.* Dehon, 27 N. Y. 364 (1863).

security, in violation of the agreement as to the notice to be given, does not release a surety on the note secured by the bonds, but discharges him only to the extent of the actual value of the bonds.[1]

By an express agreement the pledgor may waive his right to notice of the time and place of the sale.[2] The pledgee's right by

[1] Vose *v.* Florida R. R., 50 N. Y. 369 (1872).

[2] Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866); Genet *v.* Howland, 45 Barb. 560 (1866); and see §§ 459, 462, *supra;* Milliken *v.* Dehon, 27 N. Y. 364 (1863); Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Hyatt *v.* Argenti, 3 Cal. 151 (1853); Wheeler *v.* Newbould, 16 N. Y. 392 (1857); Stenton *v.* Jerome, 54 N. Y. 480 (1873); Wicks *v.* Hatch, 62 N. Y. 535 (1875); Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869). The pledgor of stock may, by the terms of the agreement creating the pledge, waive his right to notice of sale for non-payment of the debt. Jeanes's Appeal, 116 Pa. St. 573 (1887). Formerly the validity of a waiver was doubted. Campbell *v.* Parker, 9 Bosw. 322 (1862); Wilson *v.* Little, 2 N. Y. 443 (1849); Gilpin *v.* Howell, 5 Pa. St. 41 (1846); Hanks *v.* Drake, 49 Barb. 186 (1867); Sterling *v.* Jaudon, 48 Barb. 459 (1867). Authority to the pledgee to sell "at public or private sale, at his discretion," thirty days after notice, waives notice of sale. McDowell *v.* Chicago Steel Works, 124 Ill. 491 (1888). Notice may be waived. Chouteau *v.* Allen, 70 Mo. 290 (1879). In Huiskamp *v.* West, 47 Fed. Rep. 236, 249 (1891), where the pledgee was authorized to sell before maturity and without notice if the security became insufficient, the court held that "the pledgee could not make sale of the collateral until after the default in the payment of the note, without notice and demand of payment to the pledgor." See also S. C. *sub nom.* West *v.* Huiskamp, 63 Fed. Rep. 749 (1894). Where the pledgees are given power to sell "in such manner as they, in their discretion, may deem proper, without notice," a sale without notice after the maturity of the loan is legal. Williams *v.* United States Trust Co., 133 N. Y. 660 (1892). The sale by a pledgee under an agreement, whereby he sold without notice, was upheld in McDougall *v.* Hazelton, etc. Co., 88 Fed. Rep. 217 (1898). The pledgor may, subsequently to the making of the pledge, release his right to redeem. He may agree that the pledgee may sell the pledge at any time at private sale, and that the proceeds shall, after repayment of the amount loaned, be divided equally between the pledgor and pledgee. Rutherford *v.* Massachusetts Mut. Ins. Co., 45 Fed. Rep. 712 (1891). The fact that the pledgee, under a waiver of notice, of demand, and of public sale, sells the stock and debt to an enemy of the corporation, does not invalidate the sale. Carson *v.* Iowa, etc. Co., 80 Iowa, 638 (1890). Although the pledgor agrees that the pledgee may sell part of the pledge without notice upon default, this does not release the remainder of the pledge from being additional security for the debt. Bank of Africa *v.* Salisbury, etc. Co., L. R. 17 App. Cas. 281 (1892). Where a corporation authorizes its agent to pledge its bonds, the agent may make the pledge on the usual terms as to selling the bonds in case of default. Morris, etc. *v.* East Side Ry., 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13. A special agreement authorizing the pledgee to sell is not waived by the fact that the pledgee does not exercise that right when the note becomes due, but does exercise it afterwards. Louisville, etc. Co. *v.* Thomas, etc. Co., 68 S. W. Rep. 2 (Ky. 1902). Where the pledgor waives demand and notice of the time and

written agreement to sell at private sale without notice is waived by him if he does anything which reasonably causes the pledgor to understand that such special agreement is waived.[1] Such contracts are frequently entered into with stock-brokers by customers buying stock on a margin. But an express power to the pledgee to sell the pledge on certain contingencies is not a waiver of a right to notice.[2] Irregularities in the notice may be waived. Thus, where a person, upon being presented with his account, does not object, but promises to pay the amount, he thereby waives his right to object to a sale as being without notice.[3] Even though a pledgee sells the stock prior to the date on which he gave notice that he would sell it, yet, if the pledgor, knowing the facts, directs the application of the proceeds of the sale and accepts a statement of it, he cannot afterwards complain.[4] The rights and duties of a trustee holding stock as security under a mortgage are considered elsewhere.[5]

§ 478. *Formalities of sale.*— A sale of stock on notice by a pledgee, for the purpose of applying the proceeds to the pledgor's

place of sale, the pledgee, after the debt is due, may sell without demand and without notice. Thornton *v.* Martin, 42 S. E. Rep. 348 (Ga. 1902).

The following is a sample of a note and waiver:

"$——. NEW YORK, ——, 19—.

"—— after date —— promise to pay to the order of ——, —— dollars, at ——, for value received, with interest at the rate of —— per cent. per annum, having pledged to the said —— —— the following securities: ————, the market value of which is now $——, with the right on their part from time to time to demand such additional collateral security as they may deem sufficient should the market value thereof decline, and also hereby give them a lien for the amount of all the said liabilities upon all the property or securities given unto or left in their possession by the undersigned, and also upon any balance of the deposit account of the undersigned with them. Upon —— failure to comply with any such demand, this obligation shall forthwith become due, with full power and authority to them or their assigns in case of such default or of the non-payment of any of the liabilities above mentioned at maturity, to sell, assign and deliver the whole, or any part of such securities, or any substitutes therefor or additions thereto, at any brokers' board, or at public or private sale, at their option, at any time or times thereafter without advertisement or notice to —— and with the right on their part to become purchasers thereof at such sale or sales, freed and discharged of any equity of redemption. And after deducting all legal or other costs and expenses for collection, sale and delivery, to apply the residue of the proceeds of such sale or sales so made, to pay any, either or all of said liabilities, as to them shall be deemed proper, returning the overplus to the undersigned; and —— will still remain liable for any amount so unpaid. The undersigned do hereby authorize and empower them at their option, at any time, to appropriate and apply to the payment and extinguishment of any of the above-named obligations or liabilities, whether now existing or hereafter contracted, any and all moneys now or hereafter in their hands, on deposit or otherwise, to the credit of or belonging to the undersigned, whether the said obligations or liabilities are then due or not due.

—— ——.

[1] Toplitz *v.* Bauer, 161 N. Y. 325 (1900).

[2] Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862); Lewis *v.* Graham, 4 Abb. Pr. 106 (1857). See also Wilson *v.* Little, 2 N. Y. 443 (1849); Genet *v.* Howland, 30 How. Pr. 360 (1866); Stenton *v.* Jerome, 54 N. Y. 480 (1873). *Cf.* Milliken *v.* Dehon, 27 N. Y. 364 (1863). But an express power to sell on a specified day is held to waive right of notice. Bryson *v.* Rayner, 25 Md. 424 (1866).

[3] Gillett *v.* Whiting, 141 N. Y. 71 (1894).

[4] Granger *v.* Fidelity, etc. Co., 198 Pa. St. 428 (1901).

[5] See § 317, *supra.*

debt, must be at public auction.[1] A private sale is unauthorized and illegal, even though the utmost market price is obtained.[2] But a special contract by which the pledgor authorizes the pledgee to sell without notice and at public or private sale has been upheld.[3] Unless there is such a special contract, the pledgee cannot have the sale made at a brokers' board or in a stock exchange, since only the members of the association are allowed to bid for stocks sold therein, while the law requires that the public shall be allowed to bid at a pledgee's sale.[4] Frequently a special agreement is made between the pledgor and pledgee, especially between a customer and his stock-broker, whereby the pledgee is allowed to sell at a brokers'

[1] Conyngham's Appeal, 57 Pa. St. 474 (1868); Rankin *v.* McCullough, 12 Barb. 103 (1851); Genet *v.* Howland, 45 Barb. 560 (1866); Ogden *v.* Lathrop, 65 N. Y. 158 (1875); Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891). An express power to sell has been held to authorize a private sale. Bryson *v.* Rayner, 25 Md. 424 (1866). Or a sale at a brokers' board. Bryson *v.* Rayner, 25 Md. 424 (1866). A private sale of collateral held by a receiver cannot be made, even by order of the court. *In re* Earle, 92 Fed. Rep. 22 (1899).

[2] Castello *v.* City Bank of Albany, 1 N. Y. Leg. Obs. 25 (1842). *Cf.* Nabring *v.* Bank of Mobile, 58 Ala. 205 (1877). The pledgee's right to object is waived by long delay. Hayward *v.* National Bank, 96 U. S. 611 (1877). In Willoughby *v.* Comstock, 3 Hill, 389 (1842), it was held that the pledgee's failure to object when he received notice of intent to sell at a brokers' board was fatal. A *bona fide* pledgee of a certificate of stock from an agent having power to pledge, but who had so pledged the stock for purposes not authorized by the owner, is nevertheless protected, and even though such pledgee sells the stock at private sale without notice he cannot be held liable if the stock was not worth more than the debt secured. Brittan *v.* Oakdale, etc., 124 Cal. 282 (1899).

[3] Williams *v.* United States Trust Co., 133 N. Y. 660 (1892); s. c., 14 N. Y. Supp. 502. A private sale by the pledgee in accordance with an agreement authorizing such sale was upheld in Smith *v.* Lee, 84 Fed. Rep. 557 (1898), where the price realized was, under the circumstances, a fair price. In this case a third party had substituted his stock for the stock of the original pledgor, and the court held that the substituted stock was subject to the terms of the original agreement of pledge as to mode of sale. A private sale in accordance with the contract allowing said sale was held in Dullnig *v.* Weekes, 40 S. W. Rep. 178 (Tex. 1897), not to be invalid, where the amount realized was greater than the market value. The court held also that a waiver of advertisement or notice waived any notice to the pledgor and also to the public. See also § 477, *supra.* Where the pledgor becomes insolvent and assigns for the benefit of creditors, his assignee may agree with the pledgee that the stock be sold at private sale by the assignee. Durfee *v.* Harper, 22 Mont. 354 (1899). A provision in a pledge of an insurance policy that the pledgee may sell it at public or private sale upon default, or surrender it to the company, may be waived by agreement, declaration, or course of conduct indicating that an opportunity would be given to redeem. Toplitz *v.* Bauer, 161 N. Y. 325 (1900).

[4] Brass *v.* Worth, 40 Barb. 648 (1863); Rankin *v.* McCullough, 12 Barb. 103 (1851). A sale in another state is legal. King *v.* Texas, etc. Ins. Co., 58 Tex. 669 (1883).

board.[1] Such an agreement, however, does not authorize a private sale at a brokers' board.[2] The usual printed agreement which a bank requires a pledgor to sign will be construed in favor of the pledgor, inasmuch as the agreement is drawn by the pledgee. A provision that the pledge shall apply to all liabilities of the pledgor to the bank does not include a claim which the bank purchases.[3] A sale is valid though the stock is sold for only a small part of its value.[4] The fact that there is only one bidder does not render the sale invalid.[5] The pledgor in selling must "exercise reasonable skill and diligence in order to get the value of the property."[6] Where stock is sold on a mortgage foreclosure, it will be sold "by offering the shares in small blocks, and then as a whole, and taking the bid which aggregates the larger sum."[7] But a sale in small blocks is not required at common law.[8] Where an Oregon corporation pledges its bonds in California to secure notes payable in California, the law of California applies as to the mode of selling such bonds on default of the pledgor.[9]

[1] Wicks *v.* Hatch, 62 N. Y. 535 (1875). See ch. XXV, *supra.*

[2] Allen *v.* Dykers, 3 Hill, 593 (1842); aff'd, Dykers *v.* Allen, 7 Hill, 497 (1844).

[3] Gillet *v.* Bank of America, 160 N. Y. 549 (1899).

[4] See § 850, *infra.* A *bona fide* purchaser at a pledgee's sale is protected, though he purchased for less than the real value of the stock, and though a receiver had previously been appointed of the pledgor's property and it had been transferred to the receiver. Dudley *v.* Gould, 6 Hun, 97 (1875). Even though stock actually worth $5,000 is sold on public execution for $9, yet the sale cannot be attacked collaterally, but can be set aside only in a direct proceeding for that purpose. Howard *v.* Corey, 126 Ala. 283 (1900). A pledgee is not justified in selling the pledge for just enough money to pay the debt where the pledge is known to have more than double that value, and where the pledgee, although a *bona fide* holder, had learned that the pledge had been made in breach of trust by the pledgor, especially where the pledgee buys at the sale. Foote *v.* Utah, etc. Bank, 17 Utah, 283 (1898). As to a sacrifice sale by a trustee of a mortgage, see § 317, *supra.*

[5] Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896).

[6] Guinzburg *v.* H. W. Downs Co., 165 Mass. 467 (1896). A pledgee who is given power to manage the stock and sell cannot easily be held liable in damages for mismanagement, even though it turns out that he sold for much less than the stock was worth. Hewitt *v.* Steele, 118 Mo. 463 (1893). See also Minneapolis Trust Co. *v.* Menage, 73 Minn. 441 (1898).

[7] Toler *v.* East Tennessee, etc. Ry., 67 Fed. Rep. 168, 181 (1894).

[8] Even though the sheriff, under execution, sells a large block of stock in one lot, instead of dividing and selling it in small lots, and even though such sale realizes $12,000, whereas the levy was for only $1,000, yet the purchaser is protected in his purchase. Connecticut, etc. Ry. *v.* Morris, 14 S. C. Rep. (Can.) 318 (1887); Morris *v.* Connecticut, etc. Ry., L. R. 2 Q. B. 303 (1886). The court may order a receiver to sell shares of stock held by the receiver in one block instead of in parcels if the court deems best. First Nat. Bank *v.* C. Bunting Co., 63 Pac. Rep. 694 (Idaho, 1900).

[9] Morris, etc. *v.* East Side Ry., 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13.

§ 479. *If the pledgee himself purchases at the sale, then the sale is voidable.*— It is a well-established rule that, where a pledgee pursues the remedy of selling the stock upon notice, the pledgee himself is disqualified from purchasing the stock.[1] The rule is based on the principle that the pledgee owes a duty to the pledgor, and will not open the door to possible devices of the pledgee for purchasing the stock for himself at a low price. The pledgee cannot purchase, either directly or indirectly, in his own name or in the name of another.[2] The effect of a purchase by the pledgee for himself is that the whole proceeding of the pledgee for subjecting the pledge to the payment of the debt is utterly futile, and voidable at the election of the pledgor. The pledgor, however, may elect to abide by the sale.[3] The pledgor cannot claim that the pledgee has converted the stock by purchasing at the sale,[4] but he

[1] Easton *v.* German-American Bank, 127 U. S. 532 (1888); Bryan *v.* Baldwin, 52 N. Y. 232 (1873), the court saying: "The plaintiff, being pledgee of the stock, and in that character exposing it for sale, could not become the purchaser unless the defendant assented to such purchase. . . . This sale to the plaintiff was not void, but voidable at the election of the defendant;" Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242 (1866). Nor can he buy where the pledge is being sold on a forfeiture sale for non-payment of calls. Freeman *v.* Harwood, 49 Me. 195 (1859). See also Sickles *v.* Richardson, 23 Hun, 559 (1881), where the sale of property pledged was on an attachment. The pledgor's silence may constitute a ratification of the pledgee's purchase. Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). If the pledgee is a corporation its president cannot purchase for it. Star F. Ins. Co. *v.* Palmer, 41 N. Y. Super. Ct. 267 (1876). Lewis *v.* Graham, 4 Abb. Pr. 106 (1857), holds that a special partner of the pledgee firm may purchase. And see ch. XXV, § 450, *supra*. *Cf.* Finney's Appeal, 59 Pa. St. 398 (1868). Where a pledgee bank having a right to sell at private sale and without notice sells the pledge through its president, who buys the pledge himself, and the president openly pays the bank for it, long delay on the part of the bank in complaining is fatal. Raymond *v.* Palmer, 41 La. Ann. 425 (1889). Even though the attorney for the pledgee buys a pledge at public sale and afterwards resells it to the pledgee. yet if there is no proof that the transaction was a mere device the sale is valid. Steelman *v.* Weiskittel, 88 Md. 519 (1898). Where a bank holds $300,000 of first-mortgage bonds issued to the bank by the corporation itself, for a debt of about $175,000 and transfers the same to another party, who advertises and sells the bonds under the terms of the pledge, even though the purchaser borrows the money from the bank in order to make payment, the sale is not thereby invalidated. Morris, etc. *v.* East Side Ry., 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13.

[2] Minneapolis Assoc. *v.* Canfield, 121 U. S. 295 (1887). He cannot buy in the name of a dummy. Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895).

[3] Appeal of Hibernia Nat. Bank, 47 La. Ann. 643 (1895).

[4] Bryan *v.* Baldwin, 52 N. Y. 232 (1873). If the pledgee buys it in, there is no conversion. The pledge continues. Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891). Where the pledgee buys at a sale he cannot be held liable for conversion so long as he retains the property, unless the pledgor demands

may disregard the notice and sale and the whole proceeding as being ineffectual and voidable. The pledge relationship continues as though no attempt had been made by the pledgee to subject the pledge to the payment of the debt.[1] Where the pledgee buys the security at the public sale and then sells it, and then sues the pledgor for the deficiency on the first sale, the pledgor may claim a set-off for the full value of the securities wrongfully resold, and

the return of the same and offers to perform his part of the contract; but where the pledgee sells a part of the property he is liable for conversion without any demand or offer of performance by the pledgor. Glidden *v.* Mechanics' Nat. Bank, 53 Ohio St. 588 (1895). Where the pledgee purchases at the sale the sale is void, but does not amount to a conversion of the securities. First Nat. Bank *v.* Hall, 22 N. Y. App. Div. 356 (1897).

[1] Bryson *v.* Rayner, 25 Md. 424 (1866); Middlesex Bank *v.* Minot, 45 Mass. 325 (1842); Hestonville, etc. R. R. *v.* Shields, 3 Brewst. (Pa.) 257 (1869). If the pledgee purchases at the sale the pledge continues. The pledgor does not waive his rights by settling in ignorance that the pledgee purchased. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). If the pledgee buys, the pledge continues unless the pledgor confirms the sale. Hyams *v.* Bamberger, 10 Utah, 3 (1894). Where the pledgee buys in the stock himself, it is the same as though no sale had taken place, and the corporation is not liable for allowing a transfer of the stock to such pledgee. First Nat. Bank *v.* Mings, 11 Tex. Civ. App. 302 (1895). Where a pledgee buys for himself, and subsequently takes the stock into his possession, the pledge continues, and he cannot sell a second time without due notice. Leahy *v.* Lobdell, etc. Co., 80 Fed. Rep. 665 (1897). A pledgee of bonds who buys them in at his own sale as pledgee still holds them in pledge. Duncomb *v.* N. Y. etc. R. R., 84 N. Y. 190, 204 (1881). Even though a national bank, as pledgee of a national bank stock which stands on the books of the latter bank in the name of the pledgor, sells the stock on notice and buys it in at a nominal figure, yet if the pledgee does not have the stock transferred to himself on the books of the bank he cannot be held liable thereon, the pledgee having soon after the sale waived its rights as a purchaser at such sale. Robinson *v.* Southern, etc. Bank, 180 U. S. 295 (1901). Where the pledgee of stock sells it out and buys it in himself, and at the annual election votes the stock by proxy, even though the stock still stands on the corporation books in the name of the pledgor, and the pledgor claims that the sale is illegal and that the directors elected by the pledgee's vote intend to take action detrimental to the corporation, such pledgor is entitled to an injunction against such directors acting as directors. Reynolds *v.* Bridenthal, 57 Neb. 280 (1898). A purchaser of stock who makes a partial payment and gives back the stock as collateral security cannot abandon the contract and claim such part of the stock as the payment already made would pay for, on the ground that the seller has obtained control of the corporation and is guilty of a breach of trust. The fact that the seller as pledgee has sold the stock and bought it in himself is immaterial, inasmuch as such a sale is illegal. Reid *v.* Caldwell, 110 Ga. 481 (1900). Where the trustee of a mortgage makes a loan to the mortgagor on the bonds secured by the mortgage and then sells out the collateral and buys it in himself, he can upon foreclosure enforce the bonds only to the extent of the amount loaned and interest. Knick-

need not make a tender.[1] Under the statutes of California the pledgor at a public sale may buy in the stock;[2] while in Massachusetts by statute a pledgee is prohibited from purchasing at his own sale.[3] Where a pledge is foreclosed by legal proceedings similar to those for the foreclosure of chattel mortgages, either party may bid at the public judicial sale.[4] Even though the pledgee is authorized to sell at public or private sale without notice, yet he cannot buy for himself, notwithstanding he has sold the note with the collateral to another person who makes the sale.[5] The pledgor may authorize the pledgee to purchase at the sale and retain the pledge.[6] Stock held in pledge to secure a debt cannot be sold before the debt is due,[7] unless there is a special contract to that effect. The pledgor

erbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed. Rep. 814 (1900).

[1] Rush *v.* First Nat. Bank, 71 Fed. Rep. 102 (1895), reviewing the authorities on tender in such cases. Where the pledgee sues for the balance due on the note after a sale of the pledge, and the pledgor sets up a counter-claim that the pledgee had sold the stock "for the use of defendant and converted to its own use," the pledgor thereby ratifies the sale, and is entitled only to the purchase price of the stock, and not its actual value. Terry *v.* Birmingham Nat. Bank, 99 Ala. 566 (1893).

[2] McAulay *v.* Moody, 128 Cal. 202 (1900).

[3] Lord *v.* Hartford, 175 Mass. 320 (1900).

[4] Pewabic Min. Co. *v.* Mason, 145 U. S. 349 (1892). In Newport, etc. Bridge Co. *v.* Douglass, 12 Bush (Ky.), 673, 720 (1877), the pledgee of bonds from the company issuing them obtained a foreclosure of the pledge by suit, and bought the bonds in, and was then held to be the absolute owner of them.

[5] Greer *v.* Lafayette, etc. Bank, 128 Mo. 559 (1895).

[6] Chouteau *v.* Allen, 70 Mo. 290 (1879). See also Farmers', etc. Co. *v.* Toledo, etc. Co., 54 Fed. Rep. 759 (1893), where bonds were bought in. A pledgee cannot himself purchase the stock at the sale, but the pledgor may lawfully contract so as to allow the pledgee to purchase at such sale, or may ratify such purchase after it has been made. If there is no such contract or ratification, however, the sale is void, and the parties remain in the same position as though no sale had taken place. Appleton *v.* Turnbull, 84 Me. 72 (1891). Under a power of sale authorizing a pledgee to purchase, and waiving notice of sale, the pledgee may purchase, and it is immaterial that the sale took place at a time when stocks and bonds had declined in a panic. The pledgee need not wait for a favorable condition of the market. Franklin Nat. Bank *v.* Newcombe, 1 N. Y. App. Div. 294 (1896). A provision in a contract of pledge that the pledgee may, at a sale for nonpayment, buy in the stock for himself, is legal. Manning *v.* Schriver, 79 Md. 41 (1894). In Fidelity, etc. T. Co. *v.* Roanoke, etc. Co., 81 Fed. Rep. 439 (1896), the court sustained a purchase by the pledgee himself, where the agreement of pledge authorized him to sell at public or private sale and without notice or demand of payment. Where the pledgee sells bonds held as collateral and buys them in, he may enforce them for their full par value instead of to the extent of only his claim. Atlantic Trust Co. *v.* Woodbridge, etc. Co., 86 Fed. Rep. 975 (1897).

[7] Illinois Nat. Bank *v.* Baker, 128 Ill. 533 (1889).

may release his equity to the pledgee.[1] A court of equity scrutinizes closely, however, a contract between pledgor and pledgee for transfer of title, and will set it aside if there is any ground for believing that it is a harsh contract, brought about by the position of vantage occupied by the pledgee.[2]

[1] Thomas *v.* Coffin, 62 Fed. Rep. 665 (1894); Small *v.* Saloy, 42 La. Ann. 183 (1890). A pledgor may pledge the securities pledged, and the sale may be to the pledgee. The sale may be oral and will be upheld, the debt being canceled thereby. Brown *v.* Farmers' L. & T. Co., 117 N. Y. 266 (1889). *Cf.* Ryle *v.* Ryle, 41 N. J. Eq. 582 (1886). Where the owner of stock has pledged all of it to different parties and arranges with one of them to take up all the stock, and the latter does so, and for several years treats it as his own, and the lower court finds that the agreement was that the pledgee should own it, the upper court will not disturb the decision, especially where the pledgor claims that he transferred the stock to avoid paying other creditors. Hukill *v.* Yoder, 189 Pa. St. 233 (1899). Where an agreement whereby stock is pledged to secure a note provides that the pledgee may buy the stock at a fixed price on or before a certain date, a transferee of the note and pledgee cannot exercise such option by notice to the original pledgee. The notice must be to the pledgor. Rumsey *v.* Lentz, 59 Ohio St. 189 (1898). A written agreement between the pledgor and pledgee by which the note is canceled, in consideration of the stock being sold and transferred absolutely to the pledgee, is legal, unless the agreement is an unconscionable one. Cunningham *v.* Jones' Ex'rs, 57 S. W. Rep. 488 (Ky. 1900). Even though garnishee process has been served upon the pledgee of stock for a debt of the pledgor, yet the pledgor and pledgee may agree that the stock shall belong to the pledgee in cancellation of the debt. Such agreement is not illegal if the debt was the full value of the stock at the time, and even though subsequently the pledgee, upon selling the stock for more than the debt, pays the surplus to the pledgor, the creditor issuing the garnishee process cannot complain. Steiner *v.* First, etc. Bank, 127 Ala. 595 (1900). Receiving the surplus in ignorance of illegality is no waiver. Allen *v.* American, etc. Assoc., 49 Minn. 544 (1892); Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). A creditor of an individual cannot set aside a sale by the latter of his stock to a pledgee and indorser of notes, even though such sale was at a figure much less than the price at which said pledgee finally sold the stock after putting in additional money. Davis *v.* Yoder, 173 Pa. St. 138 (1896). In Fox *v.* Hartford, etc. R. R., 70 Conn. 1 (1897), the pledgor sold the pledge to the pledgee. Where an insolvent pledgor sells the pledge to the pledgee for the debt itself, $7,000, the transaction is legal, even though a jury find that the stock was worth $1,500 more. Wachovia L. & T. Co. *v.* Forbes, 102 N. C. 355 (1897).

[2] Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). Under the New Hampshire statutes, when a corporation is wound up under insolvency proceedings, all claims are allowed as of the same date, interest being added for those past due, and a rebate of interest made on those not yet due. An assignee in insolvency cannot agree that a trustee to whom the corporation pledged mortgages as security for debentures shall purchase such securities at a price named. Bank Com'rs *v.* New Hampshire, etc. Co., 69 N. H. 621 (1899).

CHAPTER XXVII.

LEVY OF ATTACHMENT AND EXECUTION UPON SHARES OF STOCK.

§ 480. *An execution at common law could not reach shares of stock.*— A share of stock is in the nature of a chose in action, and at common law a chose in action could not be reached by or made subject to a levy of execution. Consequently it has been uniformly held by the courts that at common law a levy of execution could not be made on shares of stock. Unless, therefore, the process of execution has been extended by statute so as to reach such property, the stock of a judgment debtor cannot be made subject to the payment of his debts by means of an execution.[1] An attach-

[1] Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881); Feige *v.* Burt, 118 Mich. 243 (1898); Nashville T. Co. *v.* Weaver, 102 Tenn. 66 (1899);

ment, being entirely statutory, can be levied on shares of stock only when the words of the statute declare that an attachment may be levied on such property.[1]

§ 481. *Nor, it seems, could a court of equity subject stock to the payment of debts, except when it had been conveyed away fraudulently.*— There is some doubt whether a court of equity has power to subject a judgment debtor's choses in action to the payment of his debts, where the only ground for the interference of the court is that, unless it does interfere, such property cannot be reached by the judgment creditor. In New York, previous to the statutes regulating this subject, the jurisdiction of a court of equity therein was emphatically denied in one case,[2] and with equal emphasis declared to exist in another case.[3] The English authorities are quite uniform in holding that a court of equity has no such jurisdiction.[4] And in America, for the most part, a similar conclusion is arrived

Daniel *v.* Gold Hill, etc. Co., 68 Pac. Rep. 884 (Wash. 1902); Goss, etc. Mfg. Co. *v.* People, 4 Ill. App. 510 (1879); Blair *v.* Compton, 33 Mich. 414 (1876): Slaymaker *v.* Bank of Gettysburg, 10 Pa. St. 373 (1849); Foster *v.* Potter, 37 Mo. 525 (1866); Howe *v.* Starkweather, 17 Mass. 240 (1821); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877); Denton *v.* Livingston, 9 Johns. (N. Y.) 96 (1812), per Chancellor Kent; Nashville Bank *v.* Ragsdale, Peck (Tenn.), 296 (1823). Even where the stock is held to be real estate. Cooper *v.* Dismal Swamp Canal Co., 2 Murph. (N. C.) 195 (1812). *Cf.* Gue *v.* Tidewater Canal Co., 24 How. (U. S.) 257 (1860). In the District of Columbia, stock in an incorporated company cannot be subjected to the process of attachment or of execution. Barnard *v.* Insurance Co., 4 Mackey, 63 (1885). At an early day, when the nature of stock was little understood, an attachment was attempted on the corporate property for the debts of a stockholder. It failed. Williamson *v.* Smoot, 7 Mart. (La.) 31 (1819). Stock cannot be taken on a tax warrant. Barnes *v.* Hall, 55 Vt. 420 (1883). *Cf.* McNeal *v.* Mechanics', etc. Assoc., 40 N. J. Eq. 351 (1885); Smith *v.* Northampton Bank, 58 Mass. 1 (1849). A tax collector cannot levy on and sell stock under the law relative to attachments. Kennedy *v.* Mary Lee, etc. Ry., 93 Ala. 494 (1891); and § 566, *infra.* Execution against a corporation cannot be levied on stock owned by the corporation itself, such stock having been purchased by it under statutory authority at a forfeiture sale for non-payment of calls. Robinson *v.* Spaulding, etc. Co., 72 Cal. 32 (1887). An attachment of stock does not prevent a sale of property by the corporation. Gottfried *v.* Miller, 104 U. S. 521 (1881). The question of whether an execution may be levied on a seat in an exchange is considered in ch. XXIX, *infra.*

[1] Plimpton *v.* Bigelow, 93 N. Y. 592, 602 (1883); Merchants' Mut. Ins. Co. *v.* Brower, 38 Tex. 230 (1873).

[2] Donovan *v.* Finn, 1 Hopk. Ch. 59, 67 (1823). See also 2 Dan. Ch. Pr., p. 1037, n.

[3] Storm *v.* Waddell, 2 Sandf. Ch. 495, 511 (1845).

[4] Dundas *v.* Dutens, 1 Ves. Jr. 196 (1790); Bank of England *v.* Lunn, 15 Ves. Jr. 569 (1809); Grogan *v.* Cooke, 2 Ball & B. (Ir. Ch.) 230 (1812); Nantes *v.* Corrock, 9 Ves. Jr. 182 (1803); McCarthy *v.* Goold, 1 Ball & B. (Ir. Ch.) 387 (1810), applying the same rule to dividends. In King *v.* Dupine, 2 Atk. 603, n. (1744), a court of equity subjected to the payment of a debt the debtor's reversion-

at.[1] Where, however, the debtor has conveyed away his stock for the purpose of defrauding his creditors, a court of equity will aid the judgment creditor, inasmuch as it has jurisdiction in matters involving fraud.[2]

§ 482. *By statutory provisions executions are generally sufficient to reach the debtor's stock — Strict compliance necessary.*— Nearly all of the states of the Union have enacted statutes extending the scope of executions so as to subject to them all choses in action, including shares of stock in a corporation. Frequently special provisions are made applicable to stock, and prescribing the steps which are necessary to render the levy of execution effectual. Where an execution is levied in accordance with such statutes, its provisions must be substantially complied with, and, if not complied with, the sale is not merely voidable, but is wholly unauthorized and void. The mode of sale is particularly scrutinized by the courts.[3] It is fatal to the levy and sale if the sheriff fails to give

ary interest in an annuity. In Horn *v.* Horn, Ambl. 79 (1749), the court refused aid, inasmuch as the debtor had been imprisoned under a *capias ad satisfaciendum.*

[1] Williams *v.* Reynolds, 7 Ind. 622 (1856); Disborough *v.* Outcalt, 1 N. J. Eq. 298, 306 (1831); McFerran *v.* Jones, 2 Litt. (Ky.) 219 (1822); Erwin *v.* Oldham, 6 Yerg. (Tenn.) 185 (1834). *Contra,* dictum, Watkins *v.* Dorsett, 1 Bland's Ch. (Md.) 530 (1828). In Brightwell *v.* Mallory, 10 Yerg. (Tenn.) 196 (1836), the proceeding was statutory.

[2] Taylor *v.* Jones, 2 Atk. 600 (1743), holding that the debtor's transfer of stock in trust was in fraud of creditors; Hadden *v.* Spader, 20 Johns. (N. Y.) 554 (1822); Scott *v.* Indianapolis Wagon Works, 48 Ind. 75 (1874); Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881); Lathrop *v.* McBurney, 71 Ga. 815 (1883); Gillett *v.* Bate, 86 N. Y. 87 (1881); State Bank *v.* Gill, 23 Hun, 410 (1881), and § 484, *infra;* Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); State *v.* Warren F. & M. Co., 32 N. J. L. 439 (1868); Bayard *v.* Hoffman, 4 Johns. Ch. 450 (1820); Moore *v.* Metropolitan Nat. Bank, 55 N. Y. 41 (1873); Colbert *v.* Sutton, 5 Del. Ch. 294 (1880). The fraudulent transferee must be made a party defendant. Hyatt *v.* Swivel, 52 N. Y. Super. Ct. 1 (1885). But the fraudulent transferee is not liable unless he has accepted the stock. Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); Cartmell's Case, L. R. 9 Ch. App. 691 (1874). Acceptance is a question of fact. Pim's Case, 3 De G. & S. 11 (1849). The transferee is not allowed to claim that the transfer was to defeat creditors. Smith *v.* Forty-nine, etc. Min. Co., 14 Cal. 242 (1859). The judgment creditor who institutes the suit in equity has priority in the distribution of the proceeds of his suit. See Freeman on Executions (2d ed.), § 434. The pledgor may by an instrument in writing assign his equity of redemption to one of his creditors. Such assignment need not be recorded as a chattel mortgage, and is not fraudulent, even though it be kept secret from the other creditors of the pledgor. National H. R. Bank *v.* Chaskin, 28 N. Y. App. Div. 311 (1898). A pledgee cannot, by obtaining judgment on his claim, reach the pledge by a judgment creditor's bill. Shaw *v.* Monson, etc. Co., 96 Me. 41 (1901); 71 Pac. Rep. 273.

[3] Blair *v.* Compton, 33 Mich. 414 (1876), holding that where the sheriff sold without knowing or stating how many shares of stock the debtor owned, and

to the corporation the notice that is generally required by statute,[1] or if the sale by the sheriff is not made promptly as advertised in

which were being sold, the sale was void. See also People *v.* Goss, etc. Mfg. Co., 99 Ill. 355 (1881), reversing Goss, etc. Mfg. Co. *v.* People, 4 Ill. App. 510 (1879). The procedure in levy of execution on stock, as laid down by the charter of the corporation, supersedes the procedure of a previous general statute. Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811). And a statute which is subsequent to the charter supersedes in this respect the latter. Howe *v.* Starkweather, 17 Mass. 240 (1821). The sheriff need not sell the stock in parcels, but may sell the whole at once. Morris *v.* Connecticut, etc. R. R., (Montreal) L. R. 2 Q. B. 303 (1886). Even though the sheriff sells in one lot a large block of stock under execution instead of dividing and selling it in small lots, and even though such sale realizes $12,000, whereas the levy was for only $1,000, yet the purchaser is protected in his purchase. Connecticut, etc. Ry. *v.* Morris, 14 S. C. Rep. (Can.) 318 (1887). The court may order a receiver to sell shares of stock held by the receiver in one block instead of in parcels if the court deems best. First Nat. Bank *v.* C. Bunting & Co., 63 Pac. Rep. 694 (Idaho, 1900). See also § 489, *infra*. An execution sale of stock will be set aside where it was made with an intentional concealment of the sale from the stockholder, the execution debtor. Voorhis *v.* Terhune, 50 N. J. L. 147 (1888). If no notice is given to the debtor of the levy on his stock, a sale under the attachment is not good. Commercial Nat. Bank *v.* Farmers', etc. Bank, 82 Iowa, 192 (1891). A levy and sale of "all the shares" which defendant owns is not good. The number of shares must be ascertained and stated. Keating *v.* Stone, etc. Co., 83 Tex. 467 (1892). A statute must be substantially complied with, and a failure to give notice to the corporation as required by the statute is fatal to the attachment. Deutschman *v.* Byrne, 64 Ark. 111 (1897). Inasmuch as shares of stock cannot be levied upon at common law, a levy thereon can be made only in strict compliance with the statute, and if the process is a garnishee process the levy is not good. and even a sale under such a levy conveys no title. H. B. Claflin Co. *v.* Bretzfelder, 69 Ark. 271 (1901). The statute authorizing sale under execution must be substantially complied with. Feige *v.* Burt, 118 Mich. 243 (1898). The title of a purchaser of stock at execution sale is not affected by the failure of the sheriff to show in his return that he levied before selling. McFall *v.* Buckeye, etc. Assoc., 122 Cal. 468 (1898). The procedure prescribed by statute for attaching shares of stock must be strictly followed. Leonhard *v.* John Hope, etc. Co., 21 R. I. 449 (1899). A judgment creditor of a corporation may cause its treasury stock to be sold on execution. Coit *v.* Freed, 15 Utah, 426 (1897). Stock is personal property, and may be seized under an execution. Brock *v.* Ruttan, 1 C. P. (Can.) 218 (1851). The sheriff need not indorse on his levy a description of the stocks. *Re* Braden's Estate, 165 Pa. St. 184 (1895).

[1] Princeton Bank *v.* Crozer, 22 N. J. L. 383 (1850), where no notice was given, but the stock was merely mentioned in the inventory returned by the sheriff. Oral notice by the sheriff to the corporation that stock has been attached is insufficient. Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890); Barthell *v.* Hencke, 99 Wis. 660 (1898). Service of the writ upon a corporation must be upon the *de facto* officers and not the *de jure* officers. Barthell *v.* Hencke, 99 Wis. 660 (1898). An execution sale of stock may be valid, although the notice of levy may have been irregular. Croft *v.* Colfax, etc. Co., 113 Iowa, 455 (1901).

accordance with the statute.[1] The sale itself is not complete until the sheriff gives the proper instruments of title to the purchaser, and until then the corporation is not obliged to recognize the latter as having any rights.[2] A court of equity will not compel a corporation to allow a transfer of stock by a purchaser at an execution sale, where the price paid at such sale is so small as to shock the conscience of the court.[3] A person who buys stock at an execution sale thereof and takes the sheriff's certificate therefor and presents the same to the corporation for transfer, thereby becomes a stockholder to the extent at least of being liable for any unpaid part of the subscription price of such stock.[4] Where the pledgee brings suit on the debt and attaches the stock he thereby waives his lien, and even though the attachment is illegal and void for insufficient service, yet his rights as pledgee are not thereby restored.[5] Where the pledgee obtains judgment on a note which is secured by the stock and then causes the stock to be sold out by the sheriff under levy of execution, such sale, however, not being made in accordance with the statutes, this is the same as selling the stock without notice and amounts to a conversion thereof.[6]

§ 483. *Attachment of stock as allowed by the statutes of the various states.*— The states of the Union have quite generally passed statutes providing for the attachment of a debtor's property where the debtor is a non-resident or is guilty of a fraud, or where other facts exist which bring the case within the attachment statute. Inasmuch as in modern times a large part of the property of individuals consists of shares of stock in corporations, the attachment statutes generally provide specially for the attachment of stock, and give specific directions in reference to the steps necessary to be taken in making such attachment.[7] In New York an

[1] Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811), and Howe *v.* Starkweather, 17 Mass. 240 (1821), where the sale was made after the proper day, without a re-advertisement, and consequently was held to be void. The court said: "The sale of them upon execution not being justifiable at common law, the statute must be strictly pursued to give any property to the purchaser." An execution sale of stock at nine o'clock at night, when few are present, is void. McNaughton *v.* McLean, 73 Mich. 250 (1889).

[2] Morgan *v.* Thames Bank, 14 Conn. 99 (1840).

[3] See §§ 489, 850, *infra.*

[4] Basting *v.* Northern Trust Co., 61 Minn. 307 (1895). And is also liable on the statutory liability attaching to such stock. Oswald *v.* Minneapolis Times Co., 65 Minn. 249 (1896). A dictum in Sturges *v.* Stetson, 1 Biss. 246 (1858); s. c., 23 Fed. Cas. 311, says that the purchaser at execution sale is liable on the unpaid subscription the same as his debtor was.

[5] H. B. Claflin Co. *v.* Bretzfelder, 69 Ark. 271 (1901). See also § 476, *supra.*

[6] Feige *v.* Burt, 118 Mich. 243 (1898).

[7] Where both an attachment and an execution on stock are allowed by stat-

attachment of stock is provided for; but an execution without a previous attachment is not allowed.[1] Where certificates of stock and other property are transferred to a trustee who issues transferable trustees' certificates therefor, of the par value of $5,000 each,

ute, the former is said to be the preferable remedy when the corporation has a lien on the stock or there is a claimant to the stock. Weaver *v.* Huntingdon, etc. Coal Co., 50 Pa. St. 314 (1865); Lex *v.* Potter, 16 Pa. St. 295 (1851). An attachment of stock covers the dividends also. Upon vacating the attachment damages may be recovered. Jacobus *v.* Monongahela Nat. Bank, 35 Fed. Rep. 395 (1888). Under the Vermont statutes, which prohibit preferences acquired within a specified time before an adjudication of insolvency, a bank in Vermont, which on November 1st attaches stock in New Mexico which was owned by an insolvent person in Vermont, is not entitled to the preference obtained thereby, where a creditor's petition against the insolvent was filed in Vermont October 28th, even though the bank sold its claim and the attachment to a third person. The bank and its officers may be held liable to the assignees in insolvency for the amount paid for the stock at the sale in New Mexico, the stock itself having been bought in for the benefit of the assignees. Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543 (1898). Stock may be sold under an attachment in New Mexico. Hazen *v.* Lyndonville Nat. Bank, 70 Vt. 543 (1898). Under the statutes of Idaho stock may be seized by levy of attachment or execution. Wells *v.* Price, 56 Pac. Rep. 266 (Idaho, 1899). Under the confiscation acts of the United States of 1861 and 1862, stock owned by a rebel in a Michigan railroad could be condemned by giving notice of seizure to the railroad corporation. This amounted to an attachment or garnishment. Miller *v.* U. S., 11 Wall. 268 (1870). By a statute in Rhode Island in suits in equity a writ of attachment may be levied upon stock the same as in suits at law. Ladd *v.* Franklin, etc. Co., 53 Atl. Rep. 59 (R. I. 1902). The statute may provide for the sale of stock at the place where the corporation exists, in case the taxes upon such stock are not paid. A purchaser of the outstanding certificates after the assessment has been made takes subject to the tax and tax seizure. Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890). Under the English statutes, 1 & 2 Vict., c. 110, § 14, and 3 & 4 Vict., c. 82, § 1, stock in any public company standing in the name of any person against whom judgment shall have been obtained, whether "in his own right or in the name of any person in trust for him," may be charged by a judge's order with the payment of the amount of the judgment. The statute says: "The interest of any judgment debtor, whether in possession, remainder, or reversion, and whether vested or contingent," may be so reached. Cragg *v.* Taylor, L. R. 2 Exch. 131 (1867); Baker *v.* Tynte, 2 El. & E. 897 (1860). Stock may be reached by supplementary proceedings in Ohio. Ball *v.* Towle Mfg. Co., 65 N. E. Rep. 1015 (Ohio, 1902).

[1] Code Civ. Proc., §§ 647, 649–651. See 4 Wait's Pr. 36*j*. Stock may be reached, however, by supplementary proceedings. See, in general, Barnes *v.* Morgan, 3 Hun, 703 (1875); O'Brien *v.* Mechanics', etc. Ins. Co., 56 N. Y. 52 (1874); Smoot *v.* Heim, 1 N. Y. Civ. Pro. 208 (1881) — cases arising under the attachment law; Simpson *v.* Jersey City, etc. Co., 47 N. Y. App. Div. 17 (1900), holding that the New York statute that the copy of the warrant and the notice should be served upon the president of the corporation applied only to domestic corporations; aff'd, 165 N. Y. 193 (1900).

with various provisions for the sale of the property and a distribution of the proceeds, or for the transfer to a corporation and a distribution of the stock, the legal title is thereby conveyed, and hence, the holders of the certificates having only an equitable interest in the property, an attachment cannot be levied on such trustees' certificates, under the New York statute, by serving the process on the trustee, no service having been made upon the holder of the certificates.[1] A pool of stock, however, does not prevent a creditor of one of the participants causing to be sold on execution his debtor's interest in the stock, such sale to be subject to the pooling contract if it is lawful.[2] It has been held that shares of stock may be attached under the general provisions of an attachment law which does not specify shares of stock as being subject to an attachment.[3] The formalities prescribed by the statute must be complied with fully, as in the case of a levy of execution upon stock.[4] It has been held that a state statute authorizing the levy of an attachment upon stock does not apply to stock in a national bank, and that it is doubtful whether a state statute may legally authorize an attachment on national-bank stock.[5] There are many decisions, however, where such an attachment or execution has been levied.[6]

[1] Montgomery *v.* McDermott, 103 Fed. Rep. 801 (1900).

[2] Hardin *v.* White, etc. Co., 67 Pac. Rep. 236 (Wash. 1901).

[3] Chesapeake, etc. R. R. *v.* Paine, 29 Grat. (Va.) 502 (1877), where stock was held to be included under the word "estate," and the procedure prescribed for garnishment was followed and upheld. So also Curtis *v.* Steever, 36 N. J. L. 304 (1873), where an attachment of stock was upheld though the statute merely allowed attachment of "rights and credits." In Haley *v.* Reid, 16 Ga. 437 (1854), however, an attachment of stock was not allowed where the statute allowed levy "upon the estate both real and personal." See also Merchants' Mut. Ins. Co. *v.* Brower, 38 Tex. 230 (1873). It has been held that there can be no attachment of stock under a statute which allows an attachment of "real and personal property." Foster *v.* Potter, 37 Mo. 525 (1866). Shares of stock are "personal property" subject to attachment, although the statutes provide only for levy of execution upon them. Union Nat. Bank *v.* Byram, 131 Ill. 92 (1889). The ordinary attachment statute authorizing the attachment of shares of stock is not applicable to shares of stock in a club organized for lawful sporting purposes, and being more in the nature of a statutory joint-stock association than a corporation. Lyon *v.* Denison, 80 Mich. 371 (1890).

[4] Stamford Bank *v.* Ferris, 17 Conn. 259 (1845), where the attachment failed because the sheriff did not leave a copy of the writ, duly indorsed, with the corporation, even though the cashier of the corporation was absent. A transfer subsequent to such irregular attachment is valid and carries title. See also § 484, *infra.*

[5] Sowles *v.* National U. Bank, 82 Fed. Rep. 696 (1897). An attachment in accordance with a state statute may be levied upon stock in a national bank. Oldacre *v.* Butler, 116 Ala. 652 (1898).

[6] See cases in notes to § 487, *infra.*

§ 484. *Levy of attachment or execution upon stock held in pledge or by trustee, and on stock which the debtor has fraudulently transferred away.*—Whether or not an execution can be levied on stock which has been fraudulently transferred away by the judgment debtor depends upon the wording of the statute allowing the levy of execution on stock. If it allows a levy on all interests of the debtor, whether legal or equitable, then the fraudulent transfer may be disregarded and the stock seized as though still standing in the name of the judgment debtor.[1] If, however, the statute does not expressly provide for a levy on an equitable interest, the judgment creditor's remedy is not an execution, but a suit in equity to set aside the fraudulent transfer.[2] So also an attachment may be levied on shares of stock when the words of the attachment statute are so broad as to render subject to the attachment all equitable interests of the debtor whose stock is attached. In many of the states where the debtor has transferred his stock for the purpose of defrauding his creditors, an attachment may be levied on the stock.[3] The judgment creditor may also institute a suit in equity to set aside the fraudulent transfer and subject the stock to the payment of the judgment.[4] Under the usual statutes, an attachment or execution may be levied upon stock, where the stock has been mortgaged or pledged, and the attaching creditor is seeking to reach merely the equity of redemption.[5] An injunction against

[1] Scott *v.* Indianapolis Wagon Works, 48 Ind. 75 (1874). *Cf.* State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868).

[2] Van Norman *v.* Jackson Circuit Judge, 45 Mich. 204 (1881). See § 481, *supra.*

[3] Beckwith *v.* Burrough, 14 R. I. 366 (1884); New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221 (1871), holding also that the attachment is good, even though the corporation denies that the defendant owns any stock therein; Curtis *v.* Steever, 36 N. J. L. 304 (1873), the court saying that the attachment is good, since the fraudulent transfer is void; and holding that the transferee may bring suit for trespass, and that the attaching creditor may then set up the fraud in defense; Massey *v.* Yancey, 90 Va. 626 (1894). *Cf.* State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868). See also § 482, *supra.* Where the owner of stock has made a bogus sale of the same, the purpose being to transfer the property in fraud of creditors, a judgment creditor may cause an execution to be levied on the stock and the stock sold. M'Donald *v.* First, etc. Bank, 116 Fed. Rep. 129 (1902). Where an insolvent debtor transfers all his property to trustees for the benefit of creditors, excepting certain shares of stock which are transferred to them in trust in order not to render the trustees liable thereon, and ten years later a creditor levies on the equity in such stock, causes its sale, and purchases at a nominal figure, equity will not compel the corporation to transfer the stock to such creditor on the corporate books. Randolph *v.* Quidnick Co., 135 U. S. 467 (1890).

[4] See § 481, *supra.*

[5] Foster *v.* Potter, 37 Mo. 525 (1866); Manns *v.* Brookville Nat. Bank, 73 Ind. 243 (1881); Edwards *v.* Beugnot, 7 Cal. 162 (1857), holding also that, if the mort-

a pledgee disposing of stock owned by a certain party, or an attachment upon the interest of that party, does not prevent the pledgee selling the stock if such stock really belonged to the wife of that party.[1] An attachment is not the best remedy for a pledgee who wishes to subject the pledge to the payment of the debt.[2] His better remedy is by foreclosure or a public sale on notice to the pledgor. Dividends on the stock which is attached follow the stock, and are covered by the attachment.[3] An attachment on stock standing on the books in a debtor's name is not good where it is shown that in fact he held the stock as trustee for another.[4] Even though a partnership allows stock owned by it to stand on the books of the company in the name of one of the partners, yet an attachment against him and levied on such stock does not give the attaching creditor priority over the rights of the partnership.[5] Where the stock has been transferred on the corporate books to a pledgee, and afterwards the debt has been paid, the stock cannot be attached for debts due from the pledgee.[6] There can be no attachment of stock as the property of an unregistered holder through whom title has

gage is recorded on the corporate books, notice must be served on the mortgagee also; and that, where one attachment was served on the corporation and another on the mortgagee, the latter attachment prevails and takes the surplus; Norton *v.* Norton, 43 Ohio St. 509 (1885), holding that the court will order the stock to be sold, the pledgee paid, and the balance held under the attachment. See also Vantine *v.* Morse, 104 Mass. 275 (1870); New England M. Ins. Co. *v.* Chandler, 16 Mass. 275 (1820). *Cf.* Cooke *v.* Hallett, 119 Mass. 148 (1875); Kyle *v.* Montgomery, 73 Ga. 337 (1884); Seeligson *v.* Brown, 61 Tex. 114 (1884), and § 468, *supra*. Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877), holds that an execution cannot reach an equity of redemption. See also § 491, *infra*. If a purchaser at an execution sale purchases merely a nominal equity of redemption and pays a fair price for the same, the court will order the corporation to allow a transfer to him in order that he may so redeem. See dictum in Randolph *v.* Quidnick Co., 135 U. S. 457 (1890). As to marshaling the assets, see § 473, *supra*. As to the remedy of garnishment to reach stock or the equity of redemption in pledged stock, see § 491, *infra*.

[1] Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897).

[2] Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298, 312 (1872). See §§ 476, 482, *supra*.

[3] Jacobus *v.* Monongahela, etc. Bank, 35 Fed. Rep. 395 (1888); Moore *v.* Gennett, 2 Tenn. Ch. 375 (1875).

[4] Mowry *v.* Hawkins, 57 Conn. 453 (1889). Execution or garnishee process cannot be levied on stock held by an individual as trustee, where the debt is his individual debt. Nor can it be levied on the dividend from such stock. So held where stock was owned by a city in trust for the citizens. Hitchcock *v.* Galveston Wharf Co., 50 Fed. Rep. 263 (1890). An execution levied on stock held by a treasurer standing in his own name is not good, the judgment being against him personally. Nashville T. Co. *v.* Weaver, 102 Tenn. 66 (1899).

[5] New York, etc. Co. *v.* Francis, 96 Fed. Rep. 266 (1899).

[6] Beckwith *v.* Burrough, 13 R. I. 294 (1884).

passed to another.[1] Where an execution is levied upon a certificate of stock found among the assets of a deceased judgment debtor, such stock being in the name of another person and indorsed by the latter in blank, the administrator may file a bill to enjoin the execution until the real ownership of the stock can be ascertained in order that the question of title may be settled to prevent a sacrifice of the stock.[2] In Missouri an attachment may be levied on stock standing in the name of another.[3] But in Michigan an attachment cannot be levied on stock standing in a person's name as trustee, for a debt due from the real owner of the stock, even though the trustee is merely an agent. Attachment reaches a legal interest only.[4] A wife who allows stock bought with her money to stand for several years in her husband's name, in order to give him credit, is estopped from asserting her ownership as against his creditors.[5] Where the corporation has a lien on stock for debts due from the stockholder to the corporation, it may enforce the lien by an attachment.[6] Where stock is tied up by attachment which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the attaching party if the stocks could and would have been sold before the depreciation, if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up,

[1] Thus, where A., the registered stockholder, transfers the certificate of stock to B., and B. transfers it to C., and C obtains registry directly from A., there can be no attachment of the stock against B. Lippitt *v.* American, etc. Co., 15 R. I. 141 (1885). An attachment against a person who held the certificate of stock, but was not a stockholder of record, was upheld in Matusevitz *v.* Citizens', etc. Co., 19 Mont. 368 (1897).

[2] Nashville T. Co. *v.* Weaver, 102 Tenn. 66 (1899).

[3] Tufts *v.* Volkening, 122 Mo. 631 (1894).

[4] Gypsum, etc. Co. *v.* Kent Circuit Judge, 97 Mich. 631 (1893). Under the Michigan statutes a levy of execution cannot reach stock which stands on the books of the company in the name of the pledgee of a judgment debtor. Feige *v.* Burt, 118 Mich. 243 (1898). Where the real owner of stock turns it over to his agent or trustee to look after the stock, the stock itself being put in the name of the agent or trustee as absolute owner, and the stock is subsequently attached for a debt of such agent or trustee and sold thereunder, the real owner of the stock may hold the agent or trustee liable for the value of the stock. Long delay is not a bar so long as the agent does not deny the agency or trusteeship. Hovey *v.* Bradbury, 112 Cal. 620 (1896). Where a judgment creditor levies on stock standing in the name of a "dummy" for the debtor, the corporation may practically interplead between such creditor and an alleged *bona fide* holder of the stock. A court of equity has jurisdiction in order to decree a transfer. Spencer *v.* James, 10 Tex. Civ. App. 327 (1895).

[5] Hamlen *v.* Bennett, 52 N. J. Eq. 70 (1893).

[6] Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849). See also § 530, *infra.*

no damages can be recovered.[1] A decrease in the value of the stock, while subject to attachment, does not render the sureties on the undertaking liable therefor. An attachment bond should not be increased merely because the price of the stock may go down.[2] Where a sale of stock is decreed and an appeal taken and a bond given on appeal, and the stock depreciates during the appeal and the decree is affirmed, the liability on the bond is the amount of depreciation.[3]

§ 485. *Can stock or certificates of stock be attached elsewhere than in the state creating the corporation?* — Shares of stock in a corporation are personal property, whose location is in the state where the corporation is created.[4] It is true that, for purposes of taxation and some other similar purposes, stock follows the domicile of its owner; but, considered as property separated from its owner, stock is in existence only in the state of the corporation. All attachment statutes provide for the attachment of a non-resident debtor's property in the state, and generally, under such statutes, the stock owned by a non-resident in a corporation created by the state wherein the suit is brought may be attached and jurisdiction be thereby acquired to the extent of the value of the stock attached.[5] But a defendant's shares of stock cannot be reached by levy of attachment in an action commenced outside of the state wherein the corporation is incorporated unless the certificates of stock are within the state where the suit is commenced, and are reached by

[1] Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897). See also § 330, *supra.*

[2] Miller *v.* Ferry, 50 Hun, 256 (1888).

[3] Welch *v.* Welch, 60 S. W. Rep. 409 (Ky. 1901).

[4] Evans *v.* Monot, 4 Jones, Eq. (N. C.) 227 (1858). The fact that certificates of stock in foreign corporations are in New York state does not render them subject to taxation in that state. *Re* James, 144 N. Y. 6 (1894). The inheritance tax in New York state is not applicable to certificates of stock which happen to be in the state at the time of the death of the stockholder, where the stockholder is a non-resident and the corporation itself is a foreign corporation. See § 572*e*, *infra.* As to the validity of a transfer of stock made in one state, while the corporation issuing the stock is located in another state, the rule applies "that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive or customary law of the country where it is found to the contrary." Black *v.* Zacharie, 3 How. 483, 514 (1844), an attachment case. A suit by the purchaser of a certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication. Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897). See also §§ 12, 13, 363, *supra.*

[5] New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221 (1871); Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877). An attachment and sale of stock made on a debt not justly due will be enjoined as regards registry on the corporate books, and the sale declared void. Seligman *v.* St. Louis, etc. R. R., 22 Fed. Rep. 39 (1884).

the sheriff. For purposes of attachment, stock is located where the corporation is incorporated and nowhere else.[1] The shares owned by a non-resident defendant in the stock of a foreign corporation cannot be reached and levied upon by virtue of an attachment, although officers of the corporation are within the state engaged in carrying on the corporate business.[2] It has even been

[1] Quoted and approved in Smith *v.* Downey, 8 Ind. App. 179 (1893), where it was held that a citizen of Indiana could not attach certificates of stock owned by a non-resident in a Colorado corporation, even though the certificates of stock were in the state of Indiana, and within the jurisdiction of the court. Ireland *v.* Globe, etc. Co., 19 R. I. 180 (1895); Winslow *v.* Fletcher, 53 Conn. 390 (1886), the court saying that "stock in a corporation, for the purposes of an attachment, has its situs where the corporation is located." Under the statutes of Tennessee, however, requiring a foreign corporation doing business in that state to file its articles of incorporation with the secretary of state, it was held that it became a domestic corporation sufficiently to authorize an attachment of stock in that state. Young *v.* South Tredegar Iron Co., 85 Tenn. 189 (1886). Bonds which are pledged by a non-resident cannot be attached by serving a notice on the pledgee. Tweedy *v.* Bogart, 56 Conn. 419 (1888). Certificates of stock represent the stock itself sufficiently to sustain a suit commenced by substituted service for the purpose of establishing a lien, even though the corporation is located in another state. Merritt *v.* American Steel Barge Co., 79 Fed. Rep. 228 (1897). An execution cannot be levied in the Indian Territory on stock owned by the defendant in a New Jersey corporation where the statutes of the Indian Territory provided for execution upon the stock of domestic corporations only, and the defendant is not a resident of that Territory. Caffery *v.* Choctaw, etc. Co., 68 S. W. Rep. 1049 (Mo. 1902). A statute authorizing the sale of stock on execution applies to stock in domestic corporations only, unless it clearly provides otherwise. Hence an alleged sale under levy of execution, in British Columbia, of stock in a Washington corporation is not good in Washington unless it is alleged and proved that such sale was authorized by the statutes of British Columbia. Daniel *v.* Gold Hill, etc. Co., 68 Pac. Rep. 884 (Wash. 1902).

[2] Quoted and approved in New Jersey, etc. Co. *v.* Traders', etc. Bank, 104 Ky. 90 (1898), where the court held that garnishee proceedings commenced in Kentucky against non-resident stockholders in a New Jersey corporation, the New Jersey corporation being so garnisheed, are not good as regards stock held by the defendants in such New Jersey corporation. Stock owned by a citizen of New York in a railroad corporation of Michigan cannot be attached by process levied in Ohio. Such stock is not located in Ohio, and hence is not subject to attachment or garnishment there. Ashley *v.* Quintard, 90 Fed. Rep. 84 (1898); Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), reversing 29 Hun, 362, the court saying: "We do not doubt that shares, for the purpose of attachment proceedings, may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the state or country of its creation. . . . Manifestly the *res* cannot be within the jurisdiction, as a mere consequence of a legislative declaration, when the actual locality is undeniably elsewhere." To same effect, Preston *v.* Pangburn, N. Y. L. J.,

held that such an attachment cannot be levied, although the foreign corporation has a branch registry office in the state where the attachment is levied, and although the certificates of stock are also in such state.[1] The supreme court of Pennsylvania has said that stock cannot be attached by attaching the certificate, any more than lands situated in another state can be attached by an attachment in Pennsylvania levied on the title deeds to such land.[2] And it has been held that even though certificates of stock in a West Virginia corporation are within the state of Massachusetts, yet a citizen of Massachusetts cannot attach the same in a suit in Massachusetts against a citizen of California, the owner of such certificates of stock.[3] The New York court of appeals, however, has recently held that where certificates of stock issued by a New Jersey corporation are within the state of New York, an attachment may be levied upon them and the interest of the owner or pledgor therein sold, such certificates being a property right within the state.[4] And it must be admitted that this decision, al-

March 7, 1892. See also Moore *v.* Gennett, 2 Tenn. Ch. 375 (1875). Garnishment proceedings will not apply. The defendant may move to have the attachment levy set aside. Martin *v.* Mobile, etc. R. R., 7 Bush (Ky.), 116 (1870), holding that a statute authorizing a foreign corporation to exercise certain powers does not make it a domestic corporation. Certificates of stock in a corporation of another state cannot be subjected to the payment of the stockholders' debts, either by attachment or a bill in equity. Morton *v.* Grafflin, 68 Md. 545 (1888).

1 Christmas *v.* Biddle, 13 Pa. St. 223 (1850), approved in Childs *v.* Digby, 24 Pa. St. 23 (1854). In this case the attachment was levied in Pennsylvania on certificates of stock in Pennsylvania, but belonging to a citizen of Mississippi, and the corporation was created by the laws of Mississippi. Certificates of stock in a corporation cannot be attached anywhere except in the state where the corporation is incorporated. Armour, etc. Co. *v.* St. Louis Nat. Bank, 113 Mo. 12 (1892).

2 Christmas *v.* Biddle, 13 Pa. St. 223 (1850). In Winslow *v.* Fletcher, 53 Conn. 390 (1886), the court well says: "While the certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property, yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment or a trustee process than a promissory note. The debt is subject to attachment, but the note itself, which is simply evidence of the debt, is not. So with stock. That may be attached, but the certificates cannot be." Negotiable bonds, held outside of the jurisdiction of the court, cannot be attached by serving the attachment on the corporation which issued the bonds. Von Hesse *v.* Mackaye, 55 Hun, 365 (1890); aff'd, 121 N. Y. 694. See also Tweedy *v.* Bogart, 56 Conn. 419 (1888).

3 Pinney *v.* Nevills, 86 Fed. Rep. 97 (1898).

4 Simpson *v.* Jersey City, etc. Co., 165 N. Y. 193 (1900), the court distinguishing the case of Plimpton *v.* Bigelow, 93 N. Y. 592 (1883), on the ground that the certificates of stock in that case were not within the state. The court said: "Certificates of stock are treated by

though apparently a wide departure from the common law, is a correct decision, in view of the fact that certificates of stock have gradually grown to be more than mere receipts or evidence of stock, and have come to be the stock itself, practically, in business transactions, especially in America, and, like a promissory note, a certificate of stock is property in itself and carries title, irrespective of the corporate books and of transfer on the corporate books.

§ 486. *Rights of an unregistered transferee of a certificate of stock as against an attachment or execution levied on that stock.*— The most difficult and unsettled question connected with an attachment or execution levied on stock is the question of how far a purchaser of the certificate of stock from the stockholder and debtor is protected in his ownership where such purchaser does not have his transfer registered on the corporate books before the attachment or execution is levied. The question is especially important, since it affects the rights of a *bona fide* purchaser of stock in the open market, and constitutes one of the greatest dangers incurred in the purchase of certificates of stock. It has been held that if a stockholder whose stock has been already attached or sold on execution sells his certificate of stock after the levy of such attachment or execution, the vendee or transferee buys subject to such levy, even though he had no knowledge of it. The stock, in contemplation of law, has already been seized by the levy, and the purchaser is bound to take notice of that fact.[1] The only means of avoiding this danger in the purchase of stock is by an inquiry at the office of the corporation at the time of making the purchase.[2]

A different question, however, presents itself when the stockholder against whose stock an attachment or execution is levied has already and before such levy sold and transferred his certificate of stock, but that transfer has not been registered on the corporate books. The courts of the different states are in irreconcilable conflict on this question of whether the unregistered transferee is protected in his purchase. The better rule, and the rule which ultimately will prevail, is that an unrecorded transfer of stock is in this respect like an unrecorded deed of land, and gives good title as against subsequent attachment or executions, even

business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand and they are the subject of larceny."

[1] Young *v.* South Tredegar Iron Co., 85 Tenn. 189 (1886); Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877); Shenandoah Valley R. R. *v.* Griffith, 76 Va. 913 (1882); *Re* Braden's Estate, 165 Pa. St. 184 (1895). *Cf.* Dudley *v.* Gould, 6 Hun, 97 (1875).

[2] Quoted and approved in Ball *v.* Towle Mfg. Co., 65 N. E. Rep. 1015 (Ohio, 1902).

though the latter are levied in ignorance of the unrecorded transfer or deed.

§ 487. *In New York, Pennsylvania, New Jersey, Michigan, Minnesota, Missouri, Delaware, Nebraska, Tennessee, Kentucky, Louisiana, Mississippi, Texas, Washington, and in the federal courts passing upon the transfer of national bank stock, it is held that by the common law the unregistered transferee of a certificate of stock is protected as against all subsequent attachments or executions levied on that stock.*— The decided weight of authority holds that he who purchases for a valuable consideration a certificate of stock is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferrer to appear to be the owner of the stock upon which the attachment or execution is levied. Such is the rule prevailing in the federal courts and in the courts of the above-named states.[1] Frequently this rule is justified and explained on the ground that registry and by-laws or charter pro-

[1] *New York:* The case of Smith *v.* American Coal Co., 7 Lans. 317 (1873), fully discusses and sustains this rule. See also De Comeau *v.* Guild Farm Oil Co., 3 Daly, 218 (1870), where the court says that the sheriff, "by the levy of such an attachment, could not acquire any better or greater title to the stock than a person would have done who had purchased this stock of the person in whose name it stood on the day of the levy of the attachment. And the principle is well settled in this state that such a purchaser would not acquire any interest whatever as against a prior purchaser for value." Where the corporation causes an attachment to be levied on the stock of a stockholder of record who has sold his certificates to another person and causes a sale to be made to deprive the latter of his stock, he may hold the corporation liable. Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884); Sims *v.* Bonner, 16 N. Y. Supp. 801 (1891). See also, in general, Dunn *v.* Star F. Ins. Co., 19 N. Y. Week. Dig. 531 (1884). An assignment of the certificates to a receiver in another state takes precedence of an attachment against the stock at the home of the corporation. The court will direct the corporation to register the transfer. Weller *v.* Pace Tobacco Co., 5 Ry. & Corp. L. J. (5 N. Y. Sup. Ct., 1888).

Pennsylvania: Eby *v.* Guest, 94 Pa. St. 160 (1880); Finney's Appeal, 59 Pa. St. 398 (1868); Commonwealth *v.* Watmough, 6 Whart. 117 (1840), holding also that the sheriff need not levy on stock which he knows has already been sold to an unregistered transferee. When the transferrer notifies the corporation of the transfer, a subsequent attachment of the stock as the property of the transferrer is not good, although the transfer was not recorded in the corporate book. Telford, etc. Co. *v.* Gerhab, 13 Atl. Rep. 90 (Pa. 1888); U. S. *v.* Vaughan, 3 Binn. 394 (1811), where the unregistered transferees resided in foreign lands.

New Jersey: Broadway Bank *v.* McElrath, 13 N. J. Eq. 24 (1860); aff'd, *sub nom.* Hunterdon County Bank *v.* Nassau Bank, 17 N. J. Eq. 496 (1864); Rogers *v.* New Jersey Ins. Co., 8 N. J. Eq. 167 (1849). In this last case the purchaser

visions requiring registry of transfers on the corporate books are not for the purpose of notifying the creditors of the old registered stockholder that he no longer owns the stock, nor for any similar purpose, but are for the purpose of protecting the corporation in paying dividends and allowing the stock to be voted. Another

at the execution sale knew that the certificates had been sold.

Michigan: May *v.* Cleland, 117 Mich. 45 (1898).

Minnesota: A sale and transfer of corporate stock, although not entered on the books of the corporation, takes precedence of a subsequent attachment in behalf of a creditor of the vendor. Lund *v.* Wheaton, etc. Co., 50 Minn. 36 (1892). The court so held although the statute prescribed that no transfer should be valid except as between the parties until such transfer was registered on the corporate books. Under the Minnesota practice, where a corporation is sued for refusal to transfer stock which is claimed on one hand by a purchaser of the certificate and on the other by a purchaser at an execution sale, the claimant intervenes. Haslam *v.* First Nat. Bank, etc., 79 Minn. 1 (1900).

Missouri: McClintock *v.* Central Bank, 120 Mo. 127 (1894). In this case it was held that an attaching creditor cannot complain that the pledgee, who has prior rights, settled with the pledgor after the attachment and then sold the stock. The creditor must offer to redeem or have a sale subject to the pledge. The pledgee of the certificates was the corporation itself. In Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879), application had been made to the corporation for registry, but had been refused. The purchaser of a certificate of stock in a Missouri corporation may maintain a bill in equity for injunction to prevent the corporation transferring such stock to one who purchased the same at execution sale on a judgment obtained against the registered holder of such stock, it being shown that such purchaser at execution sale took with notice of the prior sale of the certificate. Seligman *v.* St. Louis, etc. R. R., 22 Fed. Rep. 39 (1884).

Delaware: In Delaware the purchaser of a certificate of stock is protected as against attachments for debts of the transferrer, even though he does not have the stock transferred on the corporate books, and he may have an injunction against such attaching creditor selling the stock on execution. Allen *v.* Stewart, 7 Del. Ch. 287 (1895). In Trimble *v.* Vandegrift, 7 Houst. 451 (1887), the court ordered stock to be sold on an execution, although the corporation stated at the time of the attachment that it had received notice that the stock had already been sold. It appeared, however, that the statement made by the corporation did not tell to whom the sale had been made, and did not state that a transfer had been made on the corporate books, and it appeared also that the attaching creditor had no way of testing his right to priority, unless the sale was allowed to take place, and that the sale would not necessarily cut off the right of the holder of the certificate of stock to litigate the priority of his title. In Wilmington, etc. Turnp. Co. *v.* Bush, 1 Harr. 44 (1832), the court held that the company could not defend against a suit for dividends on the ground that attachment had been levied against the stock as the property of a former registered owner of the stock, it appearing that the corporation had issued new certificates of stock without a transfer on the books being made by the former owner of the stock.

Nebraska: In Nebraska a transfer of the certificates takes precedence over an attachment or garnishee process.

and stronger reason is that the law favors the transfer of stock certificates, and discountenances, so far as possible, all secret dangers incurred in their purchase. By protecting the purchaser against subsequent attachments and executions, the law removes one of

Farmers', etc. Bank *v.* Mosher, 88 N. W. Rep. 552 (Neb. 1901).

Kentucky: See the emphatic dictum in Thurber *v.* Crump, 86 Ky. 408 (1887).

Louisiana: Pitot *v.* Johnson, 33 La. Ann. 1286 (1881); Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878); Crescent City, etc. Co. *v.* Deblieux, 40 La. Ann. 155 (1888). The attaching creditor of one who appears on the books of a corporation as registered owner of shares of its stock cannot hold the stock against the true equitable owner, who holds the certificate of stock duly indorsed by the debtor. Kern *v.* Day, 45 La. Ann. 71 (1893). *Cf.* Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891), where the pledge had not been completed. See also Friedlander *v.* Slaughter House Co., 31 La. Ann. 523 (1879), holding that a company is not liable to the purchaser of the certificate where such purchaser did not make any claim or give notice of his rights until after the execution sale and until after the court had ordered the corporation to make a transfer to the purchaser at the execution sale.

Mississippi: Goyer, etc. Co. *v.* Wildberger, 71 Miss. 438 (1894); Clark *v.* German Security Bank, 61 Miss. 611 (1884), the court holding that the holder of the certificate was protected, although the statute prescribed that stock should be transferable "only" on the books of the company.

Tennessee: A sale under execution of stock which has been pledged conveys nothing. McQuade *v.* Williams, 101 Tenn. 334 (1898). Even though a pledgee who holds the certificates indorsed in blank sends them to the pledgor to be executed for new certificates in a consolidated company, and even though the pledgor takes out such new certificates in his own name, yet this is not a waiver of the pledge entitling attaching creditors of the pledgor to precedence over the pledgee. In a suit by an attaching creditor to determine the priority of his rights over an unregistered pledgee, the court has no power to decree a sale of the pledge and the distribution of the assets. McClung *v.* Colwell, 64 S. W. Rep. 890 (Tenn. 1901). See also on the main question, Cornick *v.* Richards, 3 Lea, 1 (1879). *Contra*, State Ins. Co. *v.* Sax, 2 Tenn. Ch. 507 (1875). A subscriber's subscription may be attached before a certificate of stock is issued and delivered, and such attachment has precedence over a mortgage even though the mortgage is recorded with the register of deeds, no notice, however, of such mortgage being given to the corporation itself. Cates *v.* Baxter, 97 Tenn. 443 (1896).

Texas: Seeligson *v.* Brown, 61 Tex. 114 (1884). An unregistered pledgee has priority. Hamilton *v.* San Antonio, etc. Co., 51 S. W. Rep. 1104 (Tex. 1899). A pledgee of the certificates is protected against a subsequent attachment, although the transfer is not recorded. Tombler *v.* Palestine Ice Co., 17 Tex. Civ. App. 596 (1897). Garnishee process to reach stock owned by a judgment debtor is not good as against a prior purchaser of the certificate of stock. South Texas Nat. Bank *v.* Texas, 70 S. W. Rep. 768 (Tex. 1902).

Idaho: An unrecorded sale or pledge of stock has preference over a subsequent attachment by a creditor of the vendor or pledgor, and a provision in the statutes that a transfer shall not be valid until recorded is for the benefit of the corporation, and not for the creditors of the transferrer. Such attachment, however, is good as against the equity of redemption of the pledgor.

the chief risks incurred in holding certificates of stock without a registry, and thereby increases the safety and desirability of such investments.

Mapleton Bank *v.* Standrod, 71 Pac. Rep. 119 (Idaho, 1902).

Washington: Port Townsend Nat. Bank *v.* Port Townsend, etc. Co., 6 Wash. 597 (1893), the court so holding although the statute prescribed that the transfer should not be good except as between the parties until the same was registered on the corporate books.

Federal Courts: In regard to stock in national banks, the federal courts have firmly established the rule that the unregistered transferee is protected against a subsequent attachment or execution. Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. Rep. 369 (1881), with a full review of the authorities by Judge Lowell; Hazard *v.* National Exch. Bank, 26 Fed. Rep. 94 (1886); Scott *v.* Pequonnock Nat. Bank, 15 Fed. Rep. 494 (1883), where the rule was applied, although the national bank was in Connecticut, a state which strongly favors the opposite rule. The court said: "The tendency of modern decisions is to regard certificates of stock attached to an executed blank assignment and power to transfer as approximating to negotiable securities, though neither in form or character negotiable." The statutes of the state wherein the national bank is located cannot change or interfere with this rule in regard to certificates of stock in national banks. Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892), where the court refused to give precedence to an attachment as against a prior unregistered transfer of a certificate of stock in a national bank. A pledgee of national bank stock is entitled to precedence over a subsequent attachment levied on such stock. Where the purchaser at the execution sale is the corporation itself, the remedy of the pledgee is at law, and he is entitled to recover only to the extent of his debt in case such debt is less than the actual value of the stock. Second Nat. Bank *v.* First Nat. Bank, 8 N. Dak. 50 (1898). Even in Massachusetts, where the courts upheld at common law an opposite rule, the state courts will follow the above rule when the stock of a national bank is in question. Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515 (1882). The decision in State *v.* Jeffersonville Nat. Bank, 89 Ind. 302 (1883), is erroneous in various ways. See *Indiana*, § 490, *infra*, p. 1016. Williams *v.* Mechanics' Bank, 5 Blatchf. 59 (1862); s. c., 29 Fed. Cas. 1376, is not in accord with the other federal decisions. Where an attachment is levied on stock which has already been pledged, the attachment reaches only the equitable title of the debtor pledgor. Black *v.* Zacharie, 3 How. 483, 511 (1844). A decision of a state court that a *donatio causa mortis* of bank stock was effective, although the donor merely delivered the certificates of stock without transferring the same on the back thereof, does not raise a federal question, even though the stock was national-bank stock. Leyson *v.* Davis, 170 U. S. 36 (1898).

In England the creditor of a registered stockholder cannot subject the stock to his debt as against the owner of the certificates, who has allowed the stock to remain in the name of the debtor in order to qualify the latter as a director. Cooper *v.* Griffin, [1892] 1 Q. B. 740.

In Canada the unregistered transferee is protected. Morton *v.* Cowan, 25 Ont. Rep. (Can.) 529 (1894). An execution has priority over an unrecorded transfer. Brock *v.* Ruttan, 1 C. P. (Can.) 218 (1851). An execution levied on stock after a transfer has been entered on the stock ledger is not good, even though the transferee has not yet

§ 488. *In Illinois, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Virginia, West Virginia, Wisconsin, and Wyoming, the statutes have prescribed that an unregistered purchaser or pledgee of certificates of stock shall be protected against subsequent attachments or executions levied upon that stock.*[1] — The courts of Massachusetts were among the first to lay down the rule

accepted the stock. Woodruff *v.* Harris, 11 Q. B. Rep. (Can.) 490 (1854).

For an able article by I. H. Hatfield in favor of the doctrine that the attaching creditor should be preferred to the unrecorded transferee, see 30 Am. Law Rev., p. 223. See also the detailed review of the cases on this subject in an article written by Chief Justice Corliss of North Dakota in 1 Am. & Eng. Corp. Cas. (N. S.), at the end of the volume. See also the table prepared by Lowell, Stimson, & Lowell for the Boston Clearing House Association.

[1] *Illinois:* Laws 1883, page 110; Rice *v.* Gilbert, 173 Ill. 348 (1898). The case of People's Bank *v.* Gridley, 91 Ill. 457 (1879), had previously held that at common law an attachment or execution sale took precedence over a prior unregistered sale of pledge or certificates of stock. The statute was passed in 1883 to change this rule. Rice *v.* Gilbert, 173 Ill. 348 (1898).

Maine: Laws of 1897, chapter 293. In this state the statute formerly prescribed that no title should pass by sale of the certificates except as between the parties until registry had been had on the corporate books. This statute was held to give precedence to an attachment or execution sale. Skowhegan Bank *v.* Cutler, 49 Me. 315 (1860); Fiske *v.* Carr, 20 Me. 301 (1841).

Maryland: In Maryland, by chapter 287, Laws of 1886, a pledgee or purchaser of certificates of stock is protected without a transfer on the books of the corporation as against subsequent attachments or executions. Morton *v.* Grafflin, 68 Md. 545 (1888), holding also that the attaching creditor cannot reach the equity by a bill in equity to obtain a receiver and to compel the pledgee to resort to other security first. In a transaction arising prior to the above statute, the pledgee made no effort to protect himself, and gave no notice of the pledge until seven years after the stock had been sold out on execution. It was held that the corporation was not liable to him. Noble *v.* Turner, 69 Md. 519 (1888).

Massachusetts: Chapter 229, Laws 1884. It has been held under the Massachusetts statute that where a father delivers stock to his son in order to qualify the latter as director, and the son transfers the certificate back to his father, a creditor of the son cannot attach the stock as against the father, although the stock stands on the corporate books in the name of the son. Andrews *v.* Worcester, etc. R. R., 159 Mass. 64 (1893). Where a stockholder indorses a certificate of stock in blank and delivers it to an agent and the agent pledges it for his own purposes, the pledgee, if he took without notice of the breach of trust, is protected. The court held also that the statute of 1884 applied to such a case. Russell *v.* American, etc. Co., 62 N. E. Rep. 751 (Mass. 1902). See 66 N. E. Rep. 201.

New Hampshire: Chapter 16, Laws 1887. The case of Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861), held that an attachment took precedence over a prior unregistered transfer of stock, except that the purchaser of the certificate of stock was to have a reasonable time to apply for registry. The case of Buttrick *v.* Nashua, etc. R. R., 62 N. H. 413 (1882), held that the company itself might attach, even

which places an attachment or execution levy ahead of an unregistered purchaser of the certificate of stock. The evil consequences of the rule, however, seem to have become apparent to her courts, and it was held that, although the unregistered purchaser was not protected where the charter of the corporation required registry,[1] yet, where only the by-laws or the certificate itself created such a requirement, the unregistered purchaser was protected and took precedence over the attachment or execution.[2] The legislature of Massachusetts seems to have had a still clearer perception of the demands of trade and of the interests of those who invest in certificates of stock, and in 1884 enacted a statute which makes an attachment or execution levied on stock no more effective than in New York state.[3] Similar statutory changes have been made in the other states mentioned above.

§ 489. ***Rights and duties of the corporation in such cases.***—The corporation has a dangerous duty to perform when stock has been attached or sold under levy of execution, and a registry is requested

though one of its directors knew of a prior unregistered sale of the certificates of stock; such director, however, having taken no part in levying the attachment. The case of Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (1871), held that the attachment was not good as against a prior purchaser of the certificate of stock from the president himself, inasmuch as the president's knowledge of the sale was sufficient notice to the corporation itself. See also Stowe *v.* Meserve, 13 N. H. 46 (1842).

Rhode Island: Chapter 690, Laws 1888.

Virginia: Code of 1887, sec. 1133.

West Virginia: Section 37, chapter 53, Code 1887. In West Virginia an assignment of the certificates cuts off subsequent attachments obtained by creditors of the transferrer. Donnally *v.* Hearndon, 41 W. Va. 519 (1895).

Wisconsin: Annotated Statutes, chapter 85, section 1751, thereby changing the law as laid down in *Re* Murphy, 51 Wis. 519 (1881).

Wyoming: Rev. Stat., § 2779, protecting pledgees against executions.

[1] Fisher *v.* Essex Bank, 71 Mass. 373 (1855); Newell *v.* Williston, 138 Mass. 240 (1885); Central Nat. Bank *v.* Williston, 138 Mass. 244 (1885); Boyd *v.* Rockport, etc. Mills, 73 Mass. 406 (1856); Blanchard *v.* Dedham Gas Light Co., 78 Mass. 213 (1858).

[2] Sargent *v.* Essex, etc. Ry., 26 Mass. 202 (1829); Boston, etc. Assoc. *v.* Cory, 129 Mass. 435 (1880), holding that a delay of four years was not fatal to the unregistered purchaser's rights.

[3] "The delivery of a stock certificate of a corporation to a *bona fide* purchaser or pledgee for value, together with a written transfer of the same, or a written power of attorney to sell, assign, and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties; but no such transfer shall affect the right of the corporation to pay any dividend due upon the stock, or to treat the holder of record as the holder in fact, until such transfer is recorded upon the books of the corporation, or a new certificate is issued to the person to whom it has been so transferred." Mass. Acts 1884, ch. 229. The enactment of a similar statute is respectfully recommended to the states mentioned in § 490, *infra.*

by the purchaser at such sale or by a purchaser of the outstanding certificate of stock. If the purchaser of the certificate demands registry before registry has been allowed to the purchaser at the execution sale, and if the former claims to have purchased the certificate before the attachment or execution was levied, the right of the corporation is clear. It may refuse to allow the registry, and when sued therefor may interplead and compel the claimants to litigate the matter between themselves.[1] But where the corporation does not know whether the outstanding certificate is in the hands of a purchaser or not, and a registry is demanded by a purchaser at an execution sale, the rights and duties of the corporation are not so clear. It has two courses open to it: it may refuse to allow a registry until compelled to do so by a court, or it may allow registry without being so compelled. The former is the safer course, since the corporation will probably be thereby protected from all liability to a possible purchaser of the outstanding certificate.[2] The corporation should be protected in its obedience to the decree of a court.[3] It is quite probable, also, that no court in any of the above-named states would require the corporation to issue new certificates of stock to a purchaser of stock at an execution sale, unless such purchaser give to the corporation a bond of indemnity, whereby an unknown purchaser of the outstanding certificate may be protected.[4] The other course open to the corpora-

[1] See § 387, *supra*. The proper remedy for the purchaser from the judgment debtor to pursue under such circumstances is to enjoin the corporation and the purchaser at the execution sale from registering the latter as a stockholder. Smith *v.* Crescent City, etc. Co., 30 La. Ann. 1378 (1878). See also cases *supra*. If an attachment has been levied he should enjoin that. Cheever *v.* Meyer, 52 Vt. 66 (1879).

[2] "Where a judicial tribunal of competent jurisdiction of last resort, after a fair contest in good faith by the corporation, orders the stock to be transferred to the purchaser under such seizure and sale, the corporation cannot be liable to the holder of the certificate who took no steps to protect himself." Friedlander *v.* Slaughter House Co., 31 La. Ann. 523 (1879). Where, also, the unregistered transferee contested in the courts the right of the purchaser at the execution sale, and was defeated in the lower court, and appealed without staying the decree below, the corporation is not liable for obeying the decree of the lower court, although the appeal is successful. Chapman *v.* New Orleans, etc. Co., 4 La. Ann. 153 (1849). See Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884).

[3] See §§ 361, 388, *supra*. *Cf.* § 330, *supra*.

[4] The supreme court of Ohio, in New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221 (1871), very properly and very distinctly refused to compel a registry, although conceding that the execution purchaser is entitled to dividends. The court said: "Can it be that, because the defendant refused to assume the peril of deciding between the contending claimants by issuing other certificates for the same stock to the plaintiff upon demand, that it thereby became a wrong-doer and converted the plaintiff's stock to its own use, and rendered itself liable to respond in the

tion, that of allowing a registry by the purchaser at the execution sale without being compelled to do so by a court, is pursued by the corporation at its peril. If it afterwards transpires that the outstanding certificate had been purchased before the attachment or execution was levied, the corporation is liable in damages to such purchaser for allowing the registry,[1] but not unless such purchaser gave a valuable consideration for the certificate and alleges that fact in his pleading.[2] Until such purchaser demands a registry from the corporation, it may safely pay dividends to the execution purchaser.[3] *Mandamus* lies to compel a corporation to transfer stock sold under levy of execution. It can be granted as a common-law remedy or as a remedy ancillary to the suit.[4] This rule, however, would work harshly in states where the purchaser of the outstanding certificate may have some rights. Where such a possibility exists the *mandamus* should be denied.[5] A judgment creditor's execution lien on bank stock is subject to the lien of the corporation itself by statute on the stock for debts due to it from the judgment debtor, and a further statutory provision that the enforcement of the corporation's lien shall not affect attachment or execution liens goes merely to the remedy and does not affect the priority.[6]

Where the transferee of certificates of stock in a bank presents them to the cashier of the bank for transfer, and the cashier and a director delay transfer until a debt of the transferrer to the bank becomes due, and then in behalf of the bank levy an attachment on the stock for such debt, the transferee may hold the bank and

full value of the stock to the claimant who could establish his right in a court of law? The mere statement of the proposition refutes it." As to the mode of pleading that the defendant company has been compelled to transfer the stock to a purchaser at an execution sale, see Wyoming Fair Assoc. *v.* Talbott, 3 Wyo. 244 (1889).

[1] Smith *v.* American Coal Co., 7 Lans. 317 (1873). If the purchaser at the execution sale still has the certificates, the purchaser of the old certificate may bring suit against him and the corporation to compel a retransfer. Rogers *v.* New Jersey Ins. Co., 8 N. J. Eq. 167 (1849). In a suit by a purchaser at an execution sale to cut off the rights of a judgment debtor the corporation is an indispensable party, since it alone can allow a transfer on the books. St. Louis, etc. Ry. *v.* Wilson, 114 U. S. 60 (1885). See also the case of Hazard *v.* National Exch. Bank, 26 Fed. Rep. 94 (1886), holding the corporation liable in damages to the purchaser of the outstanding certificate.

[2] Littell *v.* Scranton, etc. Co., 42 Pa. St. 500 (1862).

[3] Smith *v.* American Coal Co., 7 Lans. 317 (1873).

[4] Hair *v.* Burnell, 106 Fed. Rep. 280 (1900). *Cf.* § 390, *supra.*

[5] State *v.* First Nat. Bank, 89 Ind. 302 (1883); Bailey *v.* Strohecker, 38 Ga. 259 (1868); Durham *v.* Monumental, etc. Co., 9 Oreg. 41 (1880).

[6] Springfield, etc. Co. *v.* Bank of Batesville, 68 Ark. 234 (1900).

the cashier and such director liable in trover for conversion of the stock, and it is no defense that the transfer of the certificate was made to defraud creditors.[1] If the statute prescribes that the corporation shall register as a stockholder the purchaser at the execution sale, the writ of *mandamus* will lie to compel the corporation to make such registry;[2] but the relator must allege that he presented to the corporation the required papers, and was refused such registry.[3] A court of equity will not compel a corporation to allow a transfer of stock by a purchaser at an execution sale where the price paid at such sale is so small as to shock the conscience of the court.[4]

§ 490. *In Alabama, Arkansas, California, Colorado, Connecticut, Indiana, Iowa, New Mexico, and Vermont, the usual statutes requiring transfers of stock to be registered on the corporate books are so construed as to give an attachment or execution precedence over a prior unregistered sale or pledge of the certificates of stock*[5]*— Notice of transfer without registry.*— The courts of these states all hold that, where a statute exists requiring a transfer of stock to be registered on the corporate books in order to be effectual, an at-

[1] Hine *v.* Commercial Bank, etc., 119 Mich. 448 (1899).

[2] Bailey *v.* Strohecker, 38 Ga. 259 (1868). Where the attachment is on stock that the plaintiff alleges was transferred in fraud of creditors, *mandamus* will not lie to compel the corporation to allow a registry under the execution sale. State *v.* Warren Foundry, etc. Co., 32 N. J. L. 439 (1868). See also § 390, *supra.*.

[3] Lippitt *v.* American Wood Paper Co., 14 R. I. 301 (1883).

[4] Mississippi, etc. R. R. *v.* Cromwell, 91 U. S. 643 (1875); Randolph *v.* Quidnick Co., 135 U. S. 457 (1890). See also § 850, *infra.* Inadequacy of price is not sufficient cause for setting aside an execution sale of stock. Conway *v.* John, 14 Colo. 30 (1890). Where the court orders stock to be sold *in solido* or in blocks to suit the purchaser, and $200,000 worth of stock is sold in one block for $1,000, and it is shown that the creditor and the debtor had united, in order to deprive a transferee of his rights, the court held that the sale was fraudulent and would be set aside at the instance of the unregistered transferee. Fahrney *v.* Kelly, 102 Fed. Rep. 403 (1900). See also § 482, *supra.*

[5] *Alabama:* By statute the attachment takes precedence over a prior transfer of the certificates, where such transfer is not recorded on the corporate books within fifteen days. Berney Nat. Bank *v.* Pinckard, 87 Ala. 577 (1888); Dittey *v.* First Nat. Bank, 112 Ala. 391 (1896). Under this statute the unregistered pledgee is not protected against attachments, but notice to the corporate officer of the attachment may be oral. Abels *v.* Planters', etc. Co., 92 Ala. 382 (1890). In Fisher *v.* Jones, 82 Ala. 117 (1886), the court held that the unregistered pledgee was protected where there was an entry made on the stub of the certificate book of the stock being held in pledge. Under this statute the attaching creditor takes title in preference to an unregistered transferee, and the same rule prevails where the registered holder is a mere "dummy" for another. White *v.* Rankin, 90 Ala. 541 (1890). The statute in Alabama prescribes that, unless a transfer is made on the corporate books within fifteen days after the

tachment or execution levied on stock standing in the defendant debtor's name will cut off the rights of a previous purchaser of the certificate who has not completed his transfer by registry. Even

transfer, it "shall be void as to *bona fide* creditors or subsequent purchasers without notice." In a suit by the purchaser at execution sale to compel the corporation to transfer the stock it need not be alleged that the purchase was made without notice of the claims of other persons. Wetumpka, etc. Co. *v.* Kidd, 124 Ala. 242 (1900). A purchaser of stock at an execution sale may file a bill against an alleged transferee of the stock and the corporation to have the conflicting rights adjudicated. Howard *v.* Corey, 126 Ala. 283 (1900).

Arkansas: In Arkansas, in business corporations, an attachment takes precedence by statute, unless a certificate of transfer is filed with the county clerk. R. S., § 970. Under the Arkansas statute it is immaterial that the purchaser at the execution sale had actual knowledge that the debtor had transferred the stock, and it is immaterial that the attachment was due to an arrangement between the corporation, a creditor, and a debtor. Fahrney *v.* Kelly, 102 Fed. Rep. 403 (1900). The Arkansas statute requiring transfers of stock to be recorded with the county clerk does not apply to a pledge of stock. Batesville, etc. Co. *v.* Myer, etc. Co., 68 Ark. 115 (1900). In the case of Masury *v.* Arkansas Nat. Bank, 93 Fed. Rep. 603 (1899), the court in a carefully reasoned opinion decided that the Arkansas statute requiring a transfer on the corporate books as against creditors of the vendor of stock did not apply to a pledge of stock, even though such pledge was made by transferring and delivering the certificate of stock without any record whatsoever on the corporate books. The court stated that it was unnecessary for it to pass on the question of whether public notice of the pledge given at the execution sale had any bearing upon the rights of the purchaser. The court said: "It is a well known fact that stock certificates frequently circulate in places far remote from the home of the corporation by which they were issued, that in all commercial centers they are commonly transferred from hand to hand like negotiable paper, and that they are hypothecated for temporary loans by a simple indorsement and delivery thereof, the latter being perhaps the most common use to which such securities are put. In the great majority of cases, when stock is merely pledged for a loan, no record of the transfer is made on the books of the corporation, and in the judgment of laymen the making of such a record seems to be a needless formality. The trend of modern decisions has been to encourage the free circulation of stock certificates in the mode last indicated, on the theory that they are a valuable aid to commercial transactions, and that the public interest is best subserved by removing all restrictions against their circulation, and by placing them as nearly as possible on the plane of commercial paper."

California: In this state the statute prescribes that "no transfer of stock shall be valid for any purpose whatever . . . until it shall be entered" on the corporate books. Under this statute an attachment takes precedence over an unrecorded prior transfer of a certificate of stock. See Weston *v.* Bear River, etc. Co., 5 Cal. 186 (1855); Farmers', etc. Bank *v.* Wilson, 58 Cal. 600 (1881); Naglee *v.* Pacific Wharf Co., 20 Cal. 529 (1862). The case of Weston *v.* Bear River, etc. Co., 6 Cal. 425 (1856), holds that one who purchases stock at an execution sale, knowing that a certificate of stock had already been sold or pledged by the execution debtor,

in these states, however, it has been held that, if the person who levies the attachment or purchases at the execution sale has notice that the defendant debtor had transferred his certificate before the

cannot claim a precedence over a sale of the certificates. To same effect, People *v.* Elmore, 35 Cal. 653 (1868). If the unregistered purchaser buys the judgment obtained under the attachment, the latter is merged. Strout *v.* Natoma Water, etc. Co., 9 Cal. 78 (1858). A sale of stock after an attachment suit has failed, and before that decision is reversed, gives the purchaser good title. Loveland *v.* Alvord, etc. Co., 76 Cal. 562 (1888). A transaction whereby a debtor delivers certificates of stock to its creditor in pledge, and the creditor immediately returns them to the debtor, is not a valid pledge, even though the debtor told the corporate officers of the pledge, but said he did not want the transaction to appear on the books, and even though the secretary makes a note of the fact on the stubs of the certificate-of-stock book. An execution subsequently levied upon the stock as the property of the debtor takes precedence over the alleged pledge. McFall *v.* Buckeye, etc. Assoc., 122 Cal. 468 (1898). In California the purchaser at execution sale, without notice of a prior sale of the certificates, is entitled to the stock and to have new certificates issued to him, even though the old certificates are outstanding. West Coast, etc. Co. *v.* Wulff, 133 Cal. 315 (1901).

Colorado: In this state the statute prescribes that "no transfer of stock shall be valid for any purpose whatever . . . unless it shall have been entered" on the corporate books within sixty days from the date of such transfer. See Conway *v.* John, 14 Colo. 30 (1890), giving a preference to the attachment. *Cf.* Weber *v.* Bullock, 19 Colo. 214 (1893), holding that the pledgee was protected where he had requested transfer and been wrongfully refused by the corporation. See also Supply Ditch Co. *v.* Elliott, 10 Colo. 327 (1887). Where a statute requires a transfer on the books within sixty days, and the transfer is not made within those sixty days, an attaching creditor of the transferrer takes title, even though he knew of the unregistered transfer. First Nat. Bank, etc. *v.* Hastings, 7 Colo. App. 129 (1895). Where the purchaser of a certificate of stock files a bill in equity to enjoin an attaching creditor of the transferee from selling the stock on execution, and joins the corporation as a party defendant, and in the suit the court decides that the stock was originally legally issued, this decision is binding, even though it was not raised by the pleadings. Newman *v.* Bullock, 23 Colo. 217 (1896).

Connecticut: See Northrup *v.* Curtis, 5 Conn. 246 (1824); Oxford Turnp. Co. *v.* Bunnel, 6 Conn. 552 (1827); Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487 (1833); Dutton *v.* Connecticut Bank, 13 Conn. 493 (1840), where the recording of an assignment for the benefit of creditors in the probate office was held insufficient notice to the company as against attachments; Colt *v.* Ives, 31 Conn. 25 (1862), holding that, where a transfer is wrongfully refused by the clerk, a subsequent attachment does not take precedence. The United States court sitting in Connecticut held in the case of New York Com. Co. *v.* Francis, 83 Fed. Rep. 769 (1897), where stock in a Connecticut corporation stood on the books of the corporation in the name of a person who was really but a nominal holder for a copartnership, that an attachment levied on the stock as the property of such nominal holder was not good as against the real owner. The court distinguished such a case from a case where a purchaser allowed the stock to stand in the name of the vendor. The court sustained a

attachment or execution was levied, the purchaser of the outstanding certificate is entitled to the stock. If the attaching creditor has notice before the attachment is levied, the purchaser may ob-

bill in equity on the part of the real owner of the stock to enjoin its sale on execution.

Indiana: In this state the statute prescribing that stock should be transferable on the corporate books "and not otherwise" was held to give precedence to an attachment as against unregistered purchasers of certificates of stock. Coleman *v.* Spencer, 5 Blackf. 197 (1839). In State *v.* Jeffersonville Nat. Bank, 89 Ind. 302 (1883), the court fell into the error that there could be no pledge of stock unless there was a transfer to the pledgee on the books of the company. Such of course is not the law. See § 465, *supra.* Moreover, the court did not consider the federal decisions on this subject, although national-bank stock was involved. However, the court held that the pledgee should have appeared and set up his claim.

Iowa: In Iowa the statute prescribes that transfers shall not be valid except as between the parties until a registry is had on the corporate books. The court holds that this statute give an attachment priority over a prior unregistered sale or pledge of the certificates of stock. Fort Madison Lumber Co. *v.* Batavian Bank, 71 Iowa, 270 (1887). This case came up again in 1889, when it appears that after the decision of the lower court in favor of the pledgee, and before reversal by the upper court, the lower court ordered a sale and the pledgee bought in the stock, and afterwards the stock became worthless. The court now holds (77 Iowa, 393) that the pledgee need restore only the stock, although worthless. In Commercial Nat. Bank *v.* Farmers', etc. Bank, 82 Iowa, 102 (1891), the attaching creditor took no title because a statutory notice as to attachments was not given. In Iowa the attaching creditor has priority even though he knew at the time of his attachment that the certificates of stock had been sold by his debtor and that notice thereof had been given to the corporation. Ottumwa, etc. Co. *v.* Stodghill, 103 Iowa, 437 (1897). Under the Iowa statute a transfer of stock is not effective as against creditors, even though a request has been made to the corporation to transfer the stock, if such transfer has not been made, and even though the corporation attached to the stub of the certificate an acknowledgment of the assignment of the certificate, and even though the attaching creditor knew of such request. Where the Iowa corporation keeps its stock books in Boston, a transfer on such books in Boston is not effective as against subsequent attachments on the stock in Iowa, unless a book is kept in Iowa showing all transfers as required by the statutes of Iowa. Perkins *v.* Lyons, 111 Iowa, 192 (1900). Where the purchaser of stock at execution sale applies for a *mandamus* to compel the corporation to transfer the stock to him, and the owner of the stock intervenes and claims that the debt on which the stock was sold had been paid, and asks for a delivery of the certificates to the owner, the case may be tried in equity. Croft *v.* Colfax, etc. Co., 113 Iowa, 455 (1901), holding also that even though a pledgee brings suit on a debt and levies on the stock he does not thereby lose his rights as pledgee. Compare § 476, *supra.* The purchaser of a certificate of stock in a Missouri corporation may maintain a bill in equity for injunction to prevent the corporation transferring such stock to one who purchased the same at execution sale on a judgment obtained against the registered holder of such stock, it being shown that such purchaser at execution sale took with notice of the prior sale of the certifi-

tain a permanent injunction against the attachment.[1] Moreover, if the purchaser at the execution sale has notice, he may be prevented from obtaining registry and claiming the stock.[2]

cate. Seligman *v.* St. Louis, etc. R. R., 22 Fed. Rep. 39 (1884). The federal court sitting in Iowa will follow the Iowa decisions construing the Iowa statute to the effect that a purchaser of stock at an execution sale takes title as against a prior transfer of the certificate, not recorded on the corporate books, even though the creditor and purchaser at the sale knew that the certificate had been so transferred. Hair *v.* Burnell, 106 Fed. Rep. 280 (1900).

New Mexico: The statute in this state is substantially the same as in California, and the same decision is made by the courts. See Lyndonville Nat. Bank *v.* Folsom, 7 N. M. 611 (1894).

Vermont: No. 103, Laws 1884, provides that notice to the corporation of a transfer shall be the same as a transfer. The decisions in this state are to the effect that the attaching creditor takes precedence over an unregistered purchaser or pledgee of the certificates of stock. Sabin *v.* Bank of Woodstock, 21 Vt. 353, 362 (1849); Warren *v.* Brandon Mfg. Co. (1874), cited in 52 Vt. 75; Cheever *v.* Meyer, 52 Vt. 66 (1879), the court holding, however, that the attachment in this case did not take precedence, inasmuch as the party knew about the prior sale of the certificates of stock.

For a lurid and yet just invective against the decisions of California, Indiana, Colorado, and other states allowing attachments in those states to have priority against a prior transfer of stock, see 12 Ry. & Corp. L. J. 145.

[1] Cheever *v.* Meyer, 52 Vt. 66 (1879); Scripture *v.* Francestown Soapstone Co., 50 N. H. 571 (1871); Black *v.* Zacharie, 3 How. 483 (1845). A purchaser at an execution sale takes no title as against a prior purchaser of the certificate where the former knew of the latter's purchase when the execution sale took place. Wilson *v.* St. Louis, etc. Ry., 108 Mo. 588 (1891). If the purchaser at the execution sale buys with knowledge that the judgment debtor does not own the stock at the time of the sale, he takes no title to the stock. Blakeman *v.* Puget Sound Iron Co., 72 Cal. 321 (1887). Where the judgment creditor at the time of levying the execution knows that the certificates of stock have been transferred as security for a debt, its purchase of the stock at the sale does not give title prior to the right of a pledgee. Selma, etc. Co. *v.* Harris, 31 S. Rep. 508 (Ala. 1902).

[2] People *v.* Elmore, 35 Cal. 653 (1868); Weston *v.* Bear River, etc. Co., 6 Cal. 425 (1856); Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485 (1887); Farmers' Nat. Gold Bank *v.* Wilson, 58 Cal. 600 (1881), holding also that the execution sale will not be enjoined, since the claimant may attend and give notice of his claim; Newberry *v.* Detroit, etc. Mfg. Co., 17 Mich. 141, 158 (1868), per Cooley, J. The purchaser of a certificate of stock in a Missouri corporation may maintain a bill in equity for injunction to prevent the corporation transferring such stock to one who purchased the same at execution sale on a judgment obtained against the registered holder of such stock, it being shown that such purchaser at execution sale took with notice of the prior sale of the certificate. Seligman *v.* St. Louis, etc. R. R., 22 Fed. Rep. 39 (1884). Where the corporation bought for itself at the execution sale and had notice, it is liable in tort to the unregistered purchaser of the old certificates. Bridgewater Iron Co. *v.* Lissberger, 116 U. S. 8 (1885). Jones *v.* Latham, 70 Ala. 164 (1881), holds that, if the execution is levied without notice of an unrecorded transfer, a subsequent notice before the sale to the purchaser at the sale is ineffectual, and does not affect the latter.

Actual notice of an unrecorded pledge of the certificate is sufficient, even though the statute requires a transfer on the books or the filing of a power of attorney. The company has actual notice if its treasurer learns of it at a bank.[1]

Where the unregistered transferee of the certificate of stock has notified the corporation thereof and demanded registry, which is not granted, any attachment or execution levied subsequently to the improper refusal by the corporation to register does not take precedence over such purchaser.[2] If the corporation improperly refuses to allow the transferee of stock to register his transfer, and the stock is afterwards attached by a creditor of the stockholder, the transferee may, if he chooses, hold the corporation liable in damages for its refusal to allow the registry.[3] Where the transferee of the certificate has repeatedly demanded a transfer of the company, but been refused, a subsequent attachment by a creditor of the transferrer does not take precedence, even though the statutes require a registry within sixty days.[4] It is proper and legal for a corporation to add to the name appearing on the stock certificate the words "as pledgee" or "as collateral security," or similar words.[5] Where the unregistered purchaser is cut off by an attachment, he cannot compel a purchaser from him to pay for the stock which is made valueless by the attachment.[6]

Where the creditor of the vendor knows of the pledge of the certificates at the time he sells the stock on execution, he, the creditor, is not protected in such sale. George, etc. Co. *v.* Range, etc. Co., 16 Utah, 59 (1897). Where a statute requires a transfer on the books within sixty days, and the transfer is not made within those sixty days, an attaching creditor of the transferrer takes title, even though he knew of the unregistered transfer. First Nat. Bank, etc. *v.* Hastings, 7 Colo. App. 129 (1895).

[1] Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895).

[2] Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454 (1879); aff'd, 74 Mo. 77; Colt *v.* Ives, 31 Conn. 25 (1862); State Ins. Co. *v.* Gennett, 2 Tenn. Ch. 100 (1874); Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). See also §§ 258, 382, 383, *supra;* and § 532, *infra.* *Contra,* Fiske *v.* Carr, 20 Me. 301 (1841). But not if the transferee merely sends a letter to the corporation requesting a transfer, without sending the evidences of his title and the old certificate. Newell *v.* Williston, 138 Mass. 240 (1885). The corporation is liable in damages if it levies the attachment under such circumstances. Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829). Where registry is allowed it cuts off a subsequent attachment, even though the transferee has not formally accepted the stock as required by statute. Woodruff *v.* Harris, 11 U. C. (Q. B.) 490 (1854). A memorandum on the stock book that the stock has been transferred as collateral security is sufficient to give the transfer precedence over an attachment. Moore *v.* Marshalltown, etc. Co., 81 Iowa, 45 (1890).

[3] Robinson *v.* National Bank of New Berne, 95 N. Y. 637 (1884). See also Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830).

[4] Weber *v.* Bullock, 19 Colo. 214 (1893).

[5] See §§ 247, 466, *supra.*

[6] Rock *v.* Nichols, 85 Mass. 342 (1862).

It may be added, in regard to this whole subject, that the decisions and statutes of the various states show clearly that public policy and the legitimate demands of trade have gradually caused the courts and legislatures of the various states to establish the rule that a sale or pledge of certificates of stock has precedence over a subsequent attachment levied on that stock for the debt of the vendor or pledgor, and that the failure of the pledgee or purchaser of the certificate to obtain a registry on the corporate books is not fatal to his interest in the stock. In the great commercial centers, where certificates of stock pass from hand to hand and are pledged to banks and financial institutions daily to secure great sums of money, the necessity of such a rule is imperative;[1] and the fact that so many states have, by legislative enactment, adopted the New York rule, while no state has changed from the New York rule to the New England rule, demonstrates in itself the justice and advisability of the rule which prevails in New York state.

In North Carolina[2] and North Dakota[3] the question of the precedence of attachments over unregistered sales or pledges of certificates of stock has arisen only in an incidental way.

§ 491. *Shares of stock cannot be subjected to the payment of the stockholder's debts by the process of garnishment unless the statutes so provide.*— The process of garnishment is proper only where a debt is due from a third person to the defendant debtor. It is not a proper remedy for reaching shares of stock owned by the debtor.[4] The corporation owes the stockholder no debt, and by no fiction of law can it be held to be a debtor of the defendant debtor. Conse-

[1] Quoted and approved in Mapleton Bank *v.* Standrod, 71 Pac. Rep. 119 (Idaho, 1902).

[2] *North Carolina:* In Morehead *v.* Western N. C. R. R., 96 N. C. 362 (1887), there is a dictum to the effect that the attachment has precedence. There was no proof that the sale of the certificate was prior to the attachment, and moreover the court said that the purchaser of the certificate might thereafter litigate his rights in another suit, inasmuch as he was not a party to the suit at bar.

[3] *North Dakota:* In *Re* Argus Printing Co., 1 N. Dak. 434, 444 (1891), there is a dictum giving priority to an attachment. In Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892), the court declined to pass upon the question, inasmuch as national-bank stock was involved, and the court followed the decisions of the federal courts on this subject. In a decision in Dakota territory the court held that where an attaching creditor knew of the priority of the certificates of stock he was not protected. Van Cise *v.* Merchants' Nat. Bank, 4 Dak. 485 (1887).

[4] Planters', etc. Bank *v.* Leavens, 4 Ala. (N. S.) 753 (1843); Foster *v.* Potter, 37 Mo. 525 (1866); Ross *v.* Ross, 25 Ga. 297 (1858), where the court said: "Is stock in this railroad such a debt (indebtedness) of the railroad to the stockholder that a garnishing creditor of the stockholder can enter up judgment for it against the railroad? It is not; it is a debt which the railroad dares not pay, even to the stockholder himself. The road may pay him *dividends* on it, but that is all."

quently, where the sheriff levies an attachment, not according to procedure governing attachments, but according to the procedure of garnishment, the whole proceeding is void, and a subsequent transfer of the stock by the defendant debtor is valid.[1] Stock held as collateral is property subject to garnishment under the statutes of Texas.[2] In Michigan garnishee process lies against the pledgee of stock in behalf of a creditor of the pledgor, and enables the latter to reach the equity in the stock.[3] Garnishee process lies to reach a stockholder's interest, under the statutes of Nebraska, especially where the real interest of a registered stockholder is different from his apparent interest.[4] In Pennsylvania the equity of redemption which a pledgor has in stocks which he has pledged to a national bank may be reached by garnishment served on the bank after judgment against the debtor. The national bank act does not forbid such process.[5] Even though garnishee process has been served upon the pledgee of stock for a debt of the pledgor, yet the pledgor and pledgee may agree that the stock shall belong to the pledgee in cancellation of the debt. Such agreement is not illegal if the debt was the full value of the stock at the time; and even though subsequently the pledgee, upon selling the stock for more than the debt, pays the surplus to the pledgor, the creditor issuing the garnishee process cannot complain.[6] Garnishee proceedings against a stockholder's interest in stock which has been pooled and has also been pledged does not affect such pool or pledge, but is made subject to them if they are legal.[7] Certificates of stock held by one party and belonging to another cannot be reached by garnishee process in behalf of a creditor of the owner of the stock. The certificate is merely "like a title deed or a bill of sale, which is not the property itself, but simply the evidence of title to property."[8]

[1] Mooar *v.* Walker, 46 Iowa, 164 (1877). *Cf.* Chesapeake, etc. R. R. *v.* Paine, 29 Gratt. (Va.) 502 (1877). Garnishee process must conform to the statute relative to attachments, and if served on the holders of the certificates instead of on the corporation it is ineffectual. Younkin *v.* Collier, 47 Fed. Rep. 571 (1891).

[2] Smith *v.* Traders' Nat. Bank, 74 Tex. 457 (1889); Harrell *v.* Mexico Cattle Co., 73 Tex. 612 (1889).

[3] Old Second Nat. Bank *v.* Williams, 112 Mich. 564 (1897).

[4] Farmers', etc. Bank *v.* Mosher, 88 N. W. Rep. 552 (Neb. 1901).

[5] Commonwealth *v.* Chestnut, etc. Bank, 189 Pa. St. 606 (1899).

[6] Steiner *v.* First, etc. Bank, 127 Ala. 595 (1900).

[7] Hardin *v.* White, etc. Co., 26 Wash. 583 (1901).

[8] Packard, etc. Co. *v.* Laev, 100 Wis. 644 (1898).

CHAPTER XXVIII.

CONSTITUTIONALITY OF AMENDMENTS TO CHARTERS—RIGHT OF A STOCKHOLDER TO OBJECT.

§ 492. *A corporate charter is a contract between three parties — the state, the corporation, and the stockholders.*— The charter of a corporation having a capital stock is a contract between three parties, and forms the basis of three distinct contracts.[1] The charter is a contract between the state and the corporation; second, it is a contract between the corporation and the stockholders; third, it is a contract between the stockholders and the state.

§ 493. *The charter as a contract between the corporation and the stockholders — Amendment of charter by majority of stockholders as allowed by statute existing at time of incorporation.*— That the charter is a contract between the corporation and the stockholders has within the last fifty years been firmly established, and is now

[1] See State Bank *v.* Knoop, 16 How. 369 (1853); Port Edwards, etc. Ry. *v.* Arpin, 80 Wis. 214 (1891); Northern R. R. *v.* Miller, 10 Barb. 260 (1851); Cooley, Const. Lim. (5th ed.), p. 337, where the learned author says: "Those charters of incorporation, however, which are granted, not as a part of the machinery of the government, but for the private benefit or purposes of the corporators, stand upon a different footing, and are held to be contracts between the legislature and the corporators, having for their consideration the liabilities and duties which the corporators assume by accepting them; and the grant of the franchise can no more be resumed by the legislature, or its benefits diminished or impaired without the consent of the grantees, than any other grant of property or valuable thing, unless the right to do so is reserved in the charter itself."

unquestioned law. The cases of Natusch v. Irving [1] in England, and Livingston v. Lynch [2] in this country, followed by a long line of supporting decisions, distinctly hold that the charter is a contract prescribing to the corporation that it shall not attempt to materially change, extend, alter, or abandon the particular business which that charter authorizes the corporation to do. Any attempt of the corporation to make such a change, extension, alteration, or abandonment of that business is called an *ultra vires* act. It is an act which a single stockholder may prevent by injunction or set aside by a suit in equity. This subject, however, is fully treated in another part of this work.[3] Where the statutes in existence at the time of incorporation provide for the extension of corporate charters a stockholder cannot prevent the corporation from extending its existence in accordance with such statutes.[4] Under a statute authorizing the stockholders by an amended certificate to change the objects of the corporation, the certificate may be amended so as to give a corporation power to purchase stock in other corporations.[5] A holder of preferred stock may prevent a reduction of the preferred dividend by an amendment of the certificate of incorporation, even though the statutes of the state at the time of the organization of the company authorize the certificate of corporation to be amended by a certain vote. Such reduction may be enjoined.[6]

§ 494. *Charter as a contract between the state and the corporation.*— As between the state and the corporation the corporate charter is a contract, protected by that provision of the United States constitution which prohibits a state from passing any law which will impair the obligation of the contract.[7] Hence it is

[1] This case, decided by Lord Eldon in 1824, is reported in Gow on Partnership, 398; also 2 Cooper's Ch. 358.

[2] 4 Johns. Ch. 573 (1820); Clearwater v. Meredith, 1 Wall. 25 (1863); Harding v. American, etc. Co., 182 Ill. 551 (1899).

[3] See ch. XL, *infra*.

[4] Smith v. Eastwood, etc. Co., 58 N. J. Eq. 331 (1899).

[5] Meredith v. New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445 (1899).

[6] Pronik v. Spirits, etc. Co., 58 N. J. Eq. 97 (1899).

[7] This rule of law, first enunciated in the case of Dartmouth College v. Woodward, 4 Wheat. 518 (1819), by Marshall, C. J., has become thoroughly established. As early as 1806 a court said: "We are also satisfied that the rights legally vested in this or in any corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." Wales v. Stetson, 2 Mass. 143 (1806). In England the unwritten constitution is not superior to the powers of parliament, and consequently the rule is different. In that country, as is said by Lord Coke, "the power and jurisdiction of parliament is so transcendental and absolute that it cannot be controlled or confined, either for causes or purposes, within any bounds." Stevens v. Rutland, etc. R.

beyond the power of the state to repeal or materially annul such a corporate charter, unless the power of amendment and repeal has been expressly reserved by the state, or unless all the parties to the contract consent to the change. All the franchises, privileges, and express and implied powers necessary and essential to carrying out the corporate purposes are protected by this contract.[1] This branch of the law is important to stockholders in cases where the corporation neglects or refuses to protect itself against legislative amendments or repeals violating the charter contract between the corporation and the state. In such cases the stockholder may enjoin or remedy the wrong by bringing an action in place of and on behalf of the corporation, making it a party defendant, together with the parties who, under the authority of the state, have violated the contract.[2] A stockholder's action to prevent the payment of a tax levied upon the corporation in violation of a statutory exemption from taxation is an action of this character.[3] Corporate charters, however, are subject to constitutional provisions enacted subsequently to the granting of the charters, unless there is a clear contract to the contrary.[4] Although a special charter gives the right to a railroad corporation to consolidate with other roads, yet a subsequent general statute may take away this power except so far as the same has been already exercised.[5] A general

R., 29 Vt. 545 (1851); Thorpe *v.* Rutland, etc. R. R., 27 Vt. 140 (1857); Dartmouth College *v.* Woodward, 4 Wheat. 518, 643 (1819). Consequently, the English authorities are of little use in this chapter.

[1] State Bank *v.* Knoop, 16 How. 369 (1853); Thorpe *v.* Rutland, etc. R. R., 27 Vt. 140 (1857), per Redfield, C. J. The latter case discusses the nature of the privilege thus protected.

[2] Greenwood *v.* Union Freight R. R., 105 U. S. 13 (1881). See also §§ 900, 901, *infra*, on this subject. The character of such an action, also the parties, pleadings, and rules of relief, are explained in Part IV, *infra*.

[3] Dodge *v.* Woolsey, 18 How. 331 (1855); State Bank *v.* Knoop, 16 How. 369 (1853). See also Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Delaware R. R. Tax, 18 Wall. 206 (1873). See also § 562, *infra*.

[4] Pennsylvania R. R. *v.* Miller, 132 U. S. 75 (1889). Where by an amendment an insurance charter is changed into a banking charter, an exemption from taxation may be lost thereby by reason of a constitutional provision enacted after the original charter was granted but before the amendment was granted. Memphis City Bank *v.* Tennessee, 161 U. S. 186 (1896).

[5] Pearsall *v.* Great Northern Ry., 161 U. S. 646 (1896). Mr. Justice Brown's opinion in this case contains a clear exposition of the law on this subject, and on the various and far-reaching applications and restrictions of the Dartmouth College case. In this case the court spoke of the Dartmouth College case as follows (p. 660): "The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been re-affirmed and applied so often as to have become firmly established as a canon of American jurisprudence." The statute authorizing a corporation to amend its articles without changing substantially

act prohibiting a municipality from granting a ferry right within a half mile of an existing ferry does not constitute a contract with any particular ferry, but on the contrary may be repealed.[1] A city ordinance passed under the authorization of a statute is a law, within the meaning of the constitution of the United States prohibiting any law that impairs the validity of the contract.[2] Where an exclusive grant for a bridge by the legislature is extended, the extension is not a contract, being without consideration.[3] An amendment exempting a corporation from taxation may be repealed, there being no consideration for the contract.[4] After a foreclosure sale the legislature cannot pass a law compelling the purchaser to pay certain of the old debts, even though the purchaser is a railroad corporation, which was organized under a special charter for the purpose of making such purchase.[5] A statute cannot turn over the property of an educational institution to another educational institution.[6]

§§ 495, 496. *Charter as a contract between the state and the stockholders.*—As between the state and the stockholders, also, the corporate charter is a contract protected by the United States constitution.[7] In consequence thereof the state cannot materially amend

its purposes does not authorize a gas and power company to change itself into a street railway company. State *v.* Taylor, 55 Ohio St. 61 (1896).

[1] Williams *v.* Wingo, 177 U. S. 601 (1900).

[2] Pike's Peak, etc. Co. *v.* Colorado Springs, 105 Fed. Rep. 1 (1900).

[3] Robinson *v.* Lamb, 126 N. C. 492 (1900).

[4] Manistee, etc. Co. *v.* Commissioner of Railroads, 118 Mich. 349 (1898). An amendment which grants to a street railway company an exclusive right to certain streets may be amended or repealed, even though it was granted at the session of the legislature which granted the original charter. Philadelphia, etc. Ry.'s Appeal, 102 Pa. St. 123 (1883). See also Johnson *v.* Crow, 87 Pa. St. 184 (1878); Norwich Gas, etc. Co. *v.* Norwich, etc. Co., 25 Conn. 19 (1856).

[5] Woodward *v.* Central, etc. Ry., 62 N. E. Rep. 1051 (Mass. 1902).

[6] Ohio *v.* Neff, 52 Ohio St. 375 (1895). See also § 500, *infra.*

[7] "A charter of incorporation granted by a state creates a contract between the state and the corporators which the state cannot violate." This has been held so often by this court that it is a "work of supererogation" to repeat it. Willmington R. R. *v.* Reid, 13 Wall. 264, (1871). It "has been the settled law of this court since the decision in the Dartmouth College case." Delaware R. R. Tax, 18 Wall. 206 (1873). To the same effect, see Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Lothrop *v.* Stedman, 42 Conn. 583 (1875); Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851). "An act granting corporate privileges to a body of men is, when accepted, a contract between the state and the corporators. ... It is sustained by everything that we are bound to regard as authority,"— by the courts, by the opinion of the legal profession, and by the acquiescence of the people. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856), per Jeremiah Black, J. See also Sinking Fund Cases, 99 U. S. 700 (1878). "That an act of incorporation is a contract between the state and the stock-

the charter, except by the unanimous consent of the stockholders, unless the power of amendment is expressly reserved by the state at the time of granting the charter. It is this contract which constitutes the subject of the present chapter.

§ 497. *Charter amendments imposed upon the stockholders.*— The right of the legislature to amend a charter against the will of the stockholders has been the subject of much litigation. Such amendments are clearly divisible into two kinds. The first are those which, by their terms, are absolute and compulsory, and become a part of the charter irrespective of the action or willingness of the stockholders to accept them. Such amendments, excepting those which are made as police regulations,[1] are unconstitutional and void,[2] unless made under a reserved power to amend.[3] Of such a kind are amendments repealing an exemption of stockholders from taxation.[4] The legislature cannot compel a turnpike company to build a bridge beyond the turnpike as a condition of continuing to exercise its franchise.[5] Where a foreign railroad company has extended its lines into a state under a statute, the legislature of the latter state cannot afterwards require it to become a domestic corporation. Such a statute impairs the obliga-

holders is held for settled law by the federal courts and by every state court in the Union. All the cases on the subject are saturated with this doctrine. It is sustained not by a current but by a torrent of authorities. No judge who has a decent respect for the principle of *stare decisis* — that great principle which is the sheet-anchor of our jurisprudence — can deny that it is immovably established." "If anything is settled it is this rule of construction that a corporation takes nothing by its charter except what it is plainly, expressly, and unequivocally granted." Per Black, J., Bank of Pennsylvania *v.* Commonwealth, 19 Pa. St. 144 (1852).

[1] See § 900, *infra*.

[2] Such as an amendment changing the route and terminus. Ames *v.* Lake Superior, etc. R. R., 21 Minn. 241 (1875). A corporate charter right to take a certain rate of interest is a contract and is protected against subsequent legislation. Hazen *v.* Union Bank, 1 Sneed (Tenn.), 115 (1853). See also dictum in Philadelphia, etc. Ry.'s Appeal, 102 Pa. St. 123 (1883), that an amendment to a charter which enlarges it without imposing any new or additional burden upon it is a mere license and may be revoked, citing Johnson *v.* Crow, 87 Pa. St. 184 (1878); Christ Church *v.* Philadelphia County, 24 How. 300 (1860). The legislature may subsequently authorize the sale of the corporate franchises, etc., to pay debts. Louisville, etc. Co. *v.* Ballard, 2 Metc. (Ky.) 165 (1859).

[3] See § 501, *infra*.

[4] Thus, a statute authorizing the taxation of stock which by the corporate charter is exempt is unconstitutional. Gordon *v.* Appeal Tax Court, 3 How. 133 (1845); Farrington *v.* Tennessee, 95 U. S. 679 (1877). An exemption from taxation which is a gift may be repealed. Philadelphia *v.* Pennsylvania Hospital, 134 Pa. St. 171 (1890). See § 568, *infra*.

[5] State *v.* Lebanon, etc. Co., 61 S. W. Rep. 1096 (Tenn. 1900).

tion of the contract.[1] Stockholders sued under the Minnesota statute cannot question the amount of the assessment which has been levied by the court. A statute to that effect is not unconstitutional.[2] An amendment to a banking act whereby a lien is given to banks on stock of its stockholders for debts due the bank from them does not apply to stock already issued.[3] The New Jersey statute prohibiting suits at law to enforce the statutory liability of stockholders in foreign corporations, and prescribing that the remedy shall be in equity only, is unconstitutional so far as liabilities existing at the time of the passage of the statute are concerned.[4] The legislature may authorize the statutory liability of stockholders to be enforced by a receiver, even in corporations which have passed into a receiver's hands prior to the enactment of the statute.[5] But where, by statute, every creditor has the right to bring suit to enforce the stockholders' liability, a statute taking away this right and giving it to a receiver is unconstitutional.[6] So, also, a statute passed subsequently to the granting of a charter, and increasing the liability of a stockholder on his stock for the debts already incurred, is unconstitutional and void unless the legislature has reserved the right to alter or amend the charter.[7] Under such a

[1] Commonwealth *v.* Mobile, etc. R. R., 64 S. W. Rep. 451 (Ky. 1901).

[2] Straw, etc. Co. *v.* Kilbourne, etc. Co., 80 Minn. 125 (1900).

[3] Southern, etc. Co. *v.* Fidelity, etc. Co., 105 Ga. 487 (1898).

[4] Western, etc. Bank *v.* Reckless, 96 Fed. Rep. 70 (1899).

[5] Persons *v.* Gardner, 42 N. Y. App. Div. 490 (1899).

[6] Woodworth *v.* Bowles, 61 Kan. 569 (1900). See § 218, *supra.*

[7] It certainly is as regards corporate debts already incurred. Commonwealth *v.* Cochituate Bank, 85 Mass. 42 (1861); Wheeler *v.* Frontier Bank, 23 Me. 308 (1843). And has been held to be so as regards future corporate debts. Ireland *v.* Palestine, etc. Co., 19 Ohio St. 369 (1869). *Contra,* Stanley *v.* Stanley, 26 Me. 191 (1846); Coffin *v.* Rich, 45 Me. 507 (1858); Shufeldt *v.* Carver, 8 Ill. App. 545 (1881); Fogg *v.* Sidwell, 8 Ill. App. 551 (1881); Child *v.* Coffin, 17 Mass. 64 (1820), dictum; Gray *v.* Coffin, 63 Mass. 192, 200 (1852); Hathorn *v.* Calef, 53 Me. 471 (1866). See Weidenger *v.* Spruance, 101 Ill. 278 (1881). And it is said that a stockholder may restrain by a proper proceeding the acceptance by the corporation of an unconditional amendment to the charter by which the liability of the stockholders is increased. Owen *v.* Purdy, 12 Ohio St. 73 (1861); Fry *v.* Lexington, etc. R. R., 2 Metc. (Ky.) 314 (1859). *Cf.* Bailey *v.* Hollister, 26 N. Y. 112 (1862); Thompson *v.* Guion, 5 Jones, Eq. (N. C.) 113 (1859); Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930; Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858); Hamilton, etc. Ins. Co. *v.* Hobart, 68 Mass. 543 (1854); Gardner *v.* Hamilton Mut. Ins. Co., 33 N. Y. 421 (1865). Where the incident of individual liability was repealed by an amendment to the state (Missouri) constitution after the debt accrued, but before the increase of stock was issued, the holders of the new stock were held not liable under the former constitution. Ochiltree *v.* Railroad Co., 21 Wall. 249 (1874). A statute rendering directors liable may apply to rent becoming due thereafter on a lease

reservation the statute is legal and binding, although there are limits even to this reserved power, as will be shown hereafter.[1] A statute which authorizes an additional assessment upon existing paid-up stock is unconstitutional.[2]

A statute imposing additional liability upon the stockholders cannot be repealed so as to affect those who were corporate creditors previously to the repeal.[3] But, whenever the statute imposing the liability is penal in its nature, a repeal of it, even so as to affect existing debts, is constitutional at any time before the corporate creditor obtains judgment on his claim.[4] An important exception to the general rules stated above exists in regard to amendments under the police power of the state. The state may amend the charter of a railroad corporation by reducing its traffic charges, requiring it to build fences, and in various other ways for the protection of the public.[5] An amendment to a charter forbidding any

made before the passage of such statute. Steiffel *v.* Tolhurst, 67 N. Y. App. Div. 521 (1902).

[1] See § 501, *infra.*

[2] Enterprise, etc. Co. *v.* Moffitt, 58 Neb. 642 (1899).

[3] Hawthorne *v.* Calef, 2 Wall. 10 (1864); Conant *v.* Van Shaick, 24 Barb. 87 (1857); Norris *v.* Wrenschall, 34 Md. 492 (1871); Provident Sav. Inst. *v.* Jackson Place, etc. Co., 52 Mo. 552 (1873); St. Louis, etc. Co. *v.* Harbine, 2 Mo. App. 134 (1876); Central, etc. Assoc. *v.* Alabama, etc. Ins. Co., 70 Ala. 120 (1881); Woodruff *v.* Trapnall, 10 How. 190 (1850); McDonnell *v.* Alabama, etc. Ins. Co., 85 Ala. 401 (1888). See also Story *v.* Furman, 25 N. Y. 214 (1862); Rochester *v.* Barnes, 26 Barb. 657 (1858); Sinking Fund Cases, 99 U. S. 700 (1878). *Cf.* Jerman *v.* Benton, 79 Mo. 148 (1883); Woodhouse *v.* Commonwealth Ins. Co., 54 Pa. St. 307 (1867); *Re* State Ins. Co., 14 Fed. Rep. 28 (1882); Palfrey *v.* Paulding, 7 La. Ann. 363 (1852); *Re* Telegraph Constr. Co., L. R. 10 Eq. 384 (1870); Cooper *v.* Frederick, 9 Ala. (N. S.) 738 (1846); *Re* Credit Foncier, L. R. 11 Eq. 356 (1871); Coffin *v.* Rich, 45 Me. 507 (1858). A statute repealing a personal liability of stockholders is unconstitutional as to existing creditors to the extent only of such liability, and not as to increased capital stock after the repeal. Barton, etc. Bank *v.* Atkins, 72 Vt. 33 (1899). Registered transferees are liable the same as their transferrers, even though before the transfer the statutory liability was decreased by statute. The liability to old creditors follows the stock. National Com. Bank *v.* McDonnell, 92 Ala. 387 (1890). A statute giving the corporation a summary remedy against a stockholder for non-payment of calls may be repealed. *Ex parte* Northeast, etc. R. R., 37 Ala. 679 (1861); 54 Atl. Rep. 767.

[4] Breitung *v.* Lindauer, 37 Mich. 217 (1877); Union Iron Co. *v.* Pierce, 4 Biss. 327 (1869): s. c., 24 Fed. Cas. 583; Gregory *v.* German Bank, 3 Colo. 332 (1877); Cooley, Const. Lim. (5th ed.), pp. 444, 474. See § 223, *supra.*

[5] See §§ 900, 902, *infra.* The court in Pearsall *v.* Great Northern Ry., 161 U. S. 646, 666 (1896), in speaking of the police power, said: "So important is this power, and so necessary to the public safety and health, that it cannot be bargained away by the legislature; and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion."

consolidation with a competing line is a legitimate exercise of the police power of the state, and it is immaterial whether the power to amend was reserved or not.[1] It is constitutional for the legislature to require coal-mining companies to weigh coal before it is screened, especially where the legislature has reserved power to amend charters.[2] A statute requiring corporations to pay their employees once a month, and giving the latter a lien prior to all liens excepting recorded mortgages, is unconstitutional as being a grant of special privileges and as denying the corporation the equal protection of the laws, and as depriving them of their property without due process of law, in that such statute interferes with the freedom to make contracts.[3]

§ 498. *Charter amendments offered to the stockholders.*— The second class of amendments to a charter — the amendments which occur most frequently and give rise to many difficulties — are those which allow the corporate directors or a majority of the stockholders in corporate meeting assembled to engage in a new or different or more extensive or more contracted business than that authorized by the original and unamended charter. This is the subject of the remainder of this chapter.

§ 499. *Auxiliary and incidental amendments are constitutional, though some of the stockholders dissent.*— An amendment made to a corporate charter is either a material and fundamental change from the original plan, or it is an auxiliary and incidental change, consistent with the carrying out of the original plan.[4] The latter class of amendments are constitutional and valid. The acceptance of an auxiliary amendment, however, should be by the stockholders

[1] Louisville, etc. R. R. *v.* Kentucky, 161 U. S. 677 (1896). To same effect, Pearsall *v.* Great Northern Ry., 161 U. S. 646 (1896).

[2] A majority of the court, however, adopted the view that under the reserved right to amend charters the legislature must do so on terms that are just to the stockholders. Woodson *v.* State, 69 Ark. 521 (1900).

[3] Johnson *v.* Goodyear, etc. Co., 127 Cal. 4 (1899). To same effect, State *v.* Haun, 61 Kan. 146 (1899), rev'g s. c., 7 Kan. App. 509.

[4] The general principle of law governing this branch of the subject is well expressed in Woodfork *v.* Union Bank, 3 Coldw. (Tenn.) 488 (1866). "The contract or charter, after acceptance, is inviolable between the state and the corporation, as it is also between the corporation and stockholders. Neither the one nor the other can disregard its obligations or alter its essential franchises without the unanimous concurrence of the stockholders. . . . If the alterations proposed in the charter of a private corporation by legislative enactment are merely auxiliary and not fundamental, they may be accepted by a majority of the corporators; and when so assented to they are binding on the whole; but it is otherwise . . . when the alterations are fundamental, radical, and vital. The acceptance must then be unanimous."

in meeting assembled instead of by the board of directors.[1] But acceptance may arise from user;[2] and hence it generally happens that an incidental or auxiliary amendment to a charter is deemed to have been accepted by user and a vote of acceptance by the directors or by user alone.[3] An amendment may be said to be auxiliary and incidental when it merely grants new powers or authorizes new methods and new plans for the purpose of carrying out the original plan and effecting the real object of that plan. The individual motives and interests of a stockholder are disregarded. Whatever is for the benefit of the corporation is conclusively presumed to be for the benefit of each stockholder. A change not fundamental to the corporation is not fundamental to any stockholder.[4]

Whether an amendment materially changes the corporate plans or not is a question of law for the court.[5] Accordingly each case is to be decided according to the peculiar circumstances of that case, and no general rules can be laid down which will apply to all cases. Many illustrations are given in the notes below.[6]

[1] Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579 (1818); Brown *v.* Fairmount, etc. Co., 10 Phila. 32 (1873); Hope Ins. Co. *v.* Beckman, 47 Mo. 93 (1870).

[2] See § 503, *infra*, and § 2*a*, *supra*.

[3] Illinois, etc. R. R. *v.* Zimmer, 20 Ill. 658 (1858). See also Blatchford *v.* Ross, 5 Abb. Pr. (N. S.) 434 (1869); *Re* Excelsior F. Ins. Co., 16 Abb. Pr. 8, 14 (1862). In Venner *v.* Atchison, etc. R. R., 28 Fed. Rep. 581 (1886), it was held that the directors are the proper persons to accept an amendment under the circumstances of that case.

[4] Delaware R. R. *v.* Tharp, 1 Houst. (Del.) 149 (1855); Irvin *v.* Turnpike Co., 2 Pen. & W. (Pa.) 466 (1831); Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858); Sprague *v.* Illinois, etc. R. R., 19 Ill. 174 (1857); Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851). *Cf.* Hester *v.* Memphis, etc. R. R., 32 Miss. 378 (1856); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859); Fulton County *v.* Mississippi, etc. R. R., 21 Ill. 338 (1859). The cases of Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84 (1855), and Central R. R. *v.* Collins, 40 Ga. 617 (1869), repudiate the distinction between the material and immaterial changes. All changes are held to be equally material.

[5] Winter *v.* Muscogee R. R., 11 Ga. 438 (1852); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859); Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876). *Cf.* Southern, etc. R. R. *v.* Stevens, 87 Pa. St. 190 (1878).

[6] Certain changes in the route of a railroad have been held to be immaterial, Wilson *v.* Wills Valley R. R., 33 Ga. 466 (1863); Johnson *v.* Pensacola, etc. R. R. 9 Fla. 299 (1860); Peoria, etc. R. R. *v.* Elting, 17 Ill. 429 (1856); Banet *v.* Alton, etc. R. R., 13 Ill. 504 (1851); Chattanooga, etc. R. R. *v.* Warthen, 98 Ga. 599 (1896); building branch lines, Peoria, etc. R. R. *v.* Preston, 35 Iowa, 115 (1872); Greenville, etc. R. R. *v.* Coleman, 5 Rich. L. (S. C.) 118 (1851); issuing preferred stock, Everhart *v.* West Chester, etc. R. R., 28 Pa. St. 339 (1857); Rutland, etc. R. R. *v.* Thrall, 35 Vt. 536 (1863); Curry *v.* Scott, 54 Pa. St. 270 (1867); or more common stock, Covington *v.* Covington, etc. Bridge Co., 10 Bush (Ky.), 69 (1873); Buffalo, etc. R. R. *v.* Dudley, 14 N. Y. 336 (1856). *Cf.* Hughes *v.* Antietam

§ 500. *Material amendments offered to the stockholders can be accepted only by a unanimous vote.*—On the other hand, a material and fundamental change in the charter by an amendment to that charter is an unconstitutional violation of the contract rights of any

Mfg. Co., 34 Md. 316 (1870); extending the time for completing the road, Agricultural Branch R. R. *v.* Winchester, 95 Mass. 29 (1866); Poughkeepsie, etc. Co. *v.* Griffin, 24 N. Y. 150 (1861); Bailey *v.* Hollister, 26 N. Y. 112 (1862), power to amend being reserved; Taggart *v.* Western Md. R. R., 24 Md. 563 (1866); Union Hotel Co. *v.* Hersee, 79 N. Y. 454 (1880); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853); consolidations that take the place of part of the line as laid out, Sprague *v.* Illinois River R. R., 19 Ill. 174 (1857); Hanna *v.* Cincinnati, etc. R. R., 20 Ind. 30 (1863); change of corporate name, Bucksport, etc. R. R. *v.* Buck, 68 Me. 81 (1878); Clark *v.* Monongahela Nav. Co., 10 Watts (Pa.), 364 (1840); changing the terminus, Pacific R. R. *v.* Renshaw, 18 Mo. 210 (1852); Ross *v.* Chicago, etc. R. R., 77 Ill. 127, 134 (1875); reduction of capital stock and shortening of the road, Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854); Joslyn *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 329 (1872). *Cf.* Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855); increasing the number of directors, Mower *v.* Staples, 32 Minn. 284 (1884); or enlarging the capital stock and extending the road, such changes not appearing on the record to be detrimental, Peoria, etc. R. R. *v.* Elting, 17 Ill. 429 (1856); Rice *v.* Rock Island, etc. R. R., 21 Ill. 93 (1859); and minor changes in general, Union Agric. etc. Assoc. *v.* Mill, 31 Iowa, 95 (1870); also extensive changes, Illinois River R. R. *v.* Zimmer, 20 Ill. 654 (1858); such as extending the road, Cross *v.* Peach Bottom Ry., 90 Pa. St. 392 (1879); or purchasing another railroad, Venner *v.* Atchison, etc. R. R., 28 Fed. Rep. 581 (1886). An amendment increasing the capital stock and authorizing a branch road does not release subscribers. Schenectady, etc. Co. *v.* Thatcher, 11 N. Y. 102 (1854). See also Gray *v.* Coffin, 63 Mass. 192 (1852); Child *v.* Coffin, 17 Mass. 64 (1820); Longley *v.* Little, 26 Me. 162 (1846); Payson *v.* Withers, 5 Biss. 269 (1873); s. c., 19 Fed. Cas. 29; Joy *v.* Jackson, etc. Co., 11 Mich. 155 (1863); Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820); Greenville, etc. R. R. *v.* Johnson, 8 Baxt. (Tenn.) 332 (1874); Fall River Iron Works *v.* Old Colony R. R., 87 Mass. 221 (1862). An increase of the capital stock as allowed by the charter does not release subscribers. Port Edwards, etc. Ry. *v.* Arpin, 80 Wis. 214 (1891). An amendment may authorize the directors to change the location of toll gates. Bardstown, etc. Co. *v.* Rodman, 13 S. W. Rep. 917 (Ky. 1890). In Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236 (1886), an amendment authorizing a corporation to buy the stock of another railroad corporation and to guarantee its bonds was held to be valid. An amendment authorizing a dam company to raise the height of its dam is not a fundamental change. Gray *v.* Monongahela Nav. Co., 2 Watts & S. 156 (Pa. 1841). So also of an amendment shortening notices of calls from ninety to twenty days. Illinois River R. R. *v.* Beers, 27 Ill. 185 (1862); and an amendment making subscriptions payable five per cent. monthly instead of twenty-five per cent. annually. Burlington, etc. R. R. *v.* White, 5 Iowa, 409 (1857). The legislature may authorize a seminary for girls to lease a part of the premises to school commissioners. Webster *v.* Cambridge Female Seminary, 78 Md. 193 (1893). An amendment to the charter may prescribe that unnecessary corporate real estate shall be divided among or partitioned between the stockholders. Merchant *v.* Western Land Assoc., 56 Minn. 327 (1894). The legislature may authorize a water-works company to sell its property to a

stockholder who does not assent to such an amendment. Considerable difficulty is experienced in determining what is a material and fundamental change. Each case is decided upon its own facts, and consequently the best light as to the spirit of what constitutes a material change is obtained by a study of the facts of cases which have been decided.[1]

municipality. Peabody *v.* Westerly Water-works, 20 R. I. 176 (1897). Where a statute provides that the charter may be amended in certain respects upon the directors or a majority of them making and signing a certificate, such making and signing need not be at a meeting of the directors. No meeting is required. Burden *v.* Burden, 159 N. Y. 287 (1899). Under a statute authorizing the stockholders by an amended certificate to change the object of the corporation, the certificate may be amended so as to give a corporation power to purchase stock in other corporations. Meredith *v.* New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445 (1899). A member of an incorporated mutual life insurance association cannot prevent the association accepting an amendment to its charter changing the location of its principal place of business. Park *v.* Modern, etc. of America, 181 Ill. 214 (1899).

[1] Under the circumstances of the cases it has been held a material change to shorten and vary the route, Winter *v.* Muscogee R. R., 11 Ga. 438 (1852); to vary the route, Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 268 (1811); Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384 (1813); Hester *v.* Memphis, etc. R. R., 32 Miss. 378 (1856); Witter *v.* Mississippi, etc. R. R., 20 Ark. 463 (1859): Champion *v.* Memphis, etc. R. R., 35 Miss. 692 (1858); Simpson *v.* Denison, 10 Hare, 54 (1852); changing a terminus, Manheim, etc. Co. *v.* Arndt, 31 Pa. St. 317 (1858); Marietta, etc. R. R. *v.* Elliott, 10 Ohio St. 57 (1859); Middlesex Turnp. Corp. *v.* Locke, 8 Mass. 268 (1811); Middlesex Turnp. Corp. *v.* Swan, 10 Mass. 384 (1813); Thompson *v.* Guion, 5 Jones, Eq. (N. C.) 113 (1859); permitting a railroad to go into water transportation business, Hartford, etc. R. R. *v.* Croswell, 5 Hill, 383 (1843), a leading case; Marietta, etc. R. R. *v.* Elliott, 10 Ohio St. 57 (1859); shortening the line, First Nat. Bank *v.* Charlotte, 85 N. C. 433 (1881); allowing business to be commenced before the full capital stock is subscribed, Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876); dividing the line and forming two or more corporations, Indiana, etc. Turnp. Co. *v.* Phillips, 2 Pen. & W. (Pa.) 184 (1830); Fulton County *v.* Mississippi, etc. R. R., 21 Ill. 338 (1859); Carlisle *v.* Terre Haute, etc. R. R., 6 Ind. 316 (1855); transferring a railroad subscription from one railroad to another, Pittsburg, etc. R. R. *v.* Gazzam, 32 Pa. St. 340 (1858); making the charter perpetual and increasing power to hold property, Union Locks & Canals *v.* Towne, 1 N. H. 44 (1817); allowing a life insurance company to insure against fire and marine loss, Ashton *v.* Burbank, 2 Dill. 435 (1873); s. c., 2 Fed. Cas. 26; extending the line, Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851). See also Noesen *v.* Port Washington, 37 Wis. 168 (1875), where there was an amendment authorizing the purchase of a railroad running at right angles to the old, but a lease was upheld; increasing the par value of the stock, Mahan *v.* Wood, 44 Cal. 462 (1872); consolidating the corporation with another corporation, Illinois, etc. R. R. *v.* Cook, 29 Ill. 237 (1862); McCray *v.* Junction R. R., 9 Ind. 358 (1857) Shelbyville, etc. Turnp. Co. *v.* Barnes, 42 Ind. 498 (1873); Booe *v.* Junction R. R., 10 Ind. 93 (1857); New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517 (1854); Clearwater *v.* Meredith, 1 Wall. 25 (1863); Knoxville

§ 501. *Amendments under the reserved power of the state to alter, amend, or repeal the charter.*— The extent of the power of the legislature to amend a charter, where it has reserved that power, is not yet fully settled, and is full of difficulties. There is a strong

v. Knoxville, etc. R. R., 22 Fep. Rep. 758 (1884); Kean *v.* Johnson, 9 N. J. Eq. 401 (1853); Black *v.* Delaware, etc. Canal Co., 24 N. J. Eq. 455 (1873). *Cf.* Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858), criticised in Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930: Fry *v.* Lexington, etc R. R., 2 Metc. (Ky.) 314 (1859). Until, however, the corporation accepts such amendment the stockholders cannot complain. Delaware, etc. R. R. *v.* Irick, 23 N. J. L. 321 (1852). Amendments which have not been acted upon do not release the subscriber. Taylor *v.* Supervisors, 86 Va. 506 (1889). See, in general, Pearce *v.* Madison, etc. R. R., 21 How. 441 (1858); Tuttle *v.* Michigan Air Line R. R., 35 Mich. 247 (1877); New Jersey Mid. Ry. *v.* Strait, 35 N. J. L. 322 (1872). In all these cases neither a mandatory statute, nor a vote of the directors nor a majority of the stockholders can compel a dissenting stockholder to accept the change. It would be unconstitutional. The stockholder may say: "I have agreed to become interested in a railroad company, and have contracted in view of the profits to be expected, and the perils and losses incident to that description of business; but I have not agreed that those to be entrusted with the capital I contribute shall have power to use it in a business of a different character, and attended with hazards of a different description." Marietta, etc. R. R. *v.* Elliott, 10 Ohio St. 57 (1859). Even though the legislature, after a turnpike corporation is organized, authorizes it to issue stock in payment for another turnpike, yet a dissenting stockholder may prevent the purchase by showing that it decreases the value of his stock. Shaw *v.* Campbell, etc. Co., 15 S. W. Rep. 245 (Ky. 1891). Where the statutes under which the company is organized allow the objects of the company to be changed on a vote of the stockholders, a dissenting stockholder is not released from his subscription by such change. Mercantile Statement Co. *v.* Kneal, 51 Minn. 263 (1892). Acts relative to a corporation may be so radical as to constitute a new charter instead of amendments to the old one. Snook *v.* Georgia Imp. Co., 83 Ga. 61 (1889). Where a municipality has subscribed for stock and issued its bonds indorsed by a railroad company to raise money to pay the subscription, the legislature cannot authorize the company to apply its assets to the payment of such bonds. A stockholder may enjoin it. Hill *v.* Glasgow R. R., 41 Fed. Rep. 610 (1888). The legislature cannot, in the amendment itself, authorize the majority to bind the minority herein. New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517 (1854). Where a charter authorizes a lease, if assented to by the stockholders, an amendment authorizing such a lease by the directors would be unconstitutional, unless accepted by the stockholders. *Re* Opinion of the Judges, 28 S. E. Rep. 18 (N. C. 1897). Where a state is a stockholder, and by statute is entitled to a certain vote at elections, a subsequent statute cannot give to the state a larger vote. Tucker *v.* Russell, 82 Fed. Rep. 263 (1897). An amendment cannot deprive the members of a corporation of the privilege of electing its directors. The legislature cannot arbitrarily name and appoint trustees of an educational corporation, the charter providing that vacancies shall be filled by the remaining trustees. Sheriff *v.* Lowndes, 16 Md. 357 (1860). It cannot give to the city of Louisville the power to elect the trustees of the University of Louisville, an educational

tendency in the decisions, and a tendency which is deserving of the highest commendation, to limit the power of the legislature to amend a charter under this reserved power. It should be restricted to those amendments only in which the state has a public interest. Any attempt to use this power of amendment for the purpose of authorizing a majority of the stockholders to force upon the minority a material change in the enterprise is contrary to law and the spirit of justice. Under such reserved power the legislature has only that right to amend the charter which it would have had in case the Dartmouth College case had decided that the federal constitution did not apply to corporate charters.[1] In fact the his-

corporation. Louisville *v.* University of Louisville, 15 B. Mon. (Ky.) 642 (1855). It cannot turn over the property of an educational institution to another educational institution. Ohio *v.* Neff, 52 Ohio St. 375 (1895). It cannot vest the government of an incorporated academy in a new board of trustees. Norris *v.* Abingdon Academy, 7 Gill & J. (Md.) 7 (1834). *Cf.* § 609*a*, *infra*. For a valuable argument against the power of a majority of the stockholders to accept an amendment of the charter so as to give the company the power to lease its railroad, see 8 Harvard L. Rev. 396. In Loewenthal *v.* Rubber, etc. Co., 52 N. J. Eq. 440 (1894), the court held that the original by-laws constituted a contract between the stockholders, and that a by-law providing for cumulative voting could not be repealed. On the right of a dissenting stockholder in general, see also Printing House *v.* Trustees, 104 U. S. 711 (1881; Hoey *v.* Henderson, 32 La. Ann. 1069 (1880); *Re* St. Mary's Church, 7 Serg. & R. (Pa.) 517 (1822). A majority of the stockholders of a railroad company have no power to amend the charter so as to accept the general railroad act of the state, which general act will give the company the right to indefinitely extend its railroad, build branch lines, lease its property, build and operate steamboats, or consolidate with any other railroad company. Such a wholesale amendment is illegal as against the dissent of a stockholder, even though a portion of such general act might have been accepted as being not a fundamental but merely an auxiliary amendment. Alexander *v.* Atlanta, etc. R. R. Co., 108 Ga. 151 (1899). Where an insurance fund has been collected by an exchange, in accordance with its charter, a by-law subsequently passed distributing the fund among the members is illegal as against the objection of any member who contributed to the fund. Parish *v.* New York, etc. Exchange, 169 N. Y. 34 (1901). A holder of preferred stock may prevent a reduction of the preferred dividend by an amendment of the certificate of incorporation, even though the statutes of the state at the time of organization of the company authorized the certificate of incorporation to be amended by a certain vote. Such reduction may be enjoined. Pronik *v.* Spirits, etc. Co., 58 N. J. Eq. 97 (1899).

[1] Sinking Fund Cases, 99 U. S. 700, 720 (1878); Miller *v.* State, 15 Wall. 478, 495 (1872); San Mateo County *v.* Southern Pacific R. R., 8 Sawyer, 238, 279 (1882); Detroit *v.* Detroit, etc. Co., 43 Mich. 140 (1880). The reserved right to amend or repeal a charter "leaves the state where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsist-

torical origin of this reservation of the right to amend was due to the effort of the various states of the Union to escape from the decision in the Dartmouth College case.[1] By this reserved right the restraint of the federal constitution is done away with. But the power to make a new contract for the stockholders is not thereby given to the legislature. The legislature may repeal the charter, but cannot force any stockholder into a contract against his will.

The power to make amendments, and to repeal and alter charters, has been reserved in most of the states of the Union.[2] It is clearly established that the legislature cannot, under this reserved power, amend the charter so as to change the whole character of the enterprise and compel the corporation to proceed under the amended charter.[3] The restrictions of the state constitution still exist, and individuals cannot be forced by the state into new con-

ent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired." Smith *v.* Lake Shore, etc. Co., 72 N. W. Rep. 328 (Mich. 1897), reversed on another point in 173 U. S. 684 (1899).

[1] See Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 352 (1884).

[2] See the notes below. The following special references are made to some of the constitutional provisions on this subject: Constitution of Alabama, XIII, 1; Arkansas, V, 48; California, IV, 31; 1879, XII, 1; Colorado, 1876, XV, 3; Delaware, II, 17; Iowa, VIII, 12; Kansas, XII, 1; Maine, Laws of 1831; Maryland, III, 48, par. 2; Massachusetts, St. 1830, ch. 81; R. S., ch. 44, § 23; Gen. St., ch. 68, § 41; Michigan, XV, 1, 8; Missouri, VIII, 14; Nebraska, 1875, XI; Nevada, VIII, 1; New Jersey, Amend. IV, 7, par. 11, cl. 11; New York, VIII, 1, R. S., pt. 1, ch. XVIII, title 3, § 8; North Carolina, VIII, 1; Ohio, XVIII, 2; Oregon, XI, 2; Pennsylvania, XVI, 10; South Carolina, XII, 1; Tennessee, XI, 8; Texas, 1875, XII, 5, 7; Wisconsin, XI, § 1; *Re* New York Elevated R. R., 70 N. Y. 327 (1877); Johnson *v.* Hudson River R. R., 49 N. Y. 455 (1872); Bank of Chenango *v.* Brown, 26 N. Y. 467 (1863); Ashuelot R. R. *v.* Elliot, 58 N. H. 451, 454 (1878).

[3] In Pennsylvania it is held that the reserved power, when used so as to make an amendment compulsory on the corporation, "is in the nature of a police power, designed for the protection of the public welfare." Cross *v.* Peach Bottom Ry., 90 Pa. St. 392 (1879). Under its reserved power to amend, the state may give a remedy against a mill-dam corporation for injury by flood. Monongahela Nav. Co. *v.* Coon, 6 Pa. St. 379 (1847), holding also that, by accepting an amendment which is granted on condition that the reserved power to amend shall apply to the corporation, it is subject to such power; Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863); Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854). In Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884), the court said: "It was not competent for the legislature to do more in this respect than to waive the public rights. It could not divest or impair the rights of the shareholders as between themselves, as guaranteed by the company's charter, without their consent. It was upon the faith of the stipulations contained in said charter that the shareholders subscribed to the capital stock, and thereby made themselves members of the corporation." In Orr *v.* Bracken

tracts.[1] Moreover the amendment must not be foreign to the purposes and objects of the original charter. The power of amendment has its limits. "It can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one and oblige the stockholders to accept it. . . . The power to alter and modify does not give power to make any substantial additions to the work."[2] The best view taken of this reserved power of the state is that under it a fundamental amendment to the charter does not authorize a majority of the stockholders to accept the amendment and proceed, but that unanimous consent of the stockholders is necessary.[3]

County, 81 Ky. 593 (1884), an amendment under the reserved power, changing the method of voting, was decided to be of no effect until the stockholders accepted it. The court said: "The right to amend the charter may be expressly reserved, but that right does not confer the power of taking from the corporators the control of the corporate property." See also § 609*a*, *infra*, as to amendments affecting the right to vote. Query, whether a mandatory consolidation would be legal. Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930. When legal a mandatory change does not require acceptance by the stockholders. Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867). But when the mandatory amendment goes beyond the legal limits, it must be accepted by the corporation as though it were made optional with the corporation. Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863), the court saying that the power of amendment was never reserved with reference to any question between the corporation and its stock subscribers, but solely with reference to questions between the corporation and the state, where the latter desired to make compulsory amendments against the will of the former. The corporation cannot be compelled to proceed. All the state "can do is to grant it the power, and then it is for the corporation to accept it or not, as it pleases." See also § 497, *supra*.

[1] Cooley, Const. Lim. (5th ed.), p. 454. As to repeals of charters under this reserved power, see ch. XXXVIII, *infra*.

[2] Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867). "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." Shields *v.* Ohio, 95 U. S. 319 (1877); Spring Valley Water-works *v.* San Francisco, 61 Cal. 3 (1881). The amendment must "not defeat or substantially impair the object of the grant, or any rights vested under it." Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). See also Miller *v.* State, 15 Wall. 478 (1872); Worcester *v.* Norwich, etc. R. R., 109 Mass. 103 (1871). The motives of the legislators cannot be inquired into. Northern R. R. *v.* Miller, 10 Barb. 260 (1851); *Re* N. Y. Elevated R. R., 70 N. Y. 327, 351 (1877). See Astor *v.* Arcade Ry., 113 N. Y. 93, 111 (1889).

[3] Mills *v.* Central R. R., 41 N. J. Eq. 1, 4 (1886), where a statute subsequent to the charter authorized the consolidation of railroad companies. The court said: "The legislature did not intend to affect the rights of stockholders *inter sese*, and the act does not do so, either expressly or by implication. . . . After shareholders had entered into a contract among themselves, under leg-

Under this reserved power, however, the legislature, it is held, may impose a statutory liability upon stockholders after they have been incorporated and have gone into business under a charter which does not impose such liability. The exercise of this power by the legislature, in such a case, is held to be only a repeal of part of the corporate franchises.[1] So, also, it is said that under this reserved power the legislature may impose a statutory liability for the future debts and obligations of the corporation.[2]

islative sanction, and expended their money in the execution of the plan mutually agreed upon, the plan could not, even by virtue of legislative enactment, be radically changed by the majority alone, and dissentient stockholders be compelled to engage in a new and totally different undertaking, because such action would impair the obligation of the dissenting stockholders' contract with their associates and the state." The court said also, that, under its reserved power to amend a charter, the state cannot give "a power to one part of the corporators as against the other which they did not have before." The case of Cross *v.* Peach Bottom Ry., 90 Pa. St. 392 (1879), holds that "the legislative reservation is in the nature of a police power, designed for the protection of the public welfare; and where such protection becomes necessary, the law-making power may act without consulting either the interests or will of the company; and in such case it may well be that not only the company but its stockholders must submit. . . . The reservation . . . was only intended to enable the legislature to act without the consent and against the will of the corporation." On this subject see also § 497, *supra*, and the notes thereto.

[1] Quoted and approved in Williams *v.* Nall, 55 S. W. Rep. 706 (Ky. 1900), a case where the court held that the minority stockholders were not entitled to a dissolution of the corporation by reason of a statute imposing a statutory liability upon the stockholders. McGowan *v.* McDonald, 111 Cal. 57 (1896); Bissell *v.* Heath, 98 Mich. 472 (1894); South Bay, etc. Co. *v.* Gray, 30 Me. 547 (1849); Sleeper *v.* Goodwin, 67 Wis. 577 (1887). *Cf.* Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). See §§ 242, 280, 497, *supra*. Amendment under reserved right cannot affect rights of previous creditors against the corporation. Bank of Old Dominion *v.* McVeigh, 20 Gratt. 457 (1871).

[2] Sherman *v.* Smith, 1 Black, 587 (1861); aff'g *Re* Oliver Lee's Bank, 21 N. Y. 9 (1860); U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 199 (1858). *Cf.* Bailey *v.* Hollister, 26 N. Y. 112 (1862); Sinking Fund Cases, 99 U. S. 700 (1878); Oldtown, etc. R. R. *v.* Veazie, 39 Me. 571 (1855); Green *v.* Biddle, 8 Wheat. 1, 84 (1823); Gardner *v.* Hope Ins. Co., 9 R. I. 194 (1869). Such increased liability may be imposed by a new constitution of the state. *Re* Reciprocity Bank, 22 N. Y. 9 (1860); U. S. Trust Co. *v.* U. S. F. Ins. Co., 18 N. Y. 199 (1858); *Re* Oliver Lee's Bank, 21 N. Y. 9 (1860); aff'd *sub nom.* Sherman *v.* Smith, 1 Black, 587 (1861). In Consolidated Assoc. *v.* Lord, 35 La. Ann. 425 (1883), the court refused to uphold an amendment which imposed further liability on the stockholder. The statutory liability in California does not apply to stockholders in corporations existing at the time the statute was enacted. United States *v.* Stanford, 69 Fed. Rep. 25 (1895); aff'd, 161 U. S. 412 (1896). A legislature may by statute create a statutory liability of stockholders for existing debts of the corporation, although the original charter did not contain such liability. Lincoln *v.* Carroll, 73 N. W. Rep. 173 (Minn. 1897).

The constitutionality of various amendments to charters in which the legislature reserved the right to amend or repeal is considered in the notes below.[1]

Under the reserved right of the legislature to alter or repeal charters, the legislature may impose an additional liability on stockholders in a bank. Barnes *v.* Arnold, 45 N. Y. App. Div. 314 (1899). See also § 497, *supra.*

[1] Under the reserved right to amend, alter, or repeal charters, the rights of stockholders among themselves cannot be impaired, except as required by public interest. While it is true that the charter constitutes a contract between the stockholders, yet under this reserved power the legislature may authorize existing corporations to purchase and retire preferred stock and issue in lieu thereof mortgage bonds, such amendment being construed to be in behalf of the public interest. Berger *v.* United States Steel Corp., 53 Atl. Rep. 68 (N. J. 1902). Under the reserved right to amend charters, the legislature may authorize a corporation to reduce its capital stock and issue bonds in exchange for such part of the capital stock as is retired, especially where the original charter authorized the corporation to decrease its capital stock by purchasing its own stock. Venner Co. *v.* United States, etc. Corp., 116 Fed. Rep. 1012 (1902). Even under the right to amend or repeal charters a statute changing the amount which a member of a building association is entitled to upon withdrawal is unconstitutional. Intiso *v.* State, etc. Assoc., 53 Atl. Rep. 206 (N. J. 1902). An exclusive grant by the legislature to a water-works company to supply the city with water may be repealed under the constitution of Alabama which prohibits the legislature from "making any irrevocable grants of special privileges or immunities," and another provision of the constitution that a repeal or amendment may be made, provided "no injustice shall be done to the incorporators" does not prevent such amendment. Bienville, etc. Co. *v.* Mobile, 186 U. S. 212 (1902). The case of Sinking-Fund Com'rs *v.* Green, etc. Co., 79 Ky. 73 (1880), holding that the right to take tolls cannot be abolished where the company has maintained and kept in repair the rivers, relying on the right to take toll, is referred to in Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). Concerning this subject, see § 902, *infra.* In Ohio, etc. Ry. *v.* People, 123 Ill. 467 (1888), the court referred to but did not decide the question whether a state could withdraw its consent to a consolidation after the consolidation had been made. The legislature cannot, under its reserved power, compel a dam company to erect new fish-ways after it has compelled them to pay damages to fish owners. Commonwealth *v.* Essex Co., 79 Mass. 239 (1859). Under its reserved right the legislature may amend the charter of a college which has private stockholders, but to which the state contributes funds, so that instead of the state having four directors out of eleven, the state shall have seven out of twelve. Jackson *v.* Walsh, 75 Md. 304 (1892); but see Sage *v.* Dillard, 15 B. Mon. (Ky.) 340, 357 (1854); State *v.* Adams, 44 Mo. 570 (1869); Allen *v.* McKean, 1 Sumn. 276 (1833); s. c., 1 Fed. Cas. 489. Under its reserved right to amend or repeal a charter, the legislature may authorize a change in the location of a college, even though the citizens of the place where it was first located donated largely to its funds. Bryan *v.* Board of Education, 151 U. S. 639 (1894).

Where a gas company has an exclusive right to supply gas to a city, subject to the right of the legislature to alter or revoke the same, the legislature may authorize the city to construct its own gas-works. A municipal ordinance is not such a contract as is pro-

The supreme court of the United States has said that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter

tected by the constitution of the United States in regard to impairing the validity of contracts. It is a contract that is protected in the same way as contracts of individuals. Hamilton, etc. Co. *v.* Hamilton City, 146 U. S. 258 (1892). As to the latter point, see *contra,* City Ry. *v.* Citizens' Street R. R., 166 U. S. 557 (1897). Where an amendment exempts the company from taxation and provides that it shall furnish the city with water free of cost, a repeal of the exemption repeals the obligation as to water. Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892). An exemption from taxation may be repealed under the reserved right to amend, etc. Pearsall *v.* Great Northern Ry., 161 U. S. 646, 663 (1896); Wagner Free Institute *v.* Philadelphia, 132 Pa. St. 612 (1890). As to such repeals see § 572*b, infra.* Under the reserved power to amend or repeal a charter the legislature may compel the corporation to pay wages weekly to its employees. State *v.* Brown, etc. Mfg. Co., 18 R. I. 16 (1892). Under the reserved right to amend the charter the legislature may amend so as to confine the road to a particular route, and outstanding contracts of the company do not prevent such an amendment. Macon, etc. R. R. *v.* Gibson, 85 Ga. 1 (1890). Under its reserved power to amend, the legislature may require several railroads to acquire, build to, and use a union depot. Worcester *v.* Norwich, etc. R. R., 109 Mass. 103 (1871). Even though a provision in a special railroad charter provides that rates shall be fixed by its board of directors, yet, under a reserved right to amend, the legislature may authorize a state commission to regulate rates. Matthews *v.* Board of Corporation Com'rs, etc., 97 Fed. Rep. 400 (1899). The legislature canot reduce the rates on a railroad where the original charter fixed the rates, and even a reserved right to amend the charter upon compensation being made does not sustain such reduction of rates, no compensation being provided for. Pingree *v.* Michigan, etc. Co., 118 Mich. 314 (1898). A state, under its reserved power to amend or repeal charters, cannot change the original statute as to rates to be charged by irrigation companies, which prescribed that the actual investment should be taken into consideration by enacting a new statute which omits that check on the reduction. San Joaquin, etc. Co. *v.* Stanislaus County, 113 Fed. Rep. 930 (1902). In regard to the question of the constitutionality of a radical amendment to a charter under the reserved right to amend, see Shields *v.* Ohio, 95 U. S. 319 (1877); Sinking Fund Cases, 99 U. S. 700 (1878); Pennsylvania College Cases, 13 Wall. 190 (1871); Miller *v.* State, 15 Wall. 478 (1872); Spring Valley Water-works *v.* Schottler, 110 U. S. 347 (1884); Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). Authorizing one railroad to subscribe for stock in another railroad has been held legal. White *v.* Syracuse, etc. R. R., 14 Barb. 559 (1853). Also borrowing money and building branches. Northern R. R. *v.* Miller, 10 Barb. 260 (1851). Also reducing capital stock. Joslyn *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 329 (1872). See also White Hall, etc. R. R. *v.* Myers, 16 Abb. Pr. (N. S.) 34 (1872); State *v.* Accommodation Bank, 26 La. Ann. 288 (1874). The extension of the line from six to seventeen miles was held to require a unanimous acceptance in Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867). Under its reserved right to amend, the legislature may change the name of a corporation. Phinney *v.* Trustees, etc., 88 Md. 633 (1898).

granted subject to it which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right."[1] Under the reserved power to amend a charter the legislature may authorize the consolidation of railroads.[2] Under the reserved right of the legislature to alter or amend a charter the legislature may pass a statute allowing stockholders to cumulate their votes in elections, thus enabling minority stockholders to elect a minority of the board of directors.[3] Even though a railroad has made a survey and located its route, yet, if it has not condemned its right of way under the state statute, the state, under the reserved right to amend or repeal, may repeal the power to so condemn.[4] A general statute reserving the power to amend or repeal charters is a part of all special charters passed subsequently.[5] A general statute reserving to the legislature the right to repeal and amend charters applies to extensions of pre-existing charters

[1] New York & New England R. R. *v.* Bristol, 151 U. S. 556 (1894).

[2] Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895); Hale *v.* Cheshire R. R., 161 Mass. 443 (1894); Bishop *v.* Brainerd, 28 Conn. 289 (1859). *Contra*, Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863), a dictum; Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); S. C., 17 Fed. Cas. 930. See also § 896, *infra*. A subscription for stock is not released by a subsequent consolidation of the company with another, unless such consolidation is a fundamental alteration of the organization. Morrill *v.* Smith County, 89 Tex. 529 (1896). It has been held that, under its reserved power, the legislature may authorize a road to lease to another. Durfee *v.* Old Colony, etc. R. R., 87 Mass. 230 (1862). Under the reserved right to amend the charter, an amendment authorizing a lease is not valid except with the unanimous consent of the stockholders. Dow *v.* Northern R. R., 67 N. H. 1 (1887), giving an exhaustive discussion of the question.

[3] Looker *v.* Maynard, 179 U. S. 46 (1900). Where by statute the state retains power to amend charters subsequently granted, a subsequent constitutional provision for cumulative voting applies to all such corporations, whether organized by special charter or under the general act, and does not impair the validity of a contract. So also where a corporation amends its charter under an act providing for cumulative voting, such cumulative voting applies to it. Gregg *v.* Granby, etc. Co., 164 Mo. 616 (1901). Under the reserved right to amend, the legislature may change the charter of a library corporation so that each share shall have one vote instead of restricting the vote of those who held more than five shares. Rankin *v.* Newark, etc. Assoc., 64 N. J. L. 265 (1900).

[4] Adirondack Ry. *v.* New York State, 176 U. S. 335 (1900).

[5] A general statute reserving to the state the right to amend or repeal a charter is a part of all special charters thereafter passed, even though not expressly made a part thereof. Citizens' Sav. Bank, etc. *v.* Owensboro, 173 U. S. 636, 644 (1899). A general statute reserving the right to alter, amend, or repeal charters applies to all subsequent special charters not expressly excepted from its effect. Watson Seminary *v.* Pike Co. Court, 149 Mo. 57 (1899). See § 2, *supra*. A general antecedent statute reserving the right to

as well as to subsequent grants of new charters.[1] Where a city reserves the right in its grant to a telephone company to repeal it, such repeal is legal.[2] An exclusive right of a street railway company may be repealed under a reserved right by the legislature to revoke, and such repeal may be by implication.[3]

§ 502. *Dissenting stockholder's remedy against an illegal amendment.*— Where an unauthorized and illegal amendment has been accepted by a corporation and is about to be acted upon, a stockholder has two remedies. If he has not paid his subscription, he may consider himself released from his liability to pay the subscription, or he may begin suit in equity to obtain an injunction against or to set aside any action by the corporation under the amendment.[4] If the stockholder has already paid his subscription,

amend does not apply to subsequent amendments to an old charter where it was not so intended. A new charter may be so drawn as to be free from such a general antecedent statute. New Jersey *v.* Yard, 95 U. S. 104 (1877), rev'g 37 N. J. L. 228. Where, subsequently to the incorporation of a company, a general act reserves to the legislature the right to amend or repeal any and all charters, the legislature may repeal any amendments to the charter, so far as such amendments are passed after the general act, where the amendments do not expressly waive the legislative right of amendment or repeal. But any amendment should be "saving, whenever that power was exerted, all rights previously vested." An exemption from taxation may be repealed under the reserved power. (Approving Tomlinson *v.* Jessup, 15 Wall. 454 — 1872, and Railroad Co. *v.* Maine, 96 U. S. 499 — 1877.) Creditors stand upon the same footing in this respect. Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892).

[1] Northern Bank, etc. *v.* Stone, 88 Fed. Rep. 413 (1898).

[2] Southern, etc. Co. *v.* City of Richmond, 98 Fed. Rep. 671 (1899).

[3] Wilmington City Ry. *v.* Wilmington, etc. Ry., 46 Atl. Rep. 12 (Del. 1900). Under the right reserved in the constitution of the state to revoke charters, the legislature may disregard an exclusive right granted to a street railway by its special charter and may grant rights to another company. Wilmington, etc. Ry. *v.* People's Ry., 47 Atl. Rep. 245 (Del. 1900). *Cf.* § 913, *infra.*

[4] This rule is recognized and applied in most of the cases of this chapter. See also Clearwater *v.* Meredith, 1 Wall. 25 (1863), holding that the stockholder was released, and saying: "Clearwater could have prevented this consolidation had he chosen to do so;" Nugent *v.* Supervisors, 19 Wall. 241 (1873). An amendment to the charter materially changing the terminus releases a dissenting subscriber for stock from his subscription. Kenosha, etc. R. R. *v.* Marsh, 17 Wis. 13 (1863). A change of the termini under an amendment to the charter releases previous subscribers, there being no reserved right to make such amendment. Snook *v.* Georgia Imp. Co., 83 Ga. 61 (1889). A fundamental change in the corporation releases subscribers. Greenbrier Ind. Exposition *v.* Rodes, 37 W. Va. 738 (1893); Buffalo, etc. R. R. *v.* Pottle, 23 Barb. 21 (1856). A change in the plan of organization so as to have a larger capital stock than was originally intended releases a subscriber. Norwich, etc. Co. *v.* Hockaday, 89 Va. 557 (1893). A change of route releases the subscriber. Champion *v.* Memphis, etc. R.

then his only remedy is an injunction or a suit to set aside.[1] In Pennsylvania it has been held that the stockholder may have an injunction herein, but only until the corporation shall have purchased his interest in the corporation.[2] This decision, however, has been doubted, and hardly seems consistent with well-established principles protecting persons in their right to retain their property except as taken from them under the power of eminent domain.[3]

§ 503. *Assent and acquiescence as a bar to the stockholder's remedy.*— A stockholder may be estopped from objecting to an amendment by his express or implied acquiescence therein. Any acts indicating an acceptance by him of the amendment bind him and bar his suit.[4] Acquiescence may sometimes grow out of his silence

R., 35 Miss. 692 (1858). A charter amendment enlarging the corporate objects from fire and accident to fire, marine, and inland insurance releases dissenting stockholders. Ashton *v.* Burbank, 2 Dill. 435 (1873); s. c., 2 Fed. Cas. 26. A legislative amendment not accepted by the company is no defense to a subscription. Chattanooga, etc. R. R. *v.* Warthen, 98 Ga. 599 (1896). In opposition to the above rule of law, there are some decisions holding that the subscribers' only remedy is an injunction. Were it not that the great weight of authority holds otherwise, this view would be commended as the only logical result of the law. There is no reason why a stockholder who has not paid his subscription should be better off than he who has met that obligation. See § 187, *supra;* also Hays *v.* Ottawa, etc. R. R., 61 Ill. 422 (1871); Pacific R. R. *v.* Hughes, 22 Mo. 291 (1855); Martin *v.* Pensacola R. R., 8 Fla. 370, 389 (1859); Ware *v.* Grand Junction Water Works, 2 Russ. & M. 470 (1831); First Nat. Bank *v.* Charlotte, 85 N. C. 433 (1881). The plea of release must allege acceptance by the corporation, and injury to the defendant sued on his subscription. Hawkins *v.* Mississippi, etc. R. R., 35 Miss. 688 (1858). The subscribers' remedy, where the charter differs from the prospectus or contract of subscription, is considered elsewhere. See § 194, ch. X, *supra.*

[1] This remedy also is supported by a large number of the cases in this chapter. See Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851); Black *v.* Delaware, etc. Canal Co., 24 N. J. Eq. 455 (1873); Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930; Ware *v.* Grand Junction Water Works, 2 Russ. & M. 470 (1831). The stockholder cannot enjoin parties from applying to the legislature for the amendment. Story *v.* Jersey City, etc. Co., 16 N. J. Eq. 13 (1863), reviewing the cases; Stevens *v.* Rutland, etc. R. R., 29 Vt. 545 (1851).

[2] Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858), approved in State *v.* Bailey, 16 Ind. 46 (1861). *Cf.* Ship *v.* Crosskill, L. R. 10 Eq. 73 (1870); Stewart *v.* Austin, L. R. 3 Eq. 299 (1866), holding that the recovery back cannot be in a court of equity.

[3] Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930.

[4] Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864). Long delay may constitute a ratification herein, no formal acceptance of an amendment being necessary. Gifford *v.* New Jersey R. R., 10 N. J. Eq. 171 (1854); Bangor, etc. R. R. *v.* Smith, 47 Me. 34 (1859); State *v.* Sibley, 25 Minn. 387 (1879); Hope Mut. F. Ins. Co. *v.* Beckman, 47 Mo. 93 (1870); Covington *v.* Covington, etc. Co., 10 Bush (Ky.), 69 (1874); Kenton County Court *v.* Bank Lick Turnp. Co., 10 Bush (Ky.), 529 (1875); Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27 (1867); Smead *v.* Indianapolis,

or delay under circumstances that called on him to dissent if he so intended.[1] A court of equity will go far to aid a dissenting stockholder where he applies promptly and before large investments and many changes are made on the faith of the acts complained of. But laches will not be tolerated by the courts, especially where important interests are involved.[2]

etc. R. R., 11 Ind. 104 (1858). *Cf.* Pingry *v.* Washburn, 1 Aiken (Vt.), 264 (1826). See, in general, Memphis Branch R. R. *v.* Sullivan, 57 Ga. 240 (1876); Houston *v.* Jefferson College, 63 Pa. St. 428 (1869); Danbury, etc. R. R. *v.* Wilson, 22 Conn. 435 (1853); Vermont, etc. R. R. *v.* Vermont Central R. R., 34 Vt. 1 (1861); Hayworth *v.* Junction R. R., 13 Ind. 348 (1859); Mills *v.* Central R. R., 41 N. J. Eq. 1 (1886); Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); *Ex parte* Booker, 18 Ark. 338 (1857); Upton *v.* Jackson, 1 Flip. C. C. 413 (1874); s. c., 28 Fed. Cas. 844; Goodin *v.* Evans, 18 Ohio St. 150 (1868); also § 640 and ch. XLIV, *infra.* If the stockholder subscribed after the amendment was made he cannot complain. Eppes *v.* Mississippi, etc. R. R., 35 Ala. 33, 54 (1859); McClure *v.* People's Freight Ry., 90 Pa. St. 269 (1879). If a stockholder does not object to an amendment, it is not for a person whose land is being taken under eminent-domain proceedings to object. Ames *v.* Lake Superior, etc. R. R., 21 Minn. 241, 291 (1875). Changes and amendments as to the route do not release the subscriber where he took part therein. Owenton, etc. Co. *v.* Smith, 13 S. W. Rep. 426 (Ky. 1890). Bonds issued under an amendment to a charter with the consent of all the stockholders will be enforced, even though the amendment was invalid. Johnson *v.* Mercantile, etc. Co., 94 Ga. 324 (1894).

[1] Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850); Martin *v.* Pensacola, etc. R. R., 8 Fla. 370 (1859); Owen *v.* Purdy, 12 Ohio St. 73 (1861). *Contra,* Hamilton Mut. Ins. Co. *v.* Hobart, 68 Mass. 543 (1854). Parties taking part in an extension of the road cannot object that the charter amendment authorizing it was unconstitutional. Jones *v.* Concord, etc. R. R., 67 N. H. 234 (1892). Although a radical change in the location of a railroad after a subscription has been made releases the subscription, yet the subscriber may by his acts be bound by such change. Lowell *v.* Washington Co. R. R., 90 Me. 80 (1897). Although a stockholder may enjoin a consolidation of his company with another under a statute passed after the incorporation, the object of the consolidation being different from that of the original corporation, yet where the stockholder delays applying to the court for nearly a year, and in the meantime the consolidated company has borrowed money and given mortgages, and such mortgages are about to be foreclosed, the complaining stockholder is guilty of laches and his remedy is barred. Rabe *v.* Dunlap, 51 N. J. Eq. 40 (1893). A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. The stockholder then can only recover the value of his stock and past dividends. Deposit Bank *v.* Barrett, 13 S. W. Rep. 337 (Ky. 1890). Where stockholders in a college exchange their stock for scholarships, a removal of the college to another location under an amendment to the charter, such amendment having been made twenty-five years prior to such removal, will not be enjoined. Bryan *v.* Board of Education, 90 Ky. 322 (1890). Assent of a stockholder is not presumed, but must be proven. March *v.* Eastern R. R., 43 N. H. 515 (1862); Union Locks and Canals *v.* Towne, 1 N. H. 44 (1817); Ireland *v.* Palestine, etc. Turnp. Co., 19 Ohio St. 369 (1869).

[2] See ch. XLIV, *infra.*

CHAPTER XXIX.

"TRUSTS" AND UNINCORPORATED JOINT-STOCK ASSOCIATIONS.

§ 503a. *Definition and legality of a "trust" — Decisions in the various states on this subject — The anti-trust act of Congress.*— The word "trust" was first used to mean an agreement, between many stockholders in many corporations, to place all their stock in the hands of trustees and to receive therefor trust certificates from the trustees. The stockholders thereby consolidated their interests and became trust-certificate holders. The trustees owned the stock, voted it, elected the officers of the various corporations, controlled the business, received all the dividends on the stock, and used all these dividends to pay dividends on the trust-certificates. The trustees were periodically elected by the trust-certificate holders. The purpose of the "trust" was to control prices, prevent competition, and cheapen the cost of production. The Standard Oil Trust, the American Cotton-Seed Oil Trust, and the Sugar Trust were examples of this method of combination.[1]

[1] The committee of the House of Representatives at Washington, in their report, explained the nature of the Standard Oil Trust and Sugar Trust very clearly. The committee reports "that there exist a certain number of corporations organized under the laws of the different states and subject to their control; that these corporations have issued their stock to various individuals, and that these individual stockholders have surrendered their stock to the trustees named in the agreements creating these trusts, and accepted in lieu thereof certificates issued by the trustees named therein. The agreements provide that the various corporations whose stock is surrendered to the trustees shall preserve their identity and carry on their business." See

Later the word "trust" was given a wider and more popular meaning. It is used to designate any combination of producers for the purpose of controlling prices, reducing cost of production, and suppressing competition. In this sense of the word all schemes whereby those who were competitors combine their interests are "trusts."

During the past ten years trusts have come into great prominence. They have multiplied rapidly and have extended into many branches of business. They have been the object of great popular opposition, and their legality has been assailed, both in the courts and by prohibitory statutes.

The courts have held with great uniformity that these combinations are illegal if their purpose is to restrict production, raise prices, or restrain trade. The law is clear that any combination of competing concerns for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void. This principle of law has been applied with great rigor to some of the trusts. The two leading cases on the subject are the Sugar Trust decision in New York [1] and the Standard Oil Trust decision in Ohio.[2] Many cases showing the different circumstances under which this rule has been applied are given in the notes below, arranged in the alphabetical order of the various states:[3]

4 Ry. & Corp. L. J. 98. Mr. S. C. T. Dodd, the general solicitor and originator of the Standard Oil Trust, defines a trust as "an arrangement by which the stockholders of various corporations place their stocks in the hands of certain trustees, and take in lieu thereof certificates showing each shareholder's equitable interest in all the stock so held. The result is twofold: 1. The stockholders thereby become interested in all the corporations whose stocks are thus held. 2. The trustees elect the directors of the several corporations." See 7 Ry. & Corp. L. J. 236.

[1] The state will, at the instance of the attorney-general, forfeit the charter of a corporation whose stockholders have entered into a "trust" with the stockholders of competing corporations for the purpose of forming a monopoly in and raising the price of sugar. People v. North River, etc. Co., 121 N. Y. 582 (1890). This case broke up the "Sugar Trust" and drove it into transferring all its property to a New Jersey corporation organized for that purpose.

[2] The next important case was State v. Standard Oil Co., 49 Ohio St. 137 (1892). This case declared illegal the Standard Oil Trust. That trust was also subsequently reorganized into a New Jersey corporation.

[3] *California:* Master stevedores may form an association for the purposes of fixing charges and agreeing that all business done by them shall be for the benefit of the association. Herriman v. Menzies, 115 Cal. 16 (1896). "Monopoly signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place." San Diego Water Co. v. San Diego Flume Co., 108 Cal. 549 (1895). A contract whose effect is to give a monopoly in the sale of bags by the vendor agreeing to sell to one party exclusively is illegal, and no damages

These cases indicate the complicated questions and important litigation that have arisen by reason of the trusts. It is believed,

can be collected. Pacific Factor Co. *v.* Adler, 90 Cal. 110 (1891). Although the state is prosecuting a suit to forfeit the charter for entering into a combination, yet a sale of part of the corporate property to a stockholder pending the suit is legal, and the receiver cannot follow the property. A writ of prohibition will issue against him. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Where all the manufacturers of lumber at a certain point contracted to sell to a corporation all the product of the mills so far as such product was sold in four counties, and the mills agreed not to sell to any other parties in those counties except upon a forfeit to the corporation, the court held that any one of the mills could repudiate the contract. In a suit brought by the corporation against one of the mills for refusing to live up to the contract, the court held that the corporation could not recover. Santa Clara, etc. Co. *v.* Hayes, 76 Cal. 387 (1888).

Georgia: The statute against trusts is unconstitutional, inasmuch as it excepts agricultural products and live stock while in possession of the producer. But a merchant may enjoin other merchants from combining and preventing others from selling goods to him, unless he will agree to sell goods at prices fixed by them. Brown *v.* Jacobs, etc. Co., 41 S. E. Rep. 553 (Ga. 1902).

Illinois: In Illinois it is held that a contract of a citizen of Illinois not to engage in the manufacture of paper boxes for ten years in Illinois or Indiana is illegal, as in restraint of trade. Lanzit *v.* J. W. Sefton, etc. Co., 184 Ill. 326 (1900). In the case of Harding *v.* American, etc. Co., 182 Ill. 551 (1899), an Illinois stockholder in a New Jersey glucose manufacturing corporation enjoined in the courts of Illinois a transfer of the property of that corporation, including real estate in Illinois, to another New Jersey corporation, the latter being a trust formed to absorb practically all the glucose factories of the country, the court saying that it need not be proved that prices have actually been raised, but it is sufficient if it is within the power of the corporation to raise them. The court said: "Any combination of competing corporations for the purpose of controlling prices, or limiting production, or suppressing competition, is contrary to public policy and is void." A state may maintain a suit for an injunction against an elevator company using all its capacity for the benefit of its stockholders, where the objection is not raised that there is an adequate remedy at law. Central Elevator Co. *v.* People, 174 Ill. 203 (1898). Where a person conveys property to a corporation, the object being to place the stock of that corporation in the hands of trustees to create a trust, such person, having recovered possession of his property, may defend against his contract to convey. Bishop *v.* American, etc. Co., 157 Ill. 284 (1895). *Quo warranto* lies against a corporation formed to purchase substantially all the distilleries in the country. Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895). The Illinois statute of 1891 against trusts is constitutional. Ford *v.* Chicago, etc. Assoc., 155 Ill. 166 (1895). The state may forfeit the charter of a live-stock corporation where it limits the number of agents which each of its stockholders may employ. People *v.* Chicago L. S. Exchange, 170 Ill. 556 (1897). A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state

however, that the volume of such litigation will decrease rather than increase in the future. Most of the great trusts have been

alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder. Coquard *v.* National L. S. Co., 171 Ill. 480 (1898). Although the general statute authorizes incorporation for any "lawful purpose," yet an incorporation to buy a majority of the stock of each of four competing gas corporations in a city is illegal where the purpose is to create a monopoly. The state may by suit have the charter forfeited. People *v.* Chicago Gas T. Co., 130 Ill. 268 (1889). All gas companies owe a duty to the public. An agreement of two companies in one city to keep out of each other's territory is void. Chicago Gas L. Co. *v.* People's Gas L. Co., 121 Ill. 530 (1887). In Illinois all the grain dealers in a town secretly combined and made contracts by which they controlled the price of grain and the local storehouse accommodations. The parties succeeded, but disagreed in their division of the profits. An action for an accounting was brought by one against another. The court refused to aid either party. The law will leave the guilty conspirators as it finds them. Craft *v.* McConoughy, 79 Ill. 346 (1875).

Indiana: Where two competing gas companies agree on rates to be charged the public, and agree not to interfere with each other's patrons, the state may forfeit their charters, or the court may in its discretion declare a forfeiture or ouster of the right of the defendants to carry out the illegal acts. State *v.* Portland, etc. Co., 153 Ind. 483 (1899). A depot corporation has no right to give a monopoly to one person of the right to solicit cab business at the entrance of the depot, even though such entrance is on the company's grounds. Indianapolis, etc. Ry. *v.* Dohn, 153 Ind. 10 (1899). *Cf.* § 909, *infra.*

Iowa: The Iowa statute against trusts applies to an agreement of insurance companies to charge uniform rates. Beechley *v.* Mulville, 102 Iowa, 602 (1897).

Kansas: A criminal prosecution against the officers of a company for pooling with others to fix the price to be paid for grain, failed in State *v.* Dreany, 69 Pac. Rep. 182 (Kan. 1902), but another prosecution was successful in State *v.* Smiley, 69 Pac. Rep. 199 (Kan. 1902). A dealer in cattle cannot enjoin a voluntary association of other cattle dealers from expelling one of its members for violating a by-law prohibiting him from trading with the plaintiff. Downs *v.* Bennett, 63 Kan. 653 (1901). Where an association of live-stock commission merchants is formed for the purpose of regulating commissions, with a penalty for violation of the same, a member cannot enjoin the association from expelling him for non-payment of the penalty. Greer *v.* Payne, 4 Kan. App. 153 (1896). Insurance business is not interstate commerce. Foreign insurance companies that combine to control and increase the rates of insurance on property inside the state violate the statute against trusts, and their local agents are subject to prosecution therefor. State *v.* Phipps, 50 Kan. 609 (1893).

Kentucky: The anti-trust statute of Kentucky is not void for uncertainty, and an indictment which follows the language of the statute is sufficient. Commonwealth *v.* Grinstead, 55 S. W. Rep. 720 (Ky. 1900). The agreement of two rival boats to divide their earnings in a certain proportion, and if either owner sells he shall not go into the business again for a year, is void. The party who has sold and then returned at once to the business is not liable in damages. Anderson *v.* Jett, 89 Ky. 375 (1889).

Louisiana: Where a draymen's union has obtained a monopoly, and dictates who shall receive a particular contract,

driven from their original mode of organization and have reorganized by conveying all their property to a corporation organized for

and a contract is let to one by a business firm, and then another member claims the contract, which the firm lets to him, and then the firm gives the business to the first member, the second cannot collect damages. Fabacher *v.* Bryant, 46 La. Ann. 820 (1894). A stockholder cannot hold a director liable for the stock becoming worthless by reason of the fact that the director and others sold their stock, amounting to three-fourths of the stock, to the American Cotton Oil Trust, and that the trust then dissolved the corporation by a three-fourths vote, as allowed by statute, although the directors as such voted for the dissolution. Trisconi *v.* Winship, 43 La. Ann. 45 (1891). A pooling contract between two railroads competing for business between the same points is void as against public policy. The court will leave the parties where they are. The arrangement in this case was for a division of earnings. Texas, etc. Ry. *v.* Southern Pac. Ry., 41 La. Ann. 970 (1889). In Louisiana, where several firms owned a large quantity of India bagging, and combined and agreed not to sell except upon the consent of a majority of those who were parties to the agreement, the court refused both to uphold the agreement and to enforce the penalty for a violation of the compact. India Bagging Assoc. *v.* Kock, 14 La. Ann. 168 (1859).

Massachusetts: Where three electric companies are combined into one, and the officers of the new company are the same as the officers of the old, and agree not to engage in the same business for five years in competition with the new company, such agreement is legal. Anchor Electric Co. *v.* Hawkes, 171 Mass. 101 (1898), reviewing the authorities. The combination of two parties who each claim a patent on an article not a prime necessity nor a staple commodity in the market is legal and may be specifically enforced. Gloucester, etc. Co. *v.* Russia Cement Co., 154 Mass. 92 (1891). In Central Shade-Roller Co. *v.* Cushman, 143 Mass. 353 (1887), where certain shade-roller manufacturers formed a corporation to sell their product, the court enjoined one of the parties from repudiating the agreement, but said: "The agreement does not refer to an article of prime necessity, nor to a staple of commerce, nor to merchandise to be bought and sold in the market. . . . It does not look to affecting competition from outside — the parties have a monopoly by their patents — but only to restrict competition in price between themselves. . . . When it appears that the combination is used to the public detriment, a different question will be presented from that now before us."

Michigan: In ascertaining the market price of articles sold, the price as fixed by a combination in the trade will not be considered. Lovejoy *v.* Michels, 88 Mich. 15 (1891). A contract of a concern not to manufacture a certain line of articles in some states for five years is void. Western, etc. Assoc. *v.* Starkey, 84 Mich. 76 (1890). Where three persons interested in a match factory agreed to unite their property with that of their competitors in one large corporation, a monopoly — the Diamond Match Company — the courts will not enforce the contract between these three persons which specifies the proportion in which each of the three was to participate in the profits coming to them jointly from the monopoly. The history, character and purpose of the match monopoly are fully stated in this decision. Richardson *v.* Buhl, 77 Mich. 632 (1889).

Minnesota: A member of a commission merchant corporation which has been formed to regulate the prices to

the purpose of taking over the property. Such has been the case with the Sugar Trust, the Standard Oil Trust, and the Cotton-seed

be paid for produce may sue the corporation for damages caused by his being boycotted, even though he helped to form the corporation and was afterwards suspended. Ertz *v.* Produce, etc. Co., 82 Minn. 173 (1901). It is legal for a large number of retail lumber dealers to form a voluntary association, and agree that they will not deal with any manufacturing or wholesale dealer who sells directly to customers, and thereby deprives the retail dealer of business, and the by-laws of their association may provide that the secretary shall notify all members of the names of wholesalers who sell in this manner to consumers. An injunction against the secretary giving such notices will not be granted. Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223 (1893). By-laws of an exchange restricting the freedom of members to reduce prices and establish offices for selling are void. Kolff *v.* St. Paul Fuel Exchange, 48 Minn. 215 (1892).

Mississippi: Although two cotton compress companies have agreed to consolidate, and have put their property in the hands of a governing committee to manage until a new charter is obtained, yet either corporation may withdraw from the arrangement, it being *ultra vires.* Greenville, etc. Co. *v.* Planters', etc. Co., 70 Miss. 669 (1893). As to the Mississippi statute, see also American F. Ins. Co. *v.* State, 75 Miss. 24 (1897).

Missouri: The supreme court of Missouri, in the case of State *v.* Firemen's, etc. Co., 152 Mo. 1 (1899), rendered a judgment of ouster against a large number of insurance companies from doing business within the state on account of their entering into an agreement to maintain uniform premium rates. See Skrainka *v.* Sharringhausen, 8 Mo. App. 522 (1880), upholding a pooling contract of certain owners of stone quarries located in St. Louis, on the ground that the restraint was local in its effect. See 73 S. W. Rep. 645.

Nebraska: An association of retail lumber dealers which imposes a penalty on members who sell to consumers or to retailers not eligible to membership is illegal. Cleland *v.* Anderson, 92 N. W. Rep. 306 (Neb. 1902). Under the Nebraska statute, in a suit instituted by the state to enjoin a foreign corporation from doing business in the state on the ground that it is violating an anti-trust statute, the court may order the defendant to allow the plaintiff to examine the defendant's books and records for the purpose of obtaining evidence in the case. State *v.* Standard Oil Co., 61 Neb. 28 (1900). Where the stockholders of a distilling corporation transfer their stock to trustees, for the purpose of entering into a trust, such trustees being the holders of the stock of various other corporations engaged in the same business, and trust certificates are issued by them in place of the stock, the state, at the instance of the attorney-general, will cause the charter to be annulled on the ground of misuser, the corporation being no longer engaged in a lawful business. Although the corporate property was transferred just before judgment, the court will not allow its decree to be evaded. State *v.* Nebraska Distilling Co., 29 Neb. 700 (1890).

New Jersey: Even though a corporation is selling its product below cost, in order to force another corporation to combine with it, yet a stockholder in the former cannot enjoin such sales, where neither of the corporations has a natural monopoly. Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). It is legal for a corporation to purchase all the competing concerns in a particular line of business, even though the result is temporarily to create a monopoly in

Oil Trust. The decisions of the New York court of appeals against the Sugar Trust and of the supreme court of Ohio against

that business. Even though the agreement of the vendor not to engage in business covers too large a territory, yet the court will enforce it for a reasonable amount of territory. Trenton, etc. Co. *v.* Olyphant, 58 N. J. Eq. 507 (1899). A corporation formed to create a monopoly in the pottery business cannot enforce an agreement of one of the parties not to engage in the business. Trenton, etc. Co. *v.* Oliphant, 56 N. J. Eq. 680 (1898). An injunction does not lie at the instance of the state to restrain a corporation from transacting business, even though it was formed to bring about, by conditions imposed upon selling agents, a monopoly in the cigarette business, and had largely succeeded in doing so. The remedy, if any, is by *quo warranto.* The court reviewed the cases wherein injunction would lie. Stockton *v.* American, etc. Co., 55 N. J. Eq. 352 (1897). Where a contract between a domestic railroad company and a foreign railroad company is declared illegal and void by the court on the ground that it seeks to create a monopoly in the coal business, and the court orders the domestic railroad company to cease complying with such contract, the court will appoint a receiver of such company if it attempts to evade the decree: but on proof that no evasion has been attempted the court will refuse to appoint a receiver. Stockton *v.* Central R. R. of N. J., 50 N. J. Eq. 489 (1892). It is not illegal for one stockyard company to buy out another stockyard company. Willoughby *v.* Chicago, etc. Co., 50 N. J. Eq. 656 (1892); Ellerman *v.* Chicago, etc. Co., 49 N. J. Eq. 217 (1891).

New York: See People *v.* North River, etc. Co., 121 N. Y. 582 (1890). Under the New York anti-trust statute the court may grant an order at the instance of the attorney-general requiring a person to appear and be examined before the judge or referee in view of a suit to be brought. In the Matter of Davies, 168 N. Y. 89 (1901). Where eighty-five per cent. of the manufacturers of envelopes form a selling corporation, and such corporation agrees with an outside manufacturer to pay him ten cents a thousand for envelopes manufactured by him less that fixed number, and he to pay the corporation ten cents a thousand for those manufactured by him in excess of that number, the agreement is illegal and not enforcible. The court said: "Contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and are void." The court also said: "Such a contract threatens a monopoly whereby trade in a useful article may be restrained and its price unreasonably enhanced, and it matters not that the parties to it may have so moderately advanced prices that the sum exacted for the product seems to some persons reasonable, for 'the scope of the contract, and not the possibility of self-restraint of the parties to it, is the test of its validity.'" Cohen *v.* Berlin, etc. Co., 166 N. Y. 292, 304 (1901). In the case of Wood *v.* Whitehead, etc. Co., 165 N. Y. 545 (1901), the New York court of appeals went far towards eliminating the rule prohibiting a party from contracting not to engage in a business, the good will of which he has sold out. An agreement of dealers in stone by which all their product is sold by a selling corporation at prices fixed by them, the sales to be apportioned among them, is illegal and not enforcible. Cummings *v.* Union, etc. Co., 164 N. Y. 401 (1900). It is no defense to an action to enforce a subscription that after incorporation the company pro-

the Standard Oil Trust convinced the trusts that their original mode of organization was illegal and must be abandoned. The

ceeded to form an illegal combination of competitors in trade. U. S. Vinegar Co. *v.* Foehrenbach, 148 N. Y. 58 (1895). A person who buys a trust certificate, the certificate containing a stipulation binding the holder to all the terms of the trust agreement, thereby becomes a party to an illegal transaction, and such person has no standing in court to obtain an accounting and distribution of the property or profits. The whole agreement and transaction being illegal, the court will leave the parties where it finds them. The court pointed out that there was no proof in this case that the defendant trustees were seeking to derive any personal advantage from the agreement, but, on the contrary, were endeavoring to carry out the wishes of nearly all of the certificate-holders. Unckles *v.* Colgate, 148 N. Y. 529 (1896). A corporation formed by milk dealers to fix the price to be paid to farmers, etc., for milk is illegal. People *v.* Milk Exchange, 145 N. Y. 267 (1895). Where an Illinois corporation sues in New York on a subscription to its stock, it is no defense to allege that the company was to create a monopoly, where the only proof was certain prospectuses, etc., issued before the company was organized. The defense is not good unless the company "was formed for purposes illegal here, or was doing acts prohibited by the laws of this state to its own citizens and corporations." U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537 (1894). It is legal for a party who contemplates constructing water-works to abandon the project and enter the employ of a competitor; and he may collect compensation therefor, although a part of the compensation was due to his having abandoned his own enterprise. Oakes *v.* Catteraugus Water Co., 143 N. Y. 430 (1894). A carrier may by special agreement give reduced rates to customers who stipulate to give it all their business, and refuse those rates to others who are not able or willing to so stipulate, provided that the charge exacted from those others is not excessive or unreasonable. Lough *v.* Outerbridge, 143 N. Y. 271 (1894). Where manufacturers form an illegal association to which they pay a certain sum, which they are to forfeit if they disobey its regulations and are expelled, one of them cannot enjoin the association from expelling him. This action was to enforce the agreement, and not to recover back his money. Phœnix Bridge Co. *v.* Keystone Bridge Co., 142 N. Y. 425 (1894). In People *v.* Sheldon, 139 N. Y. 251 (1893), the defendant was convicted of the crime of conspiracy under the Penal Code of New York, where he and others combined to raise the price of coal at retail and destroy free competition, even though no excessive price was charged. 175 N. Y. 1.

A combination between dealers in sheep, to sell only to certain butchers, the butchers agreeing to buy only from them, excepting that such commissions as were received from business transacted with others should be paid into a common pool, is illegal. A penalty for violating the agreement cannot be collected. Judd *v.* Harrington, 139 N. Y. 105 (1893). The purchaser of a trust certificate issued by the trustees, the certificate being in a form similar to that of certificates of stock, may compel the trustees to transfer the same to him on their books, although he is a competitor of the trust and has opposed it in all ways possible. Rice *v.* Rockefeller, 134 N. Y. 174 (1892). In this case the court, speaking of the nature of the trust, said: "The agreement constituted not a partnership, but a trust in behalf of the beneficiaries. And while it is not a corporation, it, by the agreement, took some of the attributes of a

result has been that the trusts for the most part reorganized and reappeared in the form of gigantic corporations. How far the law

corporation, in so far that, through its trustees, certificates of shares in the equity to the property held by them were issued, and were transferable in like manner apparently as are those of corporations." Where several carbon manufacturers have formed a combination by leasing their several concerns to a trustee, and also assigning to him their orders for carbons, and subsequently one of them withdraws, the withdrawing concern cannot sue for and claim the amount due upon one of the orders assigned to and filled by such trustee. The defendant having interpleaded, the trustee takes the money. Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46 (1890). Where a manufacturer of a peculiar kind of machinery under a patent agrees with a trustee for several corporations that he, the manufacturer, will sell his machinery to them alone, and they agree to give him a percentage of their profits the agreement is legal and may be enforced by him. Good *v.* Daland, 121 N. Y. 1 (1890). Even though a party has a legal contract with a corporation by which he has the right to purchase certain goods monthly for a certain time, yet, if afterwards the corporation has sold out to a trust, and the trust assumes the contract and the party acquiesces therein and sues the trust for violation of the contract, the suit will fail, the trust agreement having limited the manufacture within a thousand miles radius of its headquarters. Falvey *v.* Woolner, 71 N. Y. App. Div. 331 (1902). The owner of a grain elevator may bring suit for damages against the owners of other elevators and a railroad company who have entered into a combination by which the railroad will not carry grain for any owner of an elevator unless the latter pays a certain sum to the railroad company, the intent being to control the elevator business. Kellogg *v.* Lehigh Valley R. R., 61 N. Y. App. Div. 35 (1901). The statute of New York prohibiting the issue of stock at less than par and of bonds at less than their fair market value does not prohibit the issue of stock and bonds by a gas company in payment for the stock and bonds of a competing gas company, even though a high value is placed upon the franchise of such competing company as a part of the purchase price. Such a transaction is not illegal on the ground of creating a monopoly, nor is it *ultra vires*, provided the charter of the first company allowed it to purchase stock and bonds, as provided in the New York statutes. Rafferty *v.* Buffalo, etc. Co., 37 N. Y. App. Div. 618 (1899). A person agreeing not to engage in a certain business within a certain territory cannot evade the contract by setting up that the other party is an illegal combination. National Wall Paper Co. *v.* Hobbs, 90 Hun, 288 (1895). The members of a retail coal dealers' association formed to prevent and actually preventing competition are liable criminally under the New York statutes. Drake *v.* Siebold, 81 Hun, 178 (1894). The holder of trustees' certificates, where the trust is organized on the plan of trustees holding the shares of stock of the various corporations, is denied all relief by the courts as against the trustees. He cannot compel them to pay dividends or have the property in their hands divided upon the dissolution of the trust. The combination being illegal, the courts will not aid any of the parties. So far as the law is concerned, the trustees can appropriate the property to their own use, and the holders of the trustees' certificates will not be granted any relief. Rice *v.* Rockefeller, Supr. Ct., Sp. T., N. Y. L. J., April 26, 1894. Where many manufacturers under

will interfere with this class of corporations remains to be seen. In the Chicago Gas Company case the supreme court of Illinois

various patents form a corporation and convey to it their patents and take back licenses under which the corporation regulates the price, and they agree not to use any new patents and not to manufacture any new kind of harrow, the combination is illegal. Any one of the parties may by suit in equity be relieved from its terms. Strait *v.* National Harrow Co., 18 N. Y. Supp. 224 (1891). The harrow trust was again declared illegal in National Harrow Co. *v.* Bement, 21 N. Y. App. Div. 290 (1897), but this decision was reversed in 163 N. Y. 505. It is established "that no contracts are void as being in general restraint of trade where they operate simply to prevent a party from engaging or competing in the same business." Hence, an agreement of one steamship company to pay another company a certain sum for withdrawing its line of boats was upheld as against the dissent of a stockholder in the former company. Leslie *v.* Lorillard, 110 N. Y. 519 (1888). A large number of the proprietors of boats on the canals made a combination. The income from every boat, over and above a certain amount allowed to the boat for expenses for wear and tear, was turned into the "pool." At certain times the fund in the "pool" was to be divided among the parties according to the number of their boats. In an action to enforce payment under the agreement the court held that the whole arrangement was illegal, void, and not enforceable. Stanton *v.* Allen, 5 Denio, 434 (1848). The proprietors of five lines of boats engaged in canal transportation agreed to combine and do business at certain rates for freight and passage. The net earnings were to be divided among themselves in a fixed proportion. One of the parties sued another to compel him to make payment. The court held that the combination was void under the statutes of New York, and said: "It is a familiar maxim that competition is the life of trade. It follows that whatever destroys or even relaxes competition in trade is injurious if not fatal to it." Hooker *v.* Vandewater, 4 Denio, 349 (1847).

A coal company bought coal from several corporations upon their contract not to sell to any other parties in that locality. The purpose was to enable the purchaser of the coal to have a monopoly of the market. The party which purchased the coal did not pay for it. The coal company which had sold brought suit for the price, but the court held that the suit must fail. The company had taken part in an illegal contract and combination. In such cases the parties are outside of the pale and protection of the law. The courts will not aid either party. Arnot *v.* Pittston, etc. Co., 68 N. Y. 558 (1877). Many salt manufacturers in New York state combined to limit the production and control the price of salt. They formed a corporation, and each of the parties leased to the corporation his manufactory of salt. Each of the parties was, however, to continue the manufacture of salt in his manufactory, but only to a limited extent, and was to sell the product to a corporation at a fixed price. The agreement was carried out. One of the parties could not collect from the corporation the price for the salt delivered to it, and accordingly he brought suit. But the court decided that he could not collect. He lost his salt, and also the price of it. The law declares such combinations illegal, and will not aid any of the parties. Clancey *v.* Onondaga, etc. Co., 62 Barb. 395 (1862). The agreement of the various members of the "Wire Trust" not to sell at less than a certain price is void. A forfeit cannot be recovered back by one of the parties. De Witt,

forfeited the charter of the company, on the ground that it was formed to bring about an illegal combination. New Jersey, on

etc. Co. *v.* New Jersey, etc. Co., 9 Ry. & Corp. L. J. 314 (N. Y. C. P., 1891). The receiver of one of the corporations forming a "trust" may enjoin it from reorganizing in the shape of one large corporation. Gray *v.* De Castro, etc. Co., 10 N. Y. Supp. 632 (1890). Although the charter of one of the corporations whose stock is held by a "trust" is forfeited, yet the receiver cannot have a receiver appointed of the "trust" property. This would amount to a receivership of all the property of a person who happened to be a stockholder in an insolvent corporation. Gray *v.* Oxnard, etc. Co., N. Y. L. J., June 6, 1890. The receiver of the company whose charter is forfeited has no right to an accounting from the other corporations as partners. He is confined to the property of his own company. Gray *v.* Oxnard, etc. Co., 11 N. Y. Supp. 118 (1890); affirmed in 59 Hun, 387 (1891), on the ground that an illegal contract cannot be enforced. A receiver of an insolvent corporation may recover money due it from an illegal "trust" though the corporation was a party to the "trust." Pittsburg Carbon Co. *v.* McMillin, 53 Hun, 67 (1889). A contract whereby the stockholders of one corporation were to buy only from the stockholders of another, and the stockholders of the latter were to sell only to the stockholders of the former, was upheld in Live-Stock Assoc. etc. *v.* Levy, 3 N. Y. St. Rep. 514 (1886). A trust being illegal, a certificate-holder may have a receiver appointed of all the stock and assets held by the trustees, and may have an accounting by the trustees. Cameron *v.* Havemeyer, 12 N. Y. Supp. 126 (1890). Where a "trust" passes into a receiver's hands by reason of insolvency, the receiver may recover debts due the "trust" from the constituent corporations. Pittsburg Carbon Co. *v.* McMillin, 119 N. Y. 46 (1890). The case of Diamond Match Co. *v.* Roeber, 106 N. Y. 473 (1887), was not a "trust" case. A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit. Ingraham *v.* National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 App. Div. 582.

Ohio: See State *v.* Standard Oil Co., 49 Ohio St. 137 (1892). It is constitutional for the legislature to prohibit corporations from entering into combinations to restrict competition with a view to raising prices. *Quo warranto* lies at the instance of the state against such corporations. State *v.* Buckeye, etc. Co., 61 Ohio St. 520 (1900). Although a combination is illegal, yet the profits thereof, when placed in the hands of a third person for the benefit of one of the corporations, may be garnisheed for a debt of that corporation. Geurinck *v.* Alcott, 63 N. E. Rep. 714 (Ohio, 1902). The Candle Manufacturers' unincorporated association, formed to control prices, etc., is illegal. A member cannot recover his share of the profits. Emery *v.* Ohio Candle Co., 47 Ohio St. 320 (1890). Many salt manufacturers formed a "trust," by agreeing to sell all their product to an unincorporated joint-stock association. The latter was composed of, and its directors were elected by, the manufacturers. The purpose of the combination was to have the association buy the salt from the manufacturers and sell it to the public. Competition would thereby be prevented. The court held that the combination was void, and enjoined the association from seizing the product of one of the manufacturers. Central Ohio Salt Co. *v.* Guthrie, 35 Ohio St. 666 (1880).

Pennsylvania: A combination of brewers to control the price of beer within

the other hand, grants broad charters to the combinations and receives a heavy toll for the privileges and immunities granted. The

a city is illegal, and the court will not enforce the agreement. Nester *v.* Continental Brewing Co., 161 Pa. St. 473 (1894). Five Pennsylvania coal corporations, which together controlled a certain kind of coal, combined and agreed that sales should be made through a committee and a general agent, and that thereby prices should be fixed, freights made, and sales and deliveries adjusted. If any company sold more than a fixed proportion it was to pay a certain amount to the others. The combination was made and carried out in New York. In the course of time one of the companies sued another to recover its proportion of the amount which the latter was to pay for the excess of coal sold by it. The Pennsylvania court held that it could not recover; that the combination was illegal and void; and that it was a conspiracy under the New York statute against the commission, by two or more persons, of "any act injurious . . . to trade or commerce." Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173 (1871). The courts will refuse a charter to a company whose business is to be "to promote the business of such retail coal-dealers as become members thereof, and to protect them," etc., the intent being to combine the retail coal-dealers. *Re* Richmond Retail Coal Co., 9 Ry. & Corp. L. J. 31 (Phila. 1890).

Rhode Island: Three out of four oleomargarine companies in New England may legally agree to consolidate into one company in order to stop sharp competition. They may also agree not to do business separately for five years anywhere. Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484 (1894).

Tennessee: The Tennessee statute, prohibiting foreign corporations from doing business in the state where they have combined to lessen competition and influence prices, is legal, and the state may file a bill to restrain foreign corporations from doing business in the state where they have violated such statute. State *v.* Schlitz, etc. Co., 104 Tenn. 715 (1900). Where two manufacturing corporations organize a third to sell their product, and pay for the stock and distribute the stock among their stockholders, a debt due from one of them to the new corporation will not be allowed to participate in the distribution of the assets of the debtor as against other creditors, under the statute of Tennessee allowing such defense. American, etc. Co. *v.* Standard, etc. Co., 59 S. W. Rep. 709 (Tenn. 1900). A shipper cannot maintain a bill in equity to compel a railroad to forward his freight by a certain route, even though he claims that the reason it is not forwarded by that route is because of an agreement between the railroads fixing the rate and fixing the percentage of traffic which each was to carry. Post *v.* Southern Ry., 103 Tenn. 184 (1899). A by-law of a plumbers' association by which any member who does work in competition with another shall pay a certain sum to the association is illegal. Bailey *v.* Association of Master Plumbers, etc., 103 Tenn. 99 (1899). It is illegal for an Ohio corporation to purchase a majority of the stock of a Tennessee corporation for the purpose of controlling the latter, even though they are engaged in a similar business, the object being to form a monopoly. Hence the purchasing company cannot enforce the contract as to certain things which were to be done by the vendor of the stock. Marble Co. *v.* Harvey, 92 Tenn. 115 (1892). A combination of four cotton-seed oil corporations, by an agreement that the possession and use of all their property should be turned over to certain persons to run, is a partnership, and contrary to the rule of law that a corporation cannot become a

past ten years have changed but little the status of the whole ques-

partner. One of the four corporations sued and recovered possession of its property. Mallory *v.* Hanaur Oil Works, 86 Tenn. 598 (1888).

Texas: Where several ice companies in the city agree to sell ice to a single corporation only, this is a violation of the Texas anti-trust law. Crystal, etc. Co. *v.* State, 23 Tex. Civ. App. 293 (1900). The charter of a gas company formed to combine all the electric light and gas interests in the city was forfeited at the instance of the state under the anti-trust statute, in the case of San Antonio, etc. Co. *v.* State, 22 Tex. Civ. App. 118 (1899). Even though a cotton compress company purchases six cotton compresses located in different parts of the state, yet if the price for compressing cotton is fixed by a state commissioner there is no violation of the anti-trust act. State *v.* Shippers', etc. Co., 69 S. W. Rep. 58 (Tex. 1902). In Waters, etc. Oil Co. *v.* State, 19 Tex. Civ. App. 1 (1898), the state forfeited the right of a foreign corporation organized under the laws of Missouri to do business in Texas, the corporation having agreed with various merchants and other dealers in oils in Texas so that such parties should not sell any oils except those of that corporation. The Texas statutes against combinations was declared unconstitutional in *Re* Grice, 79 Fed. Rep. 627 (1897), as violating the right of contract guaranteed by the federal constitution. A contract between a brewer and a dealer by which certain territory is given exclusively to the dealer, and the dealer agrees not to buy of others, is contrary to the Texas statute. Texas Brewing Co. *v.* Templeman, 90 Tex. 277 (1896). A manufacturer of windmills may grant an exclusive territory for their sale to a firm, even though such firm agrees not to handle any other kind of windmill. Welch *v.* Phelps, etc. Co., 89 Tex. 653 (1896). An agreement or combination of brewers as to sales of beer to dealers is legal at common law, but void under the Texas statute. Houch *v.* Anheuser, etc. Ass'n, 88 Tex. 184 (1894). The attorney-general cannot maintain an injunction against a combination of insurance companies to fix rates and commissions, inasmuch as insurance business is not a public or quasi-public business, nor does it concern a staple of life. Queen Ins. Co. *v.* State, 86 Tex. 250 (1893), holding also that a statute against trusts and combinations does not apply to a combination of fire insurance companies to fix uniform rates and commissions.

Wisconsin: A retail dealer in coal to whom the wholesale dealers will not sell by reason of a trust may maintain a bill of injunction against the trust. Hawarden *v.* Youghiogheny, etc. Co., 111 Wis. 545 (1901). A combination of mason builders by which they pay to their association six per cent. on all contracts, and all bids are submitted to the association before they are made, and six per cent. added to the lowest bid, is illegal. Milwaukee, etc. Assoc. *v.* Niezerowski, 95 Wis. 129 (1897). A purchaser of goods cannot defeat an action for the price on the ground that the vendor is an illegal trust or combination. National Distilling Co. *v.* Cream City Imp. Co., 86 Wis. 352 (1893). See Kellogg *v.* Larkin, 3 Pin. (Wis.) 123 (1851).

The United States Courts: A railroad pooling agreement is illegal. United States *v.* Joint, etc. Assoc., 171 U. S. 505 (1898). An employee who has made a legal contract not to engage in a similar business within a radius of fifteen hundred miles during a specified term of a period of five years cannot set up as a defense to such contract that his employer is an illegal trust. Harrison *v.* Glucose, etc. Co., 116 Fed. Rep. 304 (1902). The Nebraska anti-trust act of 1897 is unconstitutional as interfering with the right of citizens to make con-

tion. The supreme court of the United States has declared illegal

tracts. Niagara. etc. Co. *v.* Cornell, 110 Fed. Rep. 816 (1901). A state statute against trusts is no defense to a purchaser from such trusts. Only the state can raise that question in a direct proceeding for that purpose, unless the statute provides other remedies. Lafayette, etc. Co. *v.* City of Streator, 105 Fed. Rep. 729 (1900). A stockholder in a corporation which has entered a trust need not as a witness answer questions as to his participation therein, inasmuch as it might tend to criminate him and subject him to a penalty. Wyckoff, etc. Co. *v.* Wagner, etc. Co., 99 Fed. Rep. 158 (1900). The fact that a corporation is a member of a trust is no defense to a suit for infringement of a patent. Brown, etc. Co. *v.* Troxel, 98 Fed. Rep. 620 (1899). A perpetual lease which enables one railroad to run over the tracks of another is enforceable, although the lease contains a provision that its operation shall cease during any period of time within which the lessee extends its road into certain coal territory or receives coal from other railroads running through that territory. This last provision is contrary to public policy and is void; but, being a condition subsequent, does not affect the validity of the lease itself. Metropolitan, etc. Co. *v.* Columbus, etc. Ry., 95 Fed. Rep. 18 (1899). A combination of wooden-ware manufacturers, whereby they lease their machines to a corporation which is to fix the price and receive stock therefor, the dividends upon which are guaranteed by still another corporation in the combine, cannot collect such dividends by legal proceedings. Cravens *v.* Carter-Crume Co., 92 Fed. Rep. 479 (1899). In a suit by a corporation to enjoin strikers from obstructing the streets, etc., the defense that the complainant is an illegal combination in trade is not good. Amer. Steel, etc. Co. *v.* Wire Drawers', etc. Unions, 90 Fed. Rep. 608 (1898). Even though insurance companies have combined as to rates, etc., yet they may enjoin a state insurance commissioner from illegally revoking their certificates of authority to do business in the state. Liverpool, etc. Co. *v.* Clunie, 88 Fed. Rep. 160 (1898). Where a car-manufacturing corporation leases all its property to another corporation for a term of years and agrees not to engage in business during that time, "the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy." Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 53 (1891), quoting from and approving Alger *v.* Thacher, 36 Mass. 51 (1837). A person may purchase at foreclosure even though he represents the stockholders, and even though the intention may be to organize a new company to continue an illegal combination in trade. Olmstead *v.* Distilling, etc. Co., 73 Fed. Rep. 44 (1895). In McCutcheon *v.* Merz Capsule Co., 71 Fed. Rep. 786 (1896), several corporations agreed to turn over their property to one corporation and to take stock and bonds in payment, the price to be thereafter fixed by appraisers. After the stock was issued one of the companies withdrew, and the court held that the company withdrawing could file a bill to cancel the agreement on the ground that the company had no power to hold stock in other corporations. An illegal combination cannot maintain a bill to enjoin infringement upon its patents. National Harrow Co. *v.* Quick, 67 Fed. Rep. 130 (1895). Rent may be collected on a lease of a manufacturing plant to a competing concern, even though the intent was to decrease competition. An agreement of the lessor not to engage in the business during the term of the lease is valid. U. S. Chemical Co. *v.* Provident Chemical Co., 64 Fed. Rep.

railroad pooling contracts, as being contrary to the anti-trust act

946 (1894). A contract by a manufacturing company not to manufacture for a certain period if it is paid a certain percentage on sales made by others is illegal and void. Oliver *v.* Gilmore, 52 Fed. Rep. 562 (1892). It is no defense to an infringement suit that the complainant has formed a monopoly of all patents bearing upon the matter. Strait *v.* National Harrow Co., 51 Fed. Rep. 819 (1892). An assignment of patents by one of several parties to a corporation formed to unite various patents in a certain business is absolute and cannot be revoked, even though the party was by agreement to have a salary of $6,000 per year and this salary has not been paid. Bracher *v.* Hat Sweat Mfg. Co., 49 Fed. Rep. 921 (1892). A person who has sold his bakery to a corporation which is a "trust," taking stock in the corporation in payment, may tender back the stock and retake possession of his bakery. The act of congress against combinations applies. American, etc. Co. *v.* Klotz, 44 Fed. Rep. 721 (1891). Where the stockholders of a corporation enter into a contract for and in behalf of the corporation and for its benefit, and the corporation accepts that benefit, the latter is bound and affected by the contract and subject to the liabilities of the contract the same as though it had directly entered into it. Hence it is that a corporation is guilty of entering into a "trust" in a case where its stockholders enter into the "trust." American Preservers' Trust *v.* Taylor Mfg. Co., 46 Fed. Rep. 152 (1891). In this case the court held that the trustees were agents, and that the corporations were among the principals, and that it was *ultra vires* of the corporations to purchase stocks, bonds, and various properties through these agents, the trustees. Hence one of the corporations cannot be enjoined from breaking the contract. Where, in order to enter into a combination, one of the corporations assigns all its property to its stockholders, and they assign it to the new consolidated and absorbing corporation, and also agree with that corporation not to compete with it in business, the first-named corporation may be started in the business anew and will not be enjoined. American Preservers' Co. *v.* Norris, 43 Fed. Rep. 711 (1890).

In controversies between a certificate-holder and the trustees the court will not consider the legality of the "trust." Gould *v.* Head, 41 Fed. Rep. 240 (1890). A certificate-holder cannot enjoin an *ultra vires* or illegal act of the trustees where he obtains service on only four out of the nine trustees. Each trustee is liable personally for past breaches of trust, but an injunction against future acts can only be where all the trustees are made parties. Wall *v.* Thomas, 41 Fed. Rep. 620 (1890). A bill in equity to restrain a live-stock exchange from carrying out certain by-laws which tended to monopolize the business was sustained in United States *v.* Hopkins, 82 Fed. Rep. 529 (1897), but was reversed in Hopkins *v.* United States, 171 U. S. 578 (1898), on the ground that the business involved was not interstate commerce. The arrangement of the harrow trust, whereby seventy per cent. of the manufacturers assigned their patents and good will to a corporation, and then acted as agents or licensees of such corporation to manufacture and sell on the terms prescribed by it, is illegal. National Harrow Co. *v.* Hench, 83 Fed. Rep. 36 (1897). A corporation created to form a monopoly in the manufacture of harrows cannot maintain a suit for infringement. National Harrow Co. *v.* Hench, 84 Fed. Rep. 226 (1898).

England: The House of Lords, the highest court in England, in 1891 affirmed the decisions of the courts below in Mogul Steamship Co. *v.* McGregor, L. R. 17 App. Cas. 25, affirming L. R. 23 Q. B. D. 598, and L. R. 21 Q. B. D. 544,

of congress of 1890.[1] Strangely enough this anti-trust act of congress, which at first was ignored by the business public and was practically nullified by the decisions of the United States courts,[2]

and held that an action of conspiracy would not lie against a company that gave lower rates of freight to parties who shipped exclusively by them, there being in the transaction no desire to injure others and no ill-will. The defendant shipping companies and owners had combined together and formed a "conference" or "ring," and their agents in China had issued circulars to shippers there to the effect that exporters in China who confined their shipments of goods to vessels owned by members of the "conference" should be allowed a certain rebate, payable half-yearly, on the freight charged. The court held that the "conference," being formed by the defendants with a view of keeping the trade in their own hands, and not with the view of ruining the trade of the plaintiffs, or through any personal malice or ill-will toward them, was not unlawful, and that no action for conspiracy was maintainable. Lord Coke, in the great and leading "Case of the Monopolies," 11 Coke, 84*b* (1602), declared that a monopoly was illegal and void. Lord Coke said that a monopoly led to three results: an increase in price, a decrease in quality and the impoverishment of artisans and others. An agreement of manufacturers that one shall not employ the discharged hands of any other except upon the written consent of the latter is void. Mineral Water, etc. Soc. *v.* Booth, L. R. 36 Ch. D. 465 (1887). A company which is organized in violation of a statute cannot collect debts which are due to it. Jennings *v.* Hammond, L. R. 9 Q. B. D. 225 (1882), the company in this case being organized in violation of a statute which prohibited more than twenty persons uniting in an association or partnership except under certain conditions. In another case many manufacturers, in consequence of troubles between themselves and their employees, entered into an agreement and gave a bond that they all would abide by the rates of labor, hours of work, and other regulations which a majority of those who entered into the combination should decide upon. The court held that the compact was in restraint of trade; that it was illegal and void, and that the bond could not be enforced. Hilton *v.* Eckersley, 6 El. & Bl. 47 (1856). *Cf.* Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant (U. C.) Ch. 540 (1871), where a Canadian "pool" on salt was sustained; Wickens *v.* Evans, 3 Y. & J. 318 (1829). The word "monopoly" originally meant an exclusive privilege granted by the crown. The courts held that the crown could not grant it. See Case of the Monopolies, 11 Coke, 84 (1602): Mitchell *v.* Reynolds, 1 P. Wms. 181, 187 (1711).

[1] The act of congress of July, 1890, against unlawful monopolies applies to a contract between railroads regulating traffic rates. United States *v.* Trans-Missouri Freight Assoc., 166 U. S. 290 (1897).

[2] The federal statute against trusts and monopolies applies only so far as interstate and international trade is concerned. It does not apply to the sugar-refining business. United States *v.* E. C. Knight Co., 156 U. S. 1 (1895), which also (p. 9) gives a definition of the word "monopoly." The United States government may file a bill in equity to enjoin importers and dealers in coal in a certain city from combining, so as to regulate the retail prices arbitrarily. United States *v.* Coal, etc. Assoc., 85 Fed. Rep. 252 (1898). A combination of coal dealers, to regulate prices and provide for the division of prices with the miners of the coal, is contrary to the act of congress, where the coal-mining companies operate

has ultimately, under the decisions of the supreme court of the United States, turned out to be the most powerful remedy in existence against trusts.[1]

chiefly in one state, and the contract is made and carried out in a city in another state. United States *v.* Jellico, etc. Co., 46 Fed. Rep. 432 (1891). A suit for damages, based on the federal anti-trust law, failed in Bishop *v.* American Preservers' Co., 51 Fed. Rep. 272 (1892). The statute applies to illegal trusts of stock to unite competing railroads. Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See Clarke *v.* Richmond, etc. Co., 62 Fed. Rep. 328 (1894). In United States *v.* Patterson, 55 Fed. Rep. 605 (1893), the federal statute was held to apply in certain particulars, and not to apply in others. The act of congress relative to monopolies does not authorize an injunction except on the part of the government. Blindell *v.* Hagan, 54 Fed. Rep. 40 (1893). An indictment of a number of lumbermen, for raising the price of lumber fifty cents a thousand feet, will not lie under the federal statute. United States *v.* Nelson, 52 Fed. Rep. 646 (1892). Indictments under the federal law against monopolies were quashed in *Re* Corning, 51 Fed. Rep. 205 (1892); *Re* Terrell, 51 Fed. Rep. 213 (1892); *Re* Greene, 52 Fed. Rep. 104 (1892); United States *v.* Patterson, 55 Fed. Rep. 605, and 59 Fed. Rep. 280 (1893).

A suit by a stockholder, to set aside an illegal transfer of the corporate property, cannot at the same time ask for the treble damages given by the anti-trust act of congress of July 2, 1890. Such a suit is multifarious, inasmuch as the treble damages would go to the plaintiff, while the damages generally would belong to the corporation. Metcalf *v.* American, etc. Co., 108 Fed. Rep. 909 (1901). It is no defense to a suit for an infringement of patents that the complainant is a combination organized in violation of the anti-trust act of congress. Otis Elevator Co. *v.* Geiger, 107 Fed. Rep. 131 (1901). A suit giving any person injured by a trust a right to hold it liable in treble damages cannot be brought by a party who helped form the trust. Bishop *v.* American, etc. Co., 105 Fed. Rep. 845 (1900). A purchaser of a manufactured product from a corporation, who gives his notes in payment, cannot defend against such notes on the ground that the corporation is a "trust" in violation of the common law and of the act of congress. Union, etc. Co. *v.* Connelly, 99 Fed. Rep. 354 (1900). See 120 id. 721.

[1] A contract by which coke manufacturers agree to sell their output to a corporation, to resell the same at not less than a price to be fixed by a committee of the manufacturers, the profit earned above a certain sum per ton to be divided among the manufacturers, the corporation agreeing not to sell the product to any other producers, the amount of coal to be furnished by each producer to be also fixed by the committee, affects interstate commerce and is in violation of the anti-trust act of commerce, the court declaring that the policy of that act was to promote individual competition and prevent combinations which interfered with that competition, either as between the members of the combination or between the members and outsiders, and it is no defense that no harm is done to the public, or that the combination has been able to compete for business in a wider field. Chesapeake, etc. Co. *v.* United States, 115 Fed. Rep. 610 (1902). Under the act of congress of July 2, 1890, a dealer to whom a manufacturer refuses to sell may collect damages, the reason for such refusal being an illegal association of

The most important decision was rendered in 1899, when it was held that congress has power to regulate the purchase, sale and exchange of commodities between the states, and hence, under the anti-trust act of 1890, the United States government may enjoin a combination in restraint of trade by means of contracts, the purpose of which is to destroy competition and increase prices.[1]

The anti-trust act of congress of 1890 does not apply to purchasers of cattle on the market, who form an association by which each agrees not to recognize any yard trader or employ any person to buy or sell cattle unless he be a member of the association. Interstate commerce is not directly involved in such an association, and, moreover, the purpose of the agreement was clearly to regulate and not to restrict trade.[2]

It is no defense to a mortgage that it was given by a trust or combination in restraint of trade.[3]

A statute of a state, prohibiting a foreign corporation from doing business in the state, if such corporation is connected with a trust, is constitutional.[4]

The fact is, however, that the industrial movement of the age is irresistibly towards consolidation and combination, in connection with the expansion and extension of trade at home and abroad. The law is designed to check any abuses in this tendency, and has been successful in so doing. The law, however, is not intended to interfere with the legitimate demands of trade, and if such interference is attempted it will be demonstrated, just as it was demonstrated in England in regard to statutory prohibitions against the consolidation of railroads, that the laws of trade are stronger than the laws of men.[5]

competitors, by which the members charged more to outsiders than to members. Montague *v.* Lowry, 115 Fed. Rep. 27 (1902). The liability imposed by section 7 of the anti-trust act of congress of July, 1890, rendering an illegal trust and its members liable in treble damages to a person injured thereby, was enforced in Lowry *v.* Tile, etc. Assoc., 106 Fed. Rep. 38 (1900). An association of fourteen coal dealers to sell their coal through one company, at prices fixed by themselves, is illegal, under the anti-trust act of congress. United States *v.* Chesapeake, etc. Co., 105 Fed. Rep. 93 (1900). An association of shingle manufacturers, which closes the mills of some of its members and reduces the production and increases the prices, is in violation of the anti-trust act of congress of July 2, 1890, where such shingles are shipped from one state to another, even though the association agreement does not mention that fact. Gibbs *v.* McNeeley, 118 Fed. Rep. 120 (1902).

[1] Addyston, etc. Co. *v.* United States, 175 U. S. 211 (1899).

[2] Anderson *v.* United States, 171 U. S. 604 (1898).

[3] Dickerman *v.* Northern T. Co., 176 U. S. 181 (1900).

[4] Waters-Pierce, etc. Co. *v.* Texas, 177 U. S. 28 (1900).

[5] In England, for more than thirty years, parliament legislated against

In England the genuine "trust" has been used for legitimate investment purposes. The trustees are authorized to invest the funds of the "trust" in the stocks and bonds of miscellaneous corporations. Generally, however, they are limited in the amount which they may invest in any one direction. That which is lost in one investment is expected to be made up by large profits in another. It is a mode of investment on a large scale, and is made on the principle of an average gain and loss.[1] In England it has been held that a workman who has been discharged by his employer at the instance of a delegate of a workmen's organization, because he, the workman, had at a previous time done work other than that which was his regular trade, cannot hold the delegate liable in damages, even though the discharge was caused by threats of the delegate to the employer that unless the discharge was made all the men would quit work.[2]

The American "Car Trust" is practically an agreement of several owners of cars to place them in the hands of an agent to sell on the instalment plan, the agent having the power to issue certificates representing an interest in the instalments.[3]

§ 503b. *Further inquiry as to the legality of a "trust."*— There are other things to be considered in determining whether or not a "trust" is legal. Does it vest personal property or real estate in a trustee for a longer period than is allowed by law? Is the formation of a trust for the purpose of carrying on business authorized by law? Is the shifting of the parties interested — that is, the cer-

the consolidation of railroads. This legislation proved to be utterly ineffective, and in 1872 a parliamentary committee made an elaborate and exhaustive report on the subject, and said, among other things, that consolidation "had not brought with it the evils that were anticipated, but that, in any event, long and varied experience had fully demonstrated the fact that, while parliament might hinder and thwart it, it could not prevent it."

[1] See Healey, Company Law and Practice (2d ed.), p. 191. For the form of articles of agreement of this kind of a "trust," and for a detailed statement of the various provisions that are made, varying according to the character of the enterprise and the purposes of the participants, see Sykes *v.* Beadon, L. R. 11 Ch. D. 170 (1879); Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880); Wigfield *v.* Potter, 45 L. T. Rep. 612 (1882); Credit Mobilier *v.* Commonwealth, 67 Pa. St. 233 (1870), the last case being a "trust" created to construct a railroad, the *cestui que trust* being the stockholders of a designated corporation.

[2] Allen *v.* Flood, [1898] A. C. 1. *Cf.* Curran *v.* Galen, 152 N. Y. 33 (1897). A labor union is not liable in damages to a person who is discharged by an employer at the instance of the union, on the ground that the person so discharged is not a member of its organization, it being shown that the purpose of the agreement was to secure efficient and approved workmen or preference in employees, no force or unlawful act being involved. National, etc. Assoc. *v.* Cumming, 170 N. Y. 315 (1902).

[3] See ch. L, *infra*.

tificate-holders — allowed in cases of trusts? These questions will be considered in the order named.

It is the policy of the law to limit the time during which a person may tie up his personal property or real estate. Generally this time is fixed as the life-time of the survivor of any two persons then living and designated by the person creating the trust. Each state, by its statutes, generally limits the time during which property may be tied up by a trust, and if a trust is formed for a period longer than that allowed by statute the trust itself is void.[1] There is little doubt that merchandise, land, and shares of stock may be placed in trust. The law is clear that "every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a trust."[2]

A different question arises, however, in determining whether a trust may be created to carry on business and trade, or to control a concern which carries on business.[3]

At common law the placing of personal property in trust for the purpose of carrying on business in the name and under the management of the trustee is legal and allowable.[4] The statutes of the

[1] Gerard, Titles to Real Estate (3d ed.), p. 223. Moreover, if the time is to be measured by the life of a person then living, a trust which is to exist for a fixed period, however short, without reference to the life of a person then living, is void. Gerard, Titles to Real Estate (3d ed.), pp. 224, 225. In New York the suspension can be for only two lives in being, and, in certain cases, twenty-one years thereafter. 1 R. S., 773, § 1; L. 1896, ch. 547, § 32. These statutes apply to real and personal property. Gerard, Titles to Real Estate (3d ed.), p. 235; Hone *v.* Van Schaick, 7 Paige, 221 (1838). Compare §§ 812, 822*f*, *infra;* Holmes *v.* Mead, 52 N. Y. 332, 344 (1873). The statutory prohibition against the accumulation of the income of trust property, except in the case of infants, applies both to real estate and personalty. Girard, Titles to Real Estate (3d ed.), pp. 233, 235.

[2] 1 Perry, Trusts, § 67.

[3] Under the statutes of New York a trust of property consisting of *real estate* is void, unless the purpose of the trust is to sell the land for the benefit of creditors; or to sell, mortgage, or lease it for the benefit of annuitants or for satisfying a lien on the land; or to receive the rent and use it for the support of a certain person; or to accumulate the rent for a certain person. L. 1896, ch. 547, § 76. Accordingly a modern "trust," whose property consists of real estate in New York, might be void. But as to personal property the law is generally different. As to New York, see Gerard, Titles, p. 235. *Cf.* §§ 812, 822*f*.

[4] For decisions at common law to the effect that property may be vested in trustees for the purpose of carrying on business, see *Ex parte* Garland, 10 Ves. Jr. 110 (1804); Scott *v.* Izon, 34 Beav. 434 (1865). In Holmes *v.* Mead, 52 N. Y. 332, 344 (1873), the court said: "A trust in personal property, which is not in conflict with the statute regulating the accumulation of interest and protecting the suspension of absolute ownership in property of that character, is valid when the trustee is competent to take, and a trust is for a lawful purpose well defined, so as to be capable of being specifically executed by the court. . . . Trusts of personal property are not affected by the statute of uses and

various states, however, must be consulted in reference to this point.[1]

There is little difficulty in determining the question whether it is allowable in law to create a trust where the *cestuis que trust* — that is, the certificate-holders — change and fluctuate in their identity. The law does not require the *cestui que trust* to remain continuously one and the same person. He is not indefinite, even though by transfer of interest his identity may change.[2]

A more formidable objection to the legality of a "trust" is that it is similar to an unincorporated joint-stock association, and that the latter is illegal; inasmuch as it assumes the powers, privileges, and name of a corporation. It was on this ground that the decision in Louisiana declared that the American Cotton Oil Trust was illegal, and was disqualified to do business within that state. The court held that, under the statutes of Louisiana, an unincorporated joint-stock association is illegal; that a "trust" was one kind of an unincorporated joint-stock association, and consequently that it was illegal and void.[3]

But this view of the law would not be sustained elsewhere in this country; nor would it be sustained under the old common law of England. Unincorporated joint-stock companies have existed for years and are common throughout all the other states of the Union. They are legal methods of carrying on business.[4]

trusts, which applies only to trusts in real property." In Gott *v.* Cook, 7 Paige, 521, 534 (1839), the chancellor said: "The Revised Statutes have not attempted to define the objects for which express trusts of personal estate may be created, as they have done in relation to trusts of real estate. Such trusts, therefore, may be created for any purposes which are not illegal." See also Graff *v.* Bonnett, 31 N. Y. 9 (1865). In Power *v.* Cassidy, 79 N. Y. 602, 613 (1880), the court said: "The law does not limit or confine trusts as to personal property except in reference to the suspension of ownership, and they may be created for any purpose not forbidden by law." To the same effect, Bucklin *v.* Bucklin, 1 Keyes (N. Y.), 141 (1864); Goebel *v.* Wolf, 113 N. Y. 405 (1889).

[1] Many of them, including Michigan, Wisconsin, Minnesota, California, Dakota, North Carolina, Georgia, Pennsylvania, Connecticut, Kentucky, and Vermont, have statutes expressly specifying the objects for which a trust may be created. See Stimson, American Statute Law, § 1703.

[2] See Harrison *v.* Harrison, 36 N. Y. 543 (1867), affirming 42 Barb. 162; Holmes *v.* Mead, 52 N. Y. 332, 343 (1873); Conkling *v.* Washington University, 2 Md. Ch. 497 (1849); 1 Perry, Trusts, § 66. In regard to this matter, a "trust" is legal on the same principle that it is legal for a bondholder secured by a railway trust deed or mortgage to sell and transfer his interest to another.

[3] State of Louisiana *v.* American Cotton Oil Trust, 1 Ry. & Corp. L. J. 509 (1887), the court saying: "A joint-stock company is not known to the laws of Louisiana."

[4] See § 504, *infra*. In England there formerly was doubt upon this subject, but this doubt was due to the "Bubble Act." This statute was passed in 1720 for the purpose of suppressing unincor-

§ 503c. *Liability of trustee and certificate-holders.*— The law is clear that a trustee who carries on any kind of business is liable personally, and to the entire extent of his private fortune, for all the debts incurred in the management and execution of the trust.[1] It is possible, however, that the use of the words "as trustee," in the contract entered into, will protect him against this liability.[2] And there is little doubt that the creditors of the trust may collect their debts from its property. This has been a doubtful point, but is now reasonably well settled. It matters not whether the trustees have expressly bound the trust property to pay the debts. Where the trustee is insolvent, a creditor of the trust may proceed against its property to procure payment of a debt incurred in the execution of the trust.[3]

But a different rule prevails as regards the *cestui que trust*, the beneficiary. The *cestui que trust* cannot be held liable for the debts created by the trustees or for debts incurred in the execution of the trust. This question has arisen chiefly in cases where trustees have carried on the business of an insolvent person for the

porated companies. At that time they were regarded as "dangerous, mischievous, and, in short, public nuisances." But the statute was repealed in 1826, and Lindley, the great English judge and jurist, says of it: "Juster views of political economy and of the limits within which legislative enactments should be confined have led to the repeal of the statute in question, which, though deemed highly beneficial half a century ago, probably gave rise to much more mischief than it prevented." Lindley, Company Law (5th ed.), p. 132. Moreover, a careful examination of the English authorities up to the present day shows conclusively that at common law an unincorporated joint-stock association is legal and valid. Lindley, Company Law (5th ed.), p. 133. *Cf.* Greene *v.* People, 21 N. E. Rep. 605 (Ill. 1889).

[1] Thompson *v.* Brown, 4 Johns. Ch. 619 (1820); Wild *v.* Davenport, 48 N. J. L. 129 (1886); Stephens *v.* James, 77 Ga. 139 (1886); Rogers *v.* Wheeler, 43 N. Y. 598 (1871); Jones *v.* Seligman, 81 N. Y. 190 (1880).

[2] Contracts entered into by the trustees of a trust deed for many shareholders bind the latter but not the former personally, where the trustees were authorized to make the contracts and did so as trustees. It is immaterial that the contracts are under seal. Cook *v.* Gray, 133 Mass. 106 (1882). But see Stevenson *v.* Polk, 71 Iowa, 278 (1887); 1 Pars. Cont. (6th ed.), *122. As to the mode of compelling payment of a debt incurred by a trustee who has issued scrip to represent the property, see Mayo *v.* Moritz, 151 Mass. 481 (1890), holding that the remedy is not for a receiver to wind up the trust.

[3] Cater *v.* Eveleigh, 4 Desaus. (S. C.) 19 (1809); James *v.* Mayrant, 4 Desaus. (S. C.) 591 (1815); Montgomery *v.* Eveleigh, 1 McCord Ch. (S. C.) 267 (1826); Magwood *v.* Johnston, 1 Hill (S. C.) Ch. 228 (1833); Gaudy *v.* Babbitt, 56 Ga. 640 (1876); Tennant *v.* Stoney, 1 Rich. Eq. (S. C.) 222, 243 (1845); Wylly *v.* Collins, 9 Ga. 223 (1851); Frost *v.* Shackleford, 57 Ga. 261 (1876); Ferrin *v.* Myrick, 41 N. Y. 315 (1869). *Contra,* Worrall *v.* Harford, 8 Ves. Jr. 4 (1802); Mulhall *v.* Williams, 32 Ala. 489 (1858); Jones *v.* Dawson, 19 Ala. 672 (1851). See also New *v.* Nicoll, 73 N. Y. 127 (1878); Noyes *v.* Blakeman, 6 N. Y. 567 (1852).

benefit of the creditors of the latter.[1] And the same conclusion is reached in cases where an executor, administrator, or trustee carries on a business for the benefit of a beneficiary.[2]

It has been held also that the trustee cannot render the *cestui que trust* liable even though the trustee contracts with the creditor to that effect.[3]

There is little doubt that these old principles of law are applicable to "trusts." The courts of England have decided that a modern "trust" is not a partnership or mere association, but is similar to an old common-law trust estate. This conclusion was reached in construing an English statute which prohibits certain partnerships or associations from doing business.[4]

[1] Storrs *v.* Flint, 46 N. Y. Super. Ct. 498 (1880); Cox *v.* Hickman, 1 H. L. Cas. 268 (1860); *Re* Stanton Iron Co., 21 Beav. 164 (1855); Selwyn *v.* Harrison, 2 Johns. & H. 334 (1862). See Bingaman *v.* Hickman, 115 Pa. St. 420 (1887).

[2] In *Ex parte* Garland, 10 Ves. Jr. 110 (1804), where a testator directed that a certain sum be used to carry on a business, and the executor so used it, and the business became insolvent, *held*, per Lord Eldon, that no other part of the testator's property was liable for the debts thereby incurred; overruling Hankey *v.* Hammond, 1 Cooke's Bankr. Law, 67 (1785). Lord Eldon further said: "On the other hand, the case of the executor is very hard. He becomes liable, as personally responsible, to the extent of all his own property, . . . though he is but a trustee. But he places himself in that situation by his own choice." In *Re* Johnson, L. R. 15 Ch. D. 548 (1880), the cases are reviewed. Lord Eldon's decision that it is not the general estate of the testator which is liable, but only so much as he has authorized to be employed in the business, is stated to be still the law. See also Strickland *v.* Symons, L. R. 26 Ch. D. 245 (1884). An estate is not liable for debts created by a partnership continued by order of the will. Stewart *v.* Robinson, 115 N. Y. 328 (1889).

[3] Stanton *v.* King, 8 Hun, 4 (1876); aff'd, 69 N. Y. 609. See 15 Am. L. Rev. 456; Burch *v.* Breckinridge, 16 B. Mon. (Ky.) 488 (1855); New *v.* Nicoll, 12 Hun, 431 (1877); aff'd, 73 N. Y. 127.

[4] In England a statute exists which forbids any company, association, or partnership consisting of more than twenty persons from carrying on any business for the acquisition of gain, unless it is registered as a company under the Joint-stock Companies Act, and complies therewith as regards reports, etc. It has been held that a "trust" is not a "company, association, or partnership," and consequently is not affected by this statute. Wigfield *v.* Potter, 45 L. T. Rep. 612 (1882); Crowther *v.* Thorley, 32 W. R. 330 (1884); *Re* Siddall, L. R. 29 Ch. D. 1 (1885); Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880). The last case cited was an action to have the "trust" dissolved on the ground that it was a partnership, and was doing business in violation of the statute. The court refused to grant the relief desired, and said that the certificate-holders were not partners and did not form an association. "There has never been anything creating any mutual rights or obligations between those persons. They are from the first entire strangers, who have entered into no contract whatever with each other, nor has either of them entered into any contract with the trustees or any trustee on behalf of the other, there being nothing in the deed pointing to any mandate or delegation of authority to anybody to act for the

Such being the case, it seems to be clear that the trustees and the property of a modern "trust" are liable for all debts incurred by it, but that the holders of the trust certificates are not in any way liable therefor, unless they have expressly agreed to assume that liability.

§ 503*d*. *Qualifications, powers, rights, and duties of the managers and certificate-holders of a "trust."*—Any person may serve as a trustee, provided that person is competent to take the legal title to the property.[1]

The trustees of a "trust" correspond somewhat to the directors of a corporation. They generally are elected annually by the certificate-holders in a regularly called meeting of themselves. The instruments creating the "trust" usually provide for the election of trustees, and for their succession and term of office. There is nothing in the old law of trust estates which forbids this change of trustees.[2]

certificate-holders as between themselves, and nothing, as it appears to me, by which any liability could ever be cast upon the certificate-holders either as between themselves or as between themselves and anybody else. . . . If there is any business at all, it is to be carried on by the trustees. Whatever is to be done is to be done by the trustees." And Cotton, L. J., said: "The trustees here are the only persons who are dealing with the investments, and they are dealing, not as agents for some princinal, but as trustees in whom the property and the management of it are vested, and who have the power of changing the investments and securities. That is just like the case which often occurs where the executors or trustees of a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal with those persons as the only persons contracting, and hold themselves out as personally liable. Those persons have no right whatever as against the persons beneficially entitled." This case was one involving a "trust." See also dicta to the same effect in Credit Mobilier *v.* Commonwealth, 67 Pa. St. 233 (1870).

[1] 1 Perry, Trusts, § 39.

[2] "The person who creates the trust may mould it into whatever form he pleases; he may therefore determine in what manner, in what event, and upon what condition the original trustees may retire and new trustees may be substituted. All this is fully within his power, and he can make any legal provisions which he may think proper for the continuation and succession of trustees during the continuation of the trust." Perry, Trusts, § 287. In England, under the vesting acts, the court held that it had power to vest the estate of a modern "trust" in new trustees where one of the old trustees was dead, another was insane, and under the trust agreement the certificate-holders had elected new trustees. *Re* Siddall, L. R. 29 Ch. D. 1 (1885). A similar power was given to the court in regard to trusts of personal property in New York by L. 1882, ch. 185. As regards the common-law rules and powers of the courts herein, see Perry, Trusts, § 276 *et seq.* At common law, upon the death of the surviving trustee, his executor or administrator became the trustee. Boone *v.* Citizens' Sav. Bank, 84 N. Y. 83, 87

Where, by the trust deed, a majority of the *cestuis que trust* have power to fill a vacancy caused by the incapacity or inability of the trustee, they may substitute a new trustee when the old trustee removes to and becomes a resident of a foreign country.[1]

The trustee has no powers beyond those which are expressly conferred by the trust instrument.[2]

The trustees who hold stock in various corporations which make up the "trust" are trustees and not vendees of the stock.[3] The trustee ordinarily has no power to sell the stock.[4] The trustee may sue and be sued in his own name on all matters and contracts pertaining to the trust.[5]

He is not liable to the *cestui que trust* for losses incurred by his

(1881); De Peyster *v.* Beekman, 55 How. Pr. 90 (1877). In the cost-book company case of Johnson *v.* Goslett, 18 C. B. 728 (1856), the following provision appears: "The trustees of the said lease shall, when and if required by the directors, execute a deed declaring that they hold the said mine under and by virtue of such lease as trustees for the benefit of the shareholders in the said company, according to their respective shares and interests therein; and if any or either of the said trustees, or any future trustees, shall resign, or die, or become incapable or unwilling to act, then new trustees or a new trustee may be appointed by any of the general meetings of shareholders hereinafter provided for, in the place of the trustees or trustee so resigning, or dying, or becoming incapable or unwilling to act, as aforesaid; and the said premises shall be forthwith assigned to and vested in the said new trustee or trustees jointly with the continuing trustee or trustees, or in such new trustees only, as the case may require, at the expense of the said company."

1 Farmers' L. & T. Co. *v.* Hughes, 11 Hun, 130 (1877). In this case the deed of trust provided that the trustees or their survivor might be removed by the vote of a majority in interest of the holders of the bonds referred to in the trust deed, at any meeting called for that purpose; and further, by a separate and distinct provision, that in case of the death, removal, resignation, incapacity, or inability of both or either of said trustees to act in the execution of the trust, then a majority of the holders of such bonds might designate and select, in writing, one or more competent persons to fill the vacancy so occurring. The property may be made to vest in new trustees without transfer, if the trust instrument is so drawn. 1 Perry, Trusts, § 284.

2 1 Perry, Trusts, §§ 454, 460.

3 People *v.* North River, etc. Co., 121 N. Y. 582 (1890).

4 See ch. XIX, *supra*. The trustees of the American Cattle Trust cannot sell shares of stock which they hold. Gould *v.* Head, 38 Fed. Rep. 886 (1889); s. c., 41 Fed. Rep. 240 (1890).

5 In this respect the trustee is not the same as the director of a corporation. "A trustee is a man who is the owner of the property, and deals with it as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestuis que trust*. . . . The office of director is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal; that is, for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts, nor be sued on them unless he exceeds his authority. That seems to me to be

management of the property of the trust. He is bound merely to exercise ordinary discretion and to obey the directions of the instrument creating the trust. It is only for a breach of trust that he may be made to account to the *cestui que trust.*[1]

In the case of the modern "trust," it has been doubted whether the consent of all the trustees is essential to its contracts and acts, as is the case with the old common-law trust.[2] But in general these matters are regulated and provided for by the instrument which creates the "trust."

The compensation of the trustee is usually fixed by the trust deed. If not, it falls within the provisions of the statutes, or a reasonable compensation is allowed by the common law.[3]

The property of the "trust" cannot be seized for the individual debts of the trustee,[4] but the interest of the certificate-holder may be reached so as to subject it to the payment of his debts.[5] In this respect the certificates resemble shares of stock.

The trust property, where it consists of personal property in the nature of bonds, stocks, notes, or evidences of indebtedness, or corresponds to the capital stock of the corporation, may be taxed at the place where the main office or place of business of the "trust" exists. The extent of the taxation depends, of course, upon the statutes of the state wherein the tax is laid.[6]

There is more difficulty in determining whether a certificate-holder may terminate his interest in the "trust" and demand his proportion of the property. In certain "trusts," whose property

the broad distinction between trustees and directors." Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880).

[1] Simonton *v.* Sibley, 122 U. S. 220 (1887). Where a railroad construction contract is assigned to trustees to be carried out and the profits to be paid to the stockholders of a designated corporation, the stockholders may compel the trustees to pay over such profits. The trustees cannot set up that they were also directors of the railroad. Hazard *v.* Dillon, 34 Fed. Rep. 485 (1888).

[2] Mills *v.* Hurd, 29 Fed. Rep. 410 (1887).

[3] 2 Perry, Trusts, § 917.

[4] Gibson *v.* Stevens, 7 N. H. 352 (1834), where a trustee was authorized to continue the testator's business. The property was held not subject to the trustee's personal debts.

[5] As to the rule at common law, see 2 Alb. L. J. 261, 288. In New York, by statute, all transfers of personal property made in trust, for use of the person making the same, are void as against his creditors, existing or subsequent. 2 R. S. 135, § 1 (7th ed., p. 2327, and cases there cited). See also Graff *v.* Bonnett, 31 N. Y. 9, 14, 18 (1865).

[6] Ricker *v.* American Loan, etc. Co., 140 Mass. 346 (1885). See also People *v.* Albany Assessors, 40 N. Y. 154 (1869); *Re* Jefferson, 35 Minn. 215 (1886), citing many cases on this subject. In New York state, under its statutes, shares of stock in either domestic or foreign corporations, which are subject to taxation on their capital stock, are not subject to taxation except shares of stock in banks. See § 565, *infra.*

consists of shares of stock, he sometimes may.[1] But in general a single certificate-holder cannot have the whole "trust" dissolved and wound up before the time fixed by the trust agreement for its dissolution has arrived.[2]

If the "trust" itself is forbidden by the statutes of the state wherein it exists, it will not be wound up by the courts. The law will not compel a trustee to account for property or transactions which grow out of a contract which is prohibited by statute. The courts leave the parties where they are found. They are outside of the protection of the law.[3]

If, however, the "trust" is legal, it may be terminated at any time by a decree of a court, upon the consent of all the parties who are interested in it.[4] But a "trust" will not be dissolved and wound up merely because the trustees have been guilty of a breach of trust. The remedy in such a case is to enjoin or remove the trustees.[5] Where, however, the trust is insolvent and incapable of proceeding, a dissolution and winding up of its business will be decreed by a court.[6]

B. UNINCORPORATED JOINT-STOCK ASSOCIATIONS.

§ 504. *Definitions — Joint-stock companies, clubs, exchanges, etc.—Ownership of land.*— A joint-stock company may be defined to be an association of persons for the purpose of business, having

[1] See § 503*b*, *supra*, and § 622, *infra*. A syndicate operation was involved in Hogg *v.* Hoag, 107 Fed. Rep. 807 (1901), where certain stocks and property were transferred to a trustee, who issued certificates therefor to the members of the syndicate. A part of the subscribers did not pay, and the vendor of the property took the trustee certificates of such non-paying subscribers, and on the death of the trustee a bill was filed to have the court substitute a new trustee, and one of the subscribers filed a cross-bill for an accounting. The court decreed a winding up of the syndicate and appointed a receiver. The court held that a partial payment made to the vendor of the stocks was legal, even though all the property was not conveyed to the trustee, as contemplated, and that the vendor's acceptance of the certificates of non-paying subscribers obligated him to pay therefor, although such trustee's certificates had become worthless, the transaction being in connection with the Oregon Pacific Railroad Company. The court said that the syndicate was in substance, though not technically, a joint-stock company.

[2] Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880). The same rule prevails in unincorporated joint-stock associations. See Smith *v.* Virgin, 33 Me. 148 (1851). See also Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867), holding that such company will not be wound up merely because the directors have been guilty of a breach of trust.

[3] *Re* Padstow, etc. Assoc., L. R. 20 Ch. D. 137 (1882).

[4] Perry, Trusts, § 920.

[5] Perry, Trusts, §§ 816–853.

[6] See Baring *v.* Dix, 1 Cox, Ch. 213 (1786); Bailey *v.* Ford, 13 Sim. 495 (1843); Jennings *v.* Baddeley, 3 K. & J. 78 (1856), where insolvent copartnerships were wound up, though the time for which

a capital stock divided into shares, and governed by articles of association which prescribe its objects, organization, and procedure, and the rights and liabilities of the members, except that the articles cannot release the members from their liability as partners to the creditors of the company.[1]

A joint-stock company lies midway between a corporation

they were to exist had not yet expired. See also Sieghortner *v.* Weissenborn, 20 N. J. Eq. 172 (1869); Howell *v.* Harvey, 5 Ark. 270 (1843); Van Ness *v.* Fisher, 5 Lans. 236 (1871); Brien *v.* Harriman, 1 Tenn. Ch. 467 (1873); Holladay *v.* Elliott, 8 Oreg. 84 (1879); Bagley *v.* Smith, 10 N. Y. 489 (1853). In Sibley *v.* Minton, 27 L. J. (Ch.) 53 (1858), the court held that, in an action by an adventurer in a cost-book mining company to wind up the company and adjust the losses, all the co-adventurers were necessary parties.

[1] "A joint-stock company is an association of individuals possessing a common capital divided into shares, of which each member possesses one or more. These shares represent the interest of the members, and are transferable by the owners without the consent of the other members or the creditors of the association." Kossakowski *v.* People, 177 Ill. 563 (1899). In Hedge's Appeal, 63 Pa. St. 273 (1869, following the statute 8 & 9 Vict., c. 110), it is defined to be "a partnership whereof the capital is divided, or agreed to be divided, into shares, and so as to be transferable without the express consent of all the copartners." In the statutes of Massachusetts the words "joint-stock company" are used to mean a corporation organized under the general incorporation act of the state. Attorney-General *v.* Mercantile Ins. Co., 121 Mass. 524 (1877). But this is not an accurate use of the term. "The articles of association of an unincorporated joint-stock company bear the same relation to it that the charter bears to an incorporated company; they regulate the duties of the officers and the duties and obligations of the members of such a company among themselves; they specify the capital, limit the duration, and define the business of the company." Bray *v.* Farwell, 81 N. Y. 600 (1880), per Earl, J. See also White *v.* Brownell, 4 Abb. Pr. (N. S.) 162, 193 (1868). In Robbins *v.* Butler, 24 Ill. 387, 426 (1860), it is said that joint-stock companies "have none of the rights and immunities of . . . a regularly incorporated company. These stock companies are nothing more than partnerships; and every member of the company is liable for the debts of the concern, no matter what the private arrangements among themselves may be." To the same effect, see Moore *v.* Brink, 4 Hun, 402 (1875); Skinner *v.* Dayton, 19 Johns. 513 (1822); Wells *v.* Gates, 18 Barb. 554 (1854); Keasley *v.* Codd, 2 Car. & P. 408 (1826). "The term 'joint-stock company' appears to have originated in England in comparatively recent times. Joint-stock companies may be said to be partnerships, or individuals associated for some specified purpose, under a designated name or description, to which, by some general or special statute, when they have been formed or composed in a specified manner, some of the powers or proper attributes of a corporation have been given." Dayton, etc. R. R. *v.* Hatch, 1 Disney (Ohio), 84, 90 (1855). Factors', etc. Ins. Co. *v.* New Harbor, etc. Co., 37 La. Ann. 233, 239 (1885), speaks of a joint-stock company as "a nondescript organization, composed of the owners of certificates showing the proportion of their respective interests in its assets and liability for its obligations, and who are co-owners or proprietors in common. As no one

and a copartnership. It is, however, to be distinguished from them,[1] also from clubs,[2] from social, benevolent,[3] and mutual-aid [4] or-

is bound to own property in indivision, it follows that such owners who wish a division have a right to have that property sold, and after a liquidation of the affairs of the concern to have the residue distributed ratably among themselves." At common law a partnership or joint-stock association may do business under any name that it chooses. See § 233, note, *supra;* Preachers' Aid Soc. *v.* Rich, 45 Me. 552 (1858); 2 Perry, Trusts, § 730; Swasey *v.* American Bible Soc., 57 Me. 523 (1869).

[1] It differs from a corporation in that a joint-stock company has no limited liability as regards its stockholders; and it cannot sue or be sued in the name of the association. It differs from a copartnership in that it is not dissolved by a transfer of stock; and each member has not the same powers of transacting business and disposing of the assets as in a partnership. See Cox *v.* Bodfish, 35 Me. 302 (1853). In Illinois it is a criminal offense for individuals or an unincorporated association to use a name that implies incorporation. Hazelton Boiler Co. *v.* Hazelton, etc. Co., 142 Ill. 494 (1892).

[2] Park *v.* Spaulding, 10 Hun, 128 (1877); Ridgely *v.* Dobson, 3 Watts & S. (Pa.) 118 (1842); Loubat *v.* Le Roy, 40 Hun, 546 (1886); Flemyng *v.* Hector, 2 M. & W. 172 (1836); *Re* St. James Club, 2 De G., M. & G. 383 (1852); Ewing *v.* Midlock, 14 Ala. (O. S.) 82 (1837); Todd *v.* Emly, 8 M. & W. 505 (1841); Reynell *v.* Lewis, 15 M. & W. 517 (1846); Wood *v.* Finch, 2 F. & F. 447 (1861); Cross *v.* Williams, 10 W. R. 302 (1862): Cockerell *v.* Aucompte, 5 W. R. 633 (1857); Koehler *v.* Brown, 31 How. Pr. 235 (1866); Waller *v.* Thomas, 42 How. Pr. 337 (1871); Hopkinson *v.* Marquis of Exeter, 16 W. R. 266 (1867); Gardner *v.* Fremantle, 19 W. R. 256 (1870); Delauney *v.* Strickland, 2 Stark. 416 (1818); Caldicott *v.* Griffiths, 8 Exch. 898 (1853); Ebbinghousen *v.* Worth Club, 4 Abb. N. Cas. 300 (1878). The ordinary attachment statute authorizing the attachment of shares of stock does not apply to a club organized for lawful sporting purposes and being more of the nature of a statutory joint-stock association than a corporation. Lyon *v.* Denison, 80 Mich. 371 (1890). Even though the trustees of a club have been obliged to pay the debts of the club, yet

[3] Penfield *v.* Skinner, 11 Vt. 296 (1839); Beaumont *v.* Meredith, 3 Ves. & B. 180 (1814). See also Thomas *v.* Ellmaker, 1 Pars. Sel. Eq. Cas. 98 (1844). Or Masonic lodges. See Ash *v.* Guie, 97 Pa. St. 493 (1881). See also Cohn *v.* Borst, 36 Hun, 562 (1885); Goodman *v.* Jedidjah Lodge, 67 Md. 117 (1887); Schmidt *v.* Abraham Lincoln Lodge, 84 Ky. 490 (1886). A by-law of a benevolent society that, for non-payment of dues, the names of members shall be dropped, is legal and self-executing. Rood *v.* Railway, etc. Assoc., 31 Fed. Rep. 62 (1887). See McCallion *v.* Hibernia, etc. Soc., 70 Cal. 163 (1886), involving a secession from a benevolent association. Benevolent associations are not necessarily copartnerships. Brown *v.* Stoerkel, 74 Mich. 269 (1889).

[4] Lafond *v.* Deems, 81 N. Y. 507 (1880); Fritz *v.* Muck, 62 How. Pr. 69 (1881); Pipe *v.* Bateman, 1 Iowa, 369 (1855). *Cf.* Thomas *v.* Ellmaker, 1 Pars. Sel. Eq. Cas. 98 (1844); Olery *v.* Brown, 51 How. Pr. 92 (1875). An unincorporated society which has existed for nearly one hundred years, organized by an agreement by which there is a community of property, and any member dying or withdrawing not to be entitled to any part of such property, is valid in law, and such agreement will be upheld. Schwartz *v.* Duss, 93 Fed. Rep. 528 (1899); aff'd, 187 U. S. 8 (1902)

ganizations, and from associations formed for business purposes, but without a capital stock, such as stock and other exchanges,[1]

they cannot collect from the members. Wise *v.* Perpetual, etc. Co., 87 L. T. Rep. 569 (1902), the court saying: "Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing. They are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club, to be paid so long as he remains a member. It is upon this fundamental condition not usually expressed, but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognized." An unincorporated club is not a partnership, although the members may be liable as partners, and hence a member has no power to make contracts for the association. Lumbard *v.* Grant, 35 N. Y. Misc. Rep. 140 (1901). *Cf.* 88 L. T. Rep. 323.

[1] Such as stock exchanges. See White *v.* Brownell, 2 Daly, 329 (1868); Clute *v.* Loveland, 68 Cal. 254 (1885); Leech *v.* Harris, 2 Brewst. (Pa.) 571 (1869); State *v.* Chamber of Commerce, 20 Wis. 63 (1865); Weston *v.* Ives, 97 N. Y. 222 (1884), relative to sale of a seat by the exchange to pay the member's debts. See also Platt *v.* Jones, 96 N. Y. 24 (1884). As to a levy of execution on a seat in an exchange, see Bowen *v.* Bull, 12 N. Y. Supp. 325 (1890); Powell *v.* Waldron, 89 N. Y. 328 (1882); Ritterband *v.* Baggett, 4 Abb. N. Cas. 67 (1877); Londheim *v.* White, 67 How. Pr. 469 (1884). A seat in a stock exchange owned by a bankrupt vests in the trustee and may be sold by him. Page *v.* Edmunds, 187 U. S. 596 (1903). A stock exchange seat may be pledged to secure a loan and such pledge need not be recorded. Upon the death of the pledgor, the stock exchange has no right to pay the proceeds of the sale of the seat to his administrator, where notice of the pledge had been given. Nashua Sav. Bank *v.* Abbott, 63 N. E. Rep. 1058 (Mass. 1902). A seat in the exchange is property which may be reached by creditors. But, if an assignee in bankruptcy refuses to take it and pay the dues, the bankrupt who pays them may retain the seat. Sparhawk *v.* Yerkes, 142 U. S. 1 (1891). It is legal for an exchange to have and enforce a by-law providing that the seat of a member shall be sold in case of his failure to fulfill his contracts. Rorke *v.* San Francisco Stock, etc. Board, 99 Cal. 196 (1893). A seat in the stock exchange cannot be sold under levy of execution. The purchaser takes nothing. Lowenberg *v.* Greenebaum, 99 Cal. 162 (1893). The seat of a member of an exchange may be reached by judgment creditors of the owner, although the by-laws provide otherwise. Habenicht *v.* Lissak, 78 Cal. 351 (1889). Where, under a by-law of a board of trade, differences between members are arbitrated, a court of equity may review the decision in regard to the measure of damages. Ryan *v.* Cudahy, 157 Ill. 108 (1895). A fund accumulated by an exchange under its charter, for the benefit of the widows and families of deceased members, cannot, by an amendment of the by-laws, be distributed among the members. Parish *v.* New York, etc. Exchange, 169 N. Y. 34 (1901). A discharge under the bankruptcy act puts an end to the lien of members of an exchange upon the seat of the bankrupt for debts due to such members. State *v.* Chamber of Commerce, etc., 77 Minn. 308 (1899). A telegraph company is not bound to furnish stock exchange quotations to a person where the stock exchange has ordered the telegraph company not to furnish quotations to that person, and the con-

especially in respect to the right of expulsion.[1] In the matter of the expulsion of a member from an incorporated exchange, the court may pass upon the question of the jurisdiction of the board of directors to expel a member, and also as to whether there was any evidence at all justifying the expulsion.[2] Where the

tract between the stock exchange and the telegraph company required the latter to furnish quotations to only such persons as the stock exchange approved, the stock exchange being a voluntary association and not a corporation. Matter of Renville, 46 N. Y. App. Div. 37 (1889). Associations may be for improving a water-power. Troy Iron, etc. Factory *v.* Corning, 45 Barb. 231 (1884). For building a school-house. Marston *v.* Durgin, 54 N. H. 347 (1874). For protecting business interests. Caldicott *v.* Griffiths, 8 Exch. 898 (1853). See also Tenney *v.* New England Protection Union, 37 Vt. 64 (1864); Abels *v.* McKeen, 18 N. J. Eq. 462 (1867); Henry *v.* Jackson, 37 Vt. 431 (1865); Frost *v.* Walker, 60 Me. 468 (1872). A stock corporation organized to build a building for the benefit of a library association may sustain towards the latter the relation of trustee towards a *cestui que trust*, but the corporation may insist on its legal rights. Pittsburgh, etc. *v.* Mercantile, etc. Co., 189 Pa. St. 479 (1899). As to building associations, see also Phelps *v.* American, etc. Assoc., 121 Mich. 343 (1899). In building associations general creditors are prior in right to withdrawing members. Cook *v.* Emmet, etc. Assoc., 90 Md. 284 (1899). As to the nature of a building and loan association and the legality of its stock, loans, and mode of transacting business, see McIlwaine *v.* Iseley, 96 Fed. Rep. 62. See 189 U. S. 122.

[1] A member of a union cannot bring a suit in equity to declare void and illegal a by-law that members shall be fined for accepting employment in connection with non-union persons, and to enjoin the infliction of a fine upon himself. His remedy is at law or by application to the attorney-general. Thomas *v.* Musical, etc. Union, 121 N. Y. 45 (1890). A by-law that the members of a news association shall not publish news furnished by other associations in the same territory is valid. The penalty for violation may be suspension. Matthews *v.* Associated Press, 136 N. Y. 333 (1893). Where a member of a lodge was expelled for entering into a conspiracy to blackball applicants for admission, the court refused to restore him by *mandamus*, and said that such a case was different from one where property rights or money demands are involved. State *v.* Grand Lodge, 53 N. J. L. 536 (1891). Where the expelled member has the right by by-law to appeal from the decision to a corporate meeting, the courts will not interfere until such appeal is taken. Screwmen's Benev. Assoc. *v.* Benson, 76 Tex. 552 (1890). As to expulsion of a member from a club under a by-law, see Commonwealth *v.* Union League, 135 Pa. St. 301 (1890). An action is not maintainable to compel an unincorporated voluntary political association to admit a person to membership. McKane *v.* Adams, 123 N. Y. 609 (1890). Such organizations as chambers of commerce sometimes provide for forfeiture of membership for non-payment of dues, and such provision is legal. The corporation may, however, sue for its dues instead of forfeiting the membership. Denver, etc. Commerce *v.* Green, 8 Colo. App. 420 (1896). As to expulsion of members from unincorporated associations, see Otto *v.* Journeymen Tailors' Union, 75 Cal. 308 (1888). See also § 4*a*, *supra*.

[2] People *v.* New York Produce Exch., 149 N. Y. 401 (1896). See also *Re* Haebler, 149 N. Y. 414 (1896), holding that a by-law giving the board of managers

charter of a mutual protective corporation does not provide for expulsion, and the corporation has a surplus fund in its treasury, the power of expulsion does not exist unless the member has been guilty of some infamous offense or has done some act tending to the destruction of the society.[1]

In corporations having a capital stock no power of expulsion can be exercised unless expressly conferred by the charter or by statute.[2]

A member who has been unjustly expelled may have *mandamus* to compel the corporation to restore him to membership.[3] Accordingly, where a corporate body strikes off the name of one of its members without giving him previous notice of their intention so to do, and affording him opportunity to be heard in his own defense, a *mandamus* to restore will be granted;[4] and an injunction lies to restrain a board of brokers from irregularly expelling one of

power to discipline members is legal. A stock exchange may expel a member who does not fulfill his contracts made within the exchange, due notice, etc., being given to him in the matter. Lewis *v.* Wilson, 121 N. Y. 284 (1890). Stock exchanges cannot expel members for carrying cases into courts instead of arbitrating. People *v.* New York Cotton Exch., 8 Hun, 216 (1876). As to the power of a board of trade to expel a member, see Pitcher *v.* Chicago Board of Trade, 121 Ill. 412 (1887). As to the expulsion of a member from the New York Stock Exchange, see Belton *v.* Hatch, 109 N. Y. 593 (1888). See also p. 1075, *infra;* 78 N. Y. App. Div. 229.

[1] Weiss *v.* Musical, etc. Union, 189 Pa. St. 446 (1899).

[2] Evans *v.* Philadelphia Club, 50 Pa. St. 107 (1865); State *v.* Chamber of Commerce, 20 Wis. 63 (1865); also State *v.* Milwaukee Chamber of Commerce, 47 Wis. 670 (1879). In Dickenson *v.* Milwaukee Chamber of Commerce, 29 Wis. 45 (1871), it is held that there may be a lawful expulsion under a valid by-law.

Expulsion by virtue of a by-law has been held to be unlawful. People *v.* Saint Franciscus Ben. Soc., 24 How. Pr. 216 (1862); People *v.* Mechanics' Aid Soc., 22 Mich. 86 (1870); Green *v.* African Meth. Epis. Soc., 1 Serg. & R. (Pa.) 254 (1815). A resolution spread upon the corporate records unjustly expelling a member is a libel, and the member offering the resolution is liable to an action thereupon. Fawcett *v.* Charles, 13 Wend. 473 (1835). *Cf.* Adley *v.* Whitstable Co., 19 Ves. Jr. 304 (1815); Chase *v.* East Tennessee, etc. R. R., 5 Lea (Tenn.), 415 (1880). It is doubtful whether a stock corporation may impose a fine upon the stockholders for a violation of its by-laws. Monroe, etc. Assoc. *v.* Webb, 40 N. Y. App. Div. 49 (1899). See also § 4*a*, *supra*.

[3] Black, etc. Soc. *v.* Vandyke, 2 Whart. (Pa.) 309 (1837); Commonwealth *v.* German Soc., 15 Pa. St. 251 (1850); People *v.* Saint Franciscus Ben. Soc., 24 How. Pr. 216 (1862); State *v.* Carteret Club, 40 N. J. L. 295 (1878); People *v.* Erie Medical Soc., 32 N. Y. 187 (1865); People *v.* New York Ben. Soc., 3 Hun, 361 (1875); Medical, etc. Soc. *v.* Weatherly, 75 Ala. 248 (1883). As to the damages to be paid to a member who has been unlawfully expelled and is reinstated by the court, see People *v.* Musical, etc. Union, 118 N. Y. 101 (1889).

[4] Delacy *v.* Neuse River Nav. Co., 1 Hawks (N. C.), 274 (1821). The member must have a fair hearing. Southern Plank-road Co. *v.* Hixon, 5 Ind. 165 (1854).

their members.[1] Such organizations, however, as chambers of commerce sometimes provide for forfeiture of membership for non-payment of dues, and such provision is legal. The corporation may sue for its dues instead of forfeiting the membership.[2]

Where the expulsion is regular and authorized by the charter or statute it is conclusive, and *mandamus* will not lie.[3] An act of expulsion cannot be impeached or attacked collaterally.[4] At common law there were three causes for expulsion: where the member was guilty of an infamous, indictable offense; or guilty of an offense against his duty as a corporator; or of an offense compounded of these two.[5]

A mutual insurance company may pay dividends.[6] A joint-stock

[1] Leech *v.* Harris, 2 Brewst. (Pa.) 571 (1869); Hutchinson *v.* Lawrence (N. Y. Supr. Ct.), N. Y. D. Reg., Feb. 8, 1887. *Cf.* Italian Union Soc. *v.* Montedonico, 4 Am. & Eng. Corp. Cas. 22 (1884). But not as against a medical society. Gregg *v.* Massachusetts Medical Soc., 111 Mass. 185 (1872). So, also, the courts will not, upon the application of a member of the corporation, grant an injunction to restrain a corporation from initiating new members when no danger of pecuniary loss is shown as likely to result to the petitioner from such initiation. Thompson *v.* Tammany Soc., 17 Hun, 305 (1879).

[2] Denver Chamber, etc. *v.* Green, 8 Colo. App. 420 (1896).

[3] Commonwealth *v.* Pike Ben. Soc., 8 Watts & S. 247 (1844); People *v.* Fire Underwriters, 7 Hun, 248 (1876).

[4] Black, etc. Soc. *v.* Vandyke, 2 Whart. (Pa.) 309 (1837); Commonwealth *v.* Pike Ben. Soc., 8 Watts & S. (Pa.) 247 (1844); Society for Visitation, etc. *v.* Meyer, 52 Pa. St. 125, 131 (1866). *Cf.* Commonwealth *v.* Oliver, 2 Pars. Sel. Cas. 420, 426 (1849).

[5] Bagg's Case, 11 Coke, 93*b*, 99 (1616); Rex *v.* Liverpool, 2 Burr. 723, 732 (1759); State *v.* Milwaukee Chamber of Commerce, 20 Wis. 63 (1865); People *v.* New York Comm. Assoc., 18 Abb. Pr. 271 (1864); People *v.* Chicago Board of Trade, 45 Ill. 112 (1867). *Cf.* Smith *v.* Smith, 3 Desauss. (S. C.) 557 (1813), where an expulsion for misconduct was sustained; Woolsey *v.* Independent Order, etc., 1 Am. & Eng. Corp. Cas. 172 (1883); Fisher *v.* Keane, L. R. 11 Ch. D. 353 (1878); Hopkinson *v.* Exeter, L. R. 5 Eq. 63 (1867); Dawkins *v.* Antrobus, L. R. 17 Ch. D. 615 (1881); Gardner *v.* Fremantle, 19 W. R. 256 (1871); People *v.* New York Cotton Exch., 8 Hun, 216 (1876); Dean *v.* Bennett, L. R. 6 Ch. App. 489 (1871). In Sturges *v.* Chicago Board of Trade, 86 Ill. 441 (1877), it was held that the remedy of the expelled member was at law, and not in equity. But see State *v.* Lusitanian, etc. Soc., 15 La. Ann. 73 (1860); Wood *v.* Woad, L. R. 9 Exch. 190 (1874); Bostwick *v.* Detroit Fire Dept., 49 Mich. 513 (1883); Hassler *v.* Philadelphia Musical Assoc., 14 Phila. 233 (1880); Anacosta Tribe *v.* Murbach, 13 Md. 91 (1858); State *v.* Georgia Med. Soc., 38 Ga. 608 (1869); Washington Ben. Soc. *v.* Bacher, 20 Pa. St. 425 (1853); Riddell *v.* Harmony Fire Co., 8 Phila. 310 (1871); State *v.* Adams, 44 Mo. 570 (1869); Harmstead *v.* Washington Fire Co., 8 Phila. 331 (1871); Commonwealth *v.* Philanthropic Soc., 5 Binn. (Pa.) 486 (1813); Commonwealth *v.* St. Patrick Benev. Soc., 2 Binn. (Pa.) 448 (1810); People *v.* Fire Underwriters, 7 Hun, 248 (1876). Upon the general question of the power to expel members, see Ang. & A. Corp., § 410 *et seq.;* 2 Kent, Com. 297.

[6] In McKean *v.* Biddle, 181 Pa. St. 361 (1897), where a mutual insurance com-

company, although it exercises the power to issue stock, the same as a corporation, yet, when organized for the purpose of transacting any lawful business, is itself a lawful means of carrying on business.[1]

The earlier cases declaring that joint-stock companies were illegal were so decided largely because of the Bubble Act, which was in force from 1720 to 1826.[2]

Very high English authority, after a thorough review of the English cases, gives the opinion that at common law joint-stock associations are legal.[3]

pany for one hundred and thirty-two years had not paid dividends, but had accumulated a surplus of over $4,000,000, the court held that the company might resume the payment of dividends. The court also held that every corporation has the inherent right to declare dividends.

[1] "It is too late to contend that partnerships with transferable shares are illegal in this commonwealth. . . . The grounds upon which they were formerly said to be illegal in England, apart from statute, have been abandoned in modern times." Phillips *v.* Blatchford, 137 Mass. 510 (1884). "These companies, being consonant with the wants of a growing and wealthy community, have forced their way into existence, whether fostered by the law or opposed to it." Greenwood's Case, 3 De G., M. & G. 459, 477 (1854); Townsend *v.* Goewey, 19 Wend. 424 (1838). A laboring men's association for the purpose of opposing capitalists has been upheld. Snow *v.* Wheeler, 113 Mass. 179 (1873).

[2] Enacted 6 Geo. I, c. 18, § 18; repealed, 6 Geo. IV, c. 91. Lindley says of this act: "Juster views of political economy and of the limits within which legislative enactments should be confined have led to the repeal of the statute in question, which, though deemed highly beneficial half a century ago, probably gave rise to much more mischief than it prevented."

[3] Lindley, Company Law (5th ed.), p. 130. In a thorough and exhaustive note on this subject the learned author refers to Rex *v.* Dodd, 9 East, 516 (1808), holding that a company with a prospectus limiting the liability of subscribers is illegal, as a trap to ensnare the unwary; Josephs *v.* Pebrer, 3 B. & C. 639 (1825), holding that unincorporated companies with transferable shares are illegal; and Buck *v.* Buck, 1 Campb. 547 (1808), and Rex *v.* Stratton, 1 Campb. 549, n. (1809), to same effect. He states that Kinder *v.* Taylor, Coll. Partn. 917 (2d ed., 1825); s. c., 3 L. J. Ch. 69; Duvergier *v.* Fellows, 5 Bing. 248 (1828); aff'd, 10 B. & C. 826, and Blundell *v.* Winsor, 8 Sim. 601 (1837), contained dicta only, so far as they passed on the legality of these companies. The following cases clearly establish the legality of joint-stock associations: Harrison *v.* Heathorn, 6 Man. & G. 81 (1843); Garrard *v.* Hardey, 5 Man. & G. 471 (1843); Barclay's Case, 26 Beav. 177 (1858); *Re* Aston, 27 Beav. 474 (1859); Grisewood's Case, 4 De G. & J. 544 (1859); Sheppard *v.* Oxenford, 1 K. & J. 491 (1855); Rex *v.* Webb, 14 East, 406 (1811); Walburn *v.* Ingilby, 1 M. & K. 61 (1832); and see Pratt *v.* Hutchinson, 15 East, 511 (1812); Ellison *v.* Bignold, 2 Jac. & W. 510 (1821); Nockels *v.* Crosby, 3 B. & C. 814 (1825); Kempson *v.* Saunders, 4 Bing. 5 (1826); Brown *v.* Holt, 4 Taunt. 587 (1812). And the learned jurist comes to this conclusion: "The case of Blundell *v.* Winsor, always relied upon as an authority by those who contend that such a company is illegal, has never met with approbation from the

In Louisiana and Illinois a contrary conclusion has been arrived at.[1]

The real estate of an unincorporated joint-stock association is generally held in the names of trustees for its benefit.[2] A deed of

bench, nor has it ever been followed. Upon the whole, therefore, it appears that there is no case deciding that a joint-stock company with transferable shares, and not incorporated by charter or act of parliament, is illegal at common law; that opinions have nevertheless differed upon this question; that the tendency of the courts was formerly to declare such companies illegal; that this tendency exists no longer; and that an unincorporated company with transferable shares will not be held illegal at common law unless it can be shown to be of a dangerous and mischievous character, tending to the grievance of her majesty's subjects. The legality at common law of such companies may therefore be considered as finally established."

[1] See § 503*b*, *supra;* Greene *v.* People, 21 N. E. Rep. 605 (Ill. 1889). A mutual insurance company may be sufficiently a corporation, or assuming to be such, to sustain *quo warranto* against it. Greene *v.* People, 150 Ill. 513 (1894); State *v.* Ackerman, 51 Ohio St. 163 (1894).

[2] When an association holds land in the name of trustees for the benefit of certificate-holders, the certificates constitute an equitable lien on the proceeds from the sale of the lands, and even a consolidation with another association does not disturb this lien. Crawford *v.* Gross, 140 Pa. St. 297 (1891). A conveyance of land to certain individuals as trustees for the members of an unincorporated association is not void by the statute of uses and trusts. Turner *v.* Ontonagon, etc. Co., 77 Mich. 603 (1889). In matters of deeds, usage and long lapse of time may validate deeds made out by an unincorporated association as a corporation. Baeder *v.* Jennings, 40 Fed. Rep. 199 (1889). Where an unincorporated association owns land which is held in trust for it by individuals, it may, upon becoming incorporated, compel the trustees to deed to it the land. Organized Labor Hall *v.* Gebert, 48 N. J. Eq. 393 (1891). If a trustee who holds land for the benefit of a corporation commits a breach of trust, any stockholder may cause him to be removed. Fisk *v.* Patton, 7 Utah, 399 (1891). A new unincorporated association cannot claim the land of the one which it succeeds, where the members are not the same. Allen *v.* Long, 80 Tex. 261 (1891). Although the association has been dormant for many years, yet a new association formed of part of the members of the old cannot convey the land of the old one. Allen *v.* Long, 80 Tex. 261 (1891). A deed to an unincorporated association vests title in it as soon as it is incorporated. Clifton, etc. Co. *v.* Randell, 82 Iowa, 89 (1891). *Cf.* ch. XLI, *infra.* An absolute deed to an individual may nevertheless be construed as in trust, where there is a declaration in writing by him that he holds it in trust for a church. Reorganized Church, etc. *v.* Church of Christ, 60 Fed. Rep. 937 (1894). If the trustees have no power to sell the land, except on the vote of the stockholders, a conveyance without that consent is void. Willis *v.* Greiner, 26 S. W. Rep. 858 (Tex. 1894). Where an unincorporated association pays for land and takes title in the name of a corporation, the latter may be compelled to convey the land to the former, upon the former becoming incorporated. Church, etc. *v.* Algemeine, etc., 31 N. Y. App. Div. 133 (1898). It is well settled that the shareholders in an unincorporated association cannot convey or dedicate to the public any land that is held by

land to certain grantees as trustees for an unincorporated association is not void, but is upheld by the court. The trust is an active one, and is not executed at once by force of the statute.[1] An unincorporated joint-stock association to buy, lease, and sell land is legal, even though the title to the land is held in the name of trustees who cannot act except upon a three-fourths vote of the shareholders. A shareholder cannot have a receiver appointed and the business wound up on the ground of its being illegal.[2] Shares of stock in a joint-stock association are personal property, even though the property of the association consists of real estate, so far as the question of inheritance taxes is concerned.[3] A deed to persons as trustees, the beneficiaries being the members of an association, transfers title, and the New York statute does not vest the title in the beneficiaries, the trustees being beneficiaries also.[4] The English cost-book mining companies were organized on this principle.[5] A deed or devise to an unincorporated association is

trustees for its benefit. Ward *v.* Davis, 3 Sandf. 502 (1850). The interest of one of the *cestuis que trust* of such a trust, consisting of real estate, is personalty, and descends as such upon his death. Mallory *v.* Russell, 71 Iowa, 63 (1887). A scheme by which shares are sold, each share representing a lot in a tract of land, and upon a sale of all the shares the shareholders elect a board of directors, who sell at auction the best lots and distribute the remaining lots by the remaining shareholders drawing the remaining lots "by lot," is not a lottery scheme prohibited by statute. Elder *v.* Chapman, 176 Ill. 142 (1898).

[1] Hart *v.* Seymour, 147 Ill. 598 (1893).

[2] Howe *v.* Morse, 174 Mass. 491 (1899).

[3] Matter of Jones, 172 N. Y. 575 (1902).

[4] King *v.* Townshend, 141 N. Y. 358 (1894).

[5] These mining companies existed in the counties of Cornwall and Devonshire. They were first heard of in the courts about the year 1850. Their plan of reorganization and operation arose from custom. Their organization and mode of business were as follows: Many persons, desirous of working a mine, would cause the title or lease thereto to be taken in the names of one or more persons called trustees. The business was then carried on by an agent called a "purser," or by a board of managers elected by the participants, who were called the "adventurers." The latter, of course, were the beneficiaries of the "trust." Any adventurer had a right to transfer his interest to a transferee. There was no fixed capital stock. Calls for money were made on the adventurers, according to their shares, as often as it was needed. For a full statement of the character of these mining companies, see Kittow *v.* Liskeard Union, L. R. 10 Q. B. 7 (1874). See also *Re* Bodmin, etc. Co., 23 Beav. 370 (1857), holding that the court would not take judicial notice of the nature of a cost-book mining company; Hybart *v.* Parker, 4 C. B. (N. S.) 209 (1858), holding that the purser could not sue at law on an unpaid call; *Re* Wrysgan, etc. Co., 28 L. J. (Ch.) 894 (1859), as to right to relinquish shares, also describing the functions of the purser and managing directors; Johnson *v.* Goslett, 18 C. B. 728 (1856), affirmed in 3 C. B. (N. S.) 569 (1857), giving the full terms of the articles of agreement; Thomas *v.* Clark, 18 C. B. 662 (1856), where the court said: "Every partnership has a right to make its own regulations as to

not a valid conveyance of title.[1] But a deed dated before incorporation, but actually delivered after incorporation, is good.[2] An unincorporated association may take a bequest.[3] And a devise of real estate to an unincorporated association does not fail. The title

the mode of transferring shares or interests therein;" *Re* Prosper, etc. Co., L. R. 7 Ch. 286 (1872), relative to rights upon a resignation; Mayhew's Case, 5 De G., M. & G. 837 (1854), holding that by a transfer of his share "the liability of the transferrer is entirely divested from him and passes to the transferee;" *Re* Wrysgan Co., 5 Jur. (N. S.) 215 (1859), where the court said: "The various phases of absurdity which these joint-stock companies display are such that the marvel in my mind is daily increasing how any man can become a member of a joint-stock company;" Northey *v.* Johnson, 19 L. T. Rep. (O. S.) 104 (1852), holding that after transfer the transferrer is not liable for the debts incurred.

It is clearly established that the adventurers in a cost-book mining company are personally and individually liable as partners for the debts incurred in the enterprise. Peel *v.* Thomas, 15 C. B. 714 (1855); Newton *v.* Daly, 1 F. & F. 26 (1858); Harvey *v.* Clough, 8 L. T. Rep. (N. S.) 324 (1863); Tredwen *v.* Bourne, 6 M. & W. 461 (1840); Ellis *v.* Schmoeck, 5 Bing. 521 (1829); Lanyon *v.* Smith, 3 B. & S. 938 (1863), holding a transferrer liable for debts incurred previous to the transfer. To same effect, Geake *v.* Jackson, 15 W. R. 338 (1867). They are liable, also, to indemnify the directors or trustees. *Ex parte* Chippendale, 4 De G., M. & G. 19, 52 (1854). See also Birch's Case, 2 De G. & J. 10 (1857), and Fenn's Case, 4 De G., M. & G. 285 (1854), where the members who had exercised their right to withdraw were held not liable. In Hart *v.* Clarke, 6 De G., M. & G. 232 (1854), an adventurer compelled the company to account to him for his share of the profits. The adventurers have no interest in the land, and consequently a transfer of their shares is not a transfer of an interest in land. Sparling *v.* Parker, 9 Beav. 450 (1846); Powell *v.* Jessopp, 18 C. B. 336 (1856); Hayter *v.* Tucker, 4 K. & J. 243 (1858). The cost-book mining company was frequently spoken of as a species of joint-stock company. *Re* Wrysgan Co., 5 Jur. (N. S.) 215 (1859); Geake *v.* Jackson, 15 W. R. 338 (1867); Watson *v.* Spratley, 10 Exch. 222 (1854), where the court said: "The interest of the shareholder in the great incorporated joint-stock companies, and in the smallest mine conducted upon the cost-book principle, is, in its essential nature and quality, identical." For an American mining case applying similar principles, see Treat *v.* Hiles, 68 Wis. 344 (1887).

[1] As to the effect of a deed, grant, or bequest of real estate to an unincorporated association, see Webb *v.* Weatherhead, 17 How. 576 (1854); Gerard, Titles to Real Estate (3d ed.), p. 420; Owens *v.* Missionary Soc., 14 N. Y. 380 (1856); 3 Washb. Real Prop. 264 (4th ed.); Holmes *v.* Mead, 52 N. Y. 332 (1873); Goesele *v.* Bimeler, 5 McLean, 223 (1851); s. c., 10 Fed. Cas. 528; German Land Assoc. *v.* Scholler, 10 Minn. 331 (1865); Peabody *v.* Eastern Methodist Soc., 87 Mass. 540 (1863); Towar *v.* Hale, 46 Barb. 361 (1866); 1 Dart, Vend. & P. (5th ed.) 21; Chapin *v.* Chicopee Universalist Soc., 74 Mass. 580 (1857); African M. E. Church *v.* Conover, 27 N. J. Eq. 157 (1876);

[2] San Diego, etc. Co. *v.* Frame, 70 Pac. Rep. 295 (Cal. 1902).

[3] *In re* Winchester's Estate, 133 Cal. 271 (1901). An unincorporated association may be made the recipient of a bequest. Hadden *v.* Daudy, 51 N. J. Eq. 154 (1893).

descends to the heir at law, who holds the same as trustee for the use and benefit of the association.[1] A devise or bequest to a corporation to be thereafter created is valid.[2] "That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not denied."[3] A deed to a corporation not in existence is void.[4] But where promoters pay for land and take a deed in the name of the proposed corporation, the vendor cannot claim that the deed was void, even though the corporation was not actually organized until three years after such deed was given.[5]

The question of whether a deed to a *de facto* corporation may be questioned by any one other than the state is considered elsewhere.[6] An unincorporated association may enjoin a corporation from taking its name where injury is shown.[7]

Leonard *v.* Davenport, 58 How. Pr. 384 (1877); Sherwood *v.* American Bible Soc., 4 Abb. App. Dec. 227 (1864); McKeon *v.* Kearney, 57 How. Pr. 349 (1878); Gibson *v.* McCall, 1 Rich. L. (S. C.) 174 (1844); Byam *v.* Bickford, 140 Mass. 31 (1885), holding that, although a deed to the association is ineffectual, yet that it passes title to the members of the association. They cannot take by devise in New York. White *v.* Howard, 46 N. Y. 144 (1871); Philadelphia Bapt. Assoc. *v.* Hart, 4 Wheat. 1 (1819).

[1] American Bible Soc. *v.* American Tract Soc., 62 N. J. Eq. 219 (1901), the court refusing to follow the New York decisions to the contrary.

[2] See § 694, *infra*.

[3] Tilden *v.* Green, 130 N. Y. 29, 47 (1891), the court holding, however, that the devise should be to the corporation to be formed, and should not be in trust to the executors to convey to such corporation when formed if the executors think best. See also Burrill *v.* Boardman, 43 N. Y. 254 (1871); Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. 99 (1830).

[4] Provost *v.* Morgan's, etc. R. R., 42 La. Ann. 809 (1890). A lease to a corporation not yet organized is void. Utah, etc. Co. *v.* Keith, 18 Utah, 464 (1899). See also § 243, *supra*. A deed to certain persons "as incorporators" of a company not yet incorporated does not vest title in the company when incorporated. McCandless *v.* Inland, etc. Co., 112 Ga. 291 (1900). A statute validating deeds made to supposed corporations, which afterwards become incorporated, applies to deeds made after such statute. Cumberland, etc. Co. *v.* Daniel, 52 S. W. Rep. 446 (Tenn. 1899). Where no organization meetings are held and no officers elected, and no by-laws adopted, and no certificates of stock issued, and no seal adopted, and no records kept, the incorporation does not exist, even though a certificate of incorporation was issued by the state officers. Hence a deed delivered to such corporation does not give title. Wall *v.* Mines, 130 Cal. 27 (1900). A vendor of property to a concern which he supposed was a partnership, but turns out to be a corporation, may repudiate the contract on discovering that fact, inasmuch as the minds of the parties never met. Consumers' Ice Co. *v.* Webster, etc. Co., 32 N. Y. App. Div. 592 (1898).

[5] White Oak, etc. *v.* Murray, 145 Mo. 622 (1898).

[6] See §§ 637, 694, *infra*.

[7] Aiello *v.* Montecaloo, 21 R. I. 496 (1899).

§ 505. *Statutory joint-stock company — Conduct of meetings.*— There is an essential difference between a joint-stock company as it exists at common law and a joint-stock company having extensive statutory powers conferred upon it by the state within which it is organized. The latter kind of joint-stock companies are found in England and in the state of New York. To such an extent have these statutory powers been conferred on joint-stock companies that the only substantial difference between them and corporations is that the members are not exempt from liability as partners for the debts of the company. Accordingly, joint-stock companies, both those of England and New York, have been held to be corporations in many respects, although expressly declared by statute not to have that character.[1] A joint-stock association under the

[1] In the case of Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court said that a voluntary unincorporated association of seven or more persons, without capital stock, is, under the statutes of New York, neither a joint-stock company, nor a corporation, nor a partnership, but that its proceedings would be tested by the law of corporations and partnerships so far as applicable. See Thomas *v.* Dakin, 22 Wend. 9 (1839): Warner *v.* Beers, 23 Wend. 103 (1840); Parmly *v.* Tenth Ward Bank, 3 Edw. 395 (1840); People *v.* Watertown, 1 Hill, 616 (1841); Bank of Watertown *v.* Watertown, 25 Wend. 686 (1841); Willoughby *v.* Comstock, 3 Hill, 389 (1842); Leavitt *v.* Yates, 4 Edw. 134 (1843); Leavitt *v.* Tylee, 1 Sandf. Ch. 207 (1843); People *v.* Niagara County, 4 Hill, 20 (1842); Boisgerard *v.* New York Banking Co., 2 Sandf. Ch. 23 (1844); *Re* Bank of Dansville, 6 Hill, 370 (1844); Gifford *v.* Livingston, 2 Denio, 380 (1845): Case *v.* Mechanics' Banking Assoc., 1 Sandf. 693 (1848); Leavitt *v.* Blatchford, 17 N. Y. 521 (1858); s. c., 5 Barb. 9; Cuyler *v.* Sanford, 8 Barb. 225 (1850); Gillet *v.* Moody, 3 N. Y. 479 (1850); Talmage *v.* Pell, 7 N. Y. 328 (1852); Tracy *v.* Talmage, 18 Barb. 456 (1854); Gillet *v.* Phillips, 13 N. Y. 114 (1855); Falconer *v.* Campbell, 2 McLean, 195 (1840); s. c., 8 Fed. Cas. 963; Duncan *v.* Jones, 32 Hun, 12 (1884). A joint-stock association existing in New York and suable by the laws of New York by service on its president may be sued as a corporation in Ohio, although not actually incorporated in New York. Adams Express Co. *v.* State, 55 Ohio St. 69 (1896). The United States Express Company, an unincorporated association under the laws of the state of New York, is treated as a corporation in other states. Edgeworth *v.* Wood, 58 N. J. L. 463 (1896). The taxation statutes of Pennsylvania imposing taxes upon corporations organized in another state do not apply to an unincorporated association, an express company organized in New York. Sanford *v.* Gregg, 58 Fed. Rep. 620 (1893). The English joint-stock company is much the same. "The company has a name as an association, maintaining the identity of the body through all changes of its members; its property is divided into transferable shares; and it has conferred upon it the legal capacity to sue and be sued in the name of one of its officers, and such a suit . . . may be brought by or against a member as well as a third person." It is a corporation, though the English statute declares it is not. Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531 (1868): aff'd *sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870). So, also, with the New York joint-stock companies. Fargo *v.* Louisville, etc. Ry., 6 Fed. Rep. 787 (1881);

laws of the state of New York is sufficiently a corporation to sustain an indictment in Illinois against an employee for embezzling the funds.[1] Where a voluntary unincorporated association has no constitution, or by-laws, or rules, the conduct of its meetings may be in accordance with the ordinary parliamentary rules of deliberative assemblies.[2] A minority of an unincorporated voluntary association may adjourn from time to time, even if a majority of all the members is necessary to constitute a quorum in order lawfully to transact business.[3] A voluntary unincorporated association, without articles, constitution, or rules, may remove its president or other officer at any time and without notice, except that the meeting held for that purpose must be duly held, but cannot expel a member without notice.[4] An unincorporated association may purchase its own stock, and a question of whether a reduction of the capital stock is thereby effected is a question of intention.[5] An unincorporated express company cannot be compelled to divulge to railroad commissioners the business it does outside of the state, the purpose of the investigation not being connected with taxation.[6] A limited

Sanford *v.* Supervisors of New York, 15 How. Pr. 172 (1858); Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). As regards the liability of the members for the debts of the company, it is held to be a copartnership. Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880); Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531 (1868); aff'd *sub nom.* Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870). The refusal of the legislature to call them corporations is important as cutting off the exemption of the members from liability to creditors; an exemption which, at common law, belongs to all corporations. Joint-stock companies in England have always been largely statutory. See Van Sandau *v.* Moore, 1 Russ. 441 (1826). In New York the English decisions on these companies are doubtless good authority, since they exist under statutes which are much alike. In New York the statutes relative to taxation of corporations do not apply to joint-stock companies. They are not corporations. People *v.* Coleman, 133 N. Y. 279 (1892); Hoey *v.* Coleman, 46 Fed. Rep. 221 (1891). An unincorporated joint-stock association is legal in New York. Under the statutes of that state such associations are corporations for many purposes. People *v.* Wemple, 117 N. Y. 136 (1889).

[1] Kossakowski *v.* People, 177 Ill. 563 (1899).

[2] Ostrom *v.* Greene, 161 N. Y. 353 (1900).

[3] Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying in regard to the adjourned meeting: "Personal notice to every member was unnecessary, for it was the same in effect as if the association had sat in continuous session and had adjourned each day to the next." In this case the court stated that it was open to question as to whether a majority of all the members in an unincorporated association was necessary in order to constitute a quorum.

[4] Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying: "The holding of an office unprotected by rules is not an individual right, but is subject to change at the pleasure of the association."

[5] Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901).

[6] State *v.* United States, etc. Co., 81 Minn. 87 (1900).

partnership under the Pennsylvania statutes is not a corporation sufficient for purposes of jurisdiction in the federal court.[1] Partnership associations organized under the laws of Michigan are controlled by the laws relative to corporations.[2] Under the partnership association statute of Pennsylvania, a by-law may be enacted taking away the voting power from any stock which is sold, even though it is purchased by an existing member.[3]

§ 506. *Joint-stock companies may arise by implication of law.* Joint-stock companies are generally formed by the mutual agreement and direct intent of the parties. They may, however, arise by implication of law. Thus, an ineffectual attempt at an incorporation may make the parties members, not of a corporation, but of a joint-stock company.[4] In like manner, after the charter of a corporation expires and the parties continue to do business, they do so as a joint-stock company.[5]

[1] Great, etc. Co. *v.* Jones, 177 U. S. 449 (1900), overruling Andrews Bros. Co. *v.* Youngstown Coke Co., 86 Fed. Rep. 585.

A New York joint-stock association cannot sue as such in the federal courts. Chapman *v.* Barney, 129 U. S. 677 (1889). A partnership association under the statutes of Pennsylvania is not a corporation to the extent that the estate of a stockholder is liable on a claim arising after the death of such stockholder. Bodey *v.* Cooper, 82 Md. 625 (1896). Nor is it a corporation within the meaning of the tax statutes. Gregg *v.* Sanford, 65 Fed. Rep. 151 (1895). An association formed under the Pennsylvania statutes is a partnership and not a corporation. Hence it cannot be sued in Massachusetts in the name under which it does business. Edwards *v.* Warren, etc. Works, 168 Mass. 564 (1897). In Carter *v.* Producers' Oil Co., 182 Pa. St. 551 (1897), the court said in regard to Pennsylvania joint-stock associations organized under the statutes: "Whether the partnership association ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a corporation, it is so peculiar in its features that the general law of corporations cannot be applied to it without important modifications; if a partnership, it so differs from the common type that the general law of partnerships is but slightly applicable. Both the law of corporations and the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. . . . A partnership association differs from the common type of partnerships in that the members vote, and do not act with the powers of partners, and in that they are subject to no joint liability. It differs from the common type of corporations in that the members have a right to admit or refuse membership in the company to the transferee of the interest, as well as in some other particulars."

[2] Rouse, etc. Co. *v.* Detroit, etc. Co., 111 Mich. 251 (1896).

[3] Carter *v.* Producers' Oil Co., 182 Pa. St. 551 (1897).

[4] *Re* Mendenhall, 9 Nat. Bankr. Reg. 497 (1874); S. C., 17 Fed. Cas. 10; Whipple *v.* Parker, 29 Mich. 369, 380 (1874); and see ch. XIII, *supra. Cf.* Foster *v.* Moulton, 35 Minn. 458 (1886).

[5] Watertown Nat. Bank *v.* Landon, 45 N. Y. 410 (1871).

§ 507. *How a person becomes a member — Transfers.*— A person becomes a member of a joint-stock company by any act which indicates an intent to become a member on his part, and a consent or acquiescence therein by the company itself.[1] He may also become a member by a transfer made to him of another member's interest, unless the articles of association restrict the right of transfer.[2]

§ 508. *Liability of members to creditors and to the company.*— A joint-stock company is, in regard to the liability of its members to creditors of the company, a partnership; its members are liable as partners;[3] and the ordinary rules of partnership exist between the

[1] The formalities need be no greater than in forming an ordinary partnership. Schuylerville Nat. Bank *v.* Van Derwerker, 74 N. Y. 234 (1878); Pettis *v.* Atkins, 60 Ill. 454 (1871); Machinists' Nat. Bank *v.* Dean, 124 Mass. 81 (1878). *Cf.* Volger *v.* Ray, 131 Mass. 439 (1881). It is not necessary that certificates of the stock be issued in order to constitute membership. Dennis *v.* Kennedy, 19 Barb. 517 (1854); Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880). Evidence of subscription and payment of an assessment is sufficient. Frost *v.* Walker, 60 Me. 468 (1872). But not of subscription without any participation. Hedge's Appeal, 63 Pa. St. 273 (1869).

[2] A transfer of the certificate of stock has such effect although not registered in the stock book. Butterfield *v.* Beardsley, 28 Mich. 412 (1874). Transfer may be before the certificates are issued. Butterfield *v.* Spencer, 1 Bosw. 1 (1856). But if the articles of association prohibit transfer, the transferee takes only the right to profits, not as a partner, but as an assignee, and a transfer does not carry dividends already declared. Harper *v.* Raymond, 3 Bosw. 29 (1858). So, also, where transfer is allowed only on consent of certain officers who refuse. Kingman *v.* Spurr, 24 Mass. 235 (1828). If a transfer is improperly allowed, the company is liable to the party injured. Cohen *v.* Gwynn, 4 Md. Ch. 357 (1848). Although an unincorporated association's articles provide that transfers of stock shall be made only with consent of the directors, yet, where such provision is for many years disregarded, a stockholder who so transferred his stock at a time when the assets equaled the liabilities cannot be held liable as a stockholder. Wadsworth *v.* Duncan, 164 Ill. 360 (1896); Wadsworth *v.* Lawrie, 164 Ill. 42 (1896). See also § 622, *infra.* Where an unincorporated partnership issues so-called certificates of stock representing a specified interest in such partnership, and one of the partners assigns his certificates as collateral security and afterwards sells them, the purchaser is entitled to his share of the partnership property and to demand an accounting, even though the certificates provided that they were not transferable. The transfer of such certificates as security need not be recorded as a chattel mortgage. Rommerdahl *v.* Jackson, 102 Wis. 444 (1899). As to the liability of the transferee, see next section. See 78 N. Y. App. Div. 607.

A member's interest cannot be reached by execution. Kramer *v.* Arthurs, 7 Pa. St. 165 (1847). But see Lindley, Partn. (2d Am. ed.), p. 837. The holders of certificates in an unincorporated irrigating ditch association are tenants in common, and any one may sell his interest without the consent of the other. A transfer conveys his water rights and interest in the property. Biggs *v.* Utah, etc. Co., 64 Pac. Rep. 494 (Ariz. 1901).

[3] Wadsworth *v.* Duncan, 164 Ill. 360

members themselves,[1] including the right to contribution as between themselves,[2] and the members are also liable to third per-

(1896); McFadden *v.* Leeka, 48 Ohio St. 513 (1891); Jenne *v.* Matlack, 41 S. W. Rep. 11 (Ky. 1897); Westcott *v.* Fargo, 61 N. Y. 542 (1875); Witherhead *v.* Allen, 3 Keyes, 562 (1867); Cross *v.* Jackson, 5 Hill, 478 (1843); Skinner *v.* Dayton, 19 Johns. 513 (1822); Wells *v.* Gates, 18 Barb. 554 (1854); Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880); Taft *v.* Warde, 106 Mass. 518 (1871); s. c., 111 Mass. 518 (1873); Bodwell *v.* Eastman, 106 Mass. 525 (1871); Tappan *v.* Bailey, 45 Mass. 529 (1842); Cutler *v.* Thomas, 25 Vt. 73 (1852); Kramer *v.* Arthurs, 7 Pa. St. 165 (1847); Gott *v.* Dinsmore, 111 Mass. 45 (1872); Newell *v.* Borden, 128 Mass. 31 (1879). See also § 504, *supra*. *Contra*, Irvine *v.* Forbes. 11 Barb. 587 (1852); Livingston *v.* Lynch, 4 Johns. Ch. 573 (1820), overruled as dicta by Townsend *v.* Goewey, 19 Wend. 424 (1838); Allen *v.* Long, 80 Tex. 261 (1891); Ridenour *v.* Mayo, 40 Ohio St. 9 (1883). In Frost *v.* Walker, 60 Me. 468 (1872), the court said: "An unincorporated joint-stock company is a mere partnership, and each member is personally liable for all its debts. It is important for the public to know that if persons connect themselves with a company of this description they are every one of them liable to pay the demands upon it." The officers who enter into a contract for the company are liable thereon personally. "It is immaterial whether they be so held because they held themselves out as agents for a principal that had no existence, or on the ground that they must, under the contract, be regarded as principals for the simple reason that there is no other principal in existence." Lewis *v.* Tilton, 64 Iowa, 220 (1884); Fredendall *v.* Taylor, 26 Wis. 286 (1870). The individual members of a club are not liable for the salary of the manager, even though the club is unincorporated. Georgeson *v.* Caffrey, 71 Hun, 472 (1893). Those who actively take part in a purchase are liable whether the others are or not. Winona Lumber Co. *v.* Church, 6 S. D. 498 (1895). This liability as partners applies only to associations having a definite membership, and does not apply to a public meeting held to promote the construction of a shoe shop, the subscriptions made at such meeting having been duly paid, even though it was further voted "to stand back of the committee." In any case the suit would be at law and

[1] Bullard *v.* Kinney, 10 Cal. 60 (1858). The remedy of one member against another is in equity. Huth *v.* Humboldt Stamm, 61 Conn. 227 (1892). One member cannot sue another at law for his part of the profits of the business, which is under control of the latter. Myrick *v.* Dame, 63 Mass. 248 (1852); Duff *v.* Maguire, 99 Mass. 300 (1868); Whitehouse *v.* Sprague, 7 Atl. Rep. 17 (Me. 1886). A person induced to put money into an enterprise on false representations that it is a joint-stock company may recover back his money. Lebby *v.* Ahrens, 26 S. C. 275 (1887). A director of an unincorporated association who contracts for it is not liable personally. Abbott *v.* Cobb, 17 Vt. 593 (1845); Alexander *v.* Worman, 6 H. & N. 100 (1860). *Cf.* 54 Atl. Rep. 798.

[2] Morrissey *v.* Weed, 12 Hun, 491 (1878); Skinner *v.* Dayton, 19 Johns. 513 (1822); Ray *v.* Powers, 134 Mass. 22 (1883); Whitman *v.* Porter, 107 Mass. 522 (1871); Tyrrell *v.* Washburn, 88 Mass. 466 (1863). But not if the expense was incurred contrary to the articles of association. Danforth *v.* Allen, 49 Mass. 334 (1844); Clark *v.* Reed, 28 Mass. 446 (1831). Where the constitution of an unincorporated association limits the debts, and the directors incur a larger amount of debts, the directors cannot obtain contribution from the stockholders. McFadden *v.* Leeka, 48 Ohio St. 513 (1891).

sons.[1] The question whether a stockholder may limit his common-law or statutory liability by an express contract with the company's

not in equity. Cheney *v.* Goodwin, 88 Me. 563 (1896). A lease to an unincorporated association binds personally all members assenting to it. Reding *v.* Anderson, 72 Iowa, 498 (1887). Members of co-operative trading associations are liable as partners for the debts of the concern. Davidson *v.* Holden, 55 Conn. 103 (1887). And sometimes are liable also for debts contracted after they have sold their stock. See Shamburg *v.* Abbott, 112 Pa. St. 6 (1886). The members of an unincorporated association to enforce the liquor laws are not liable to an attorney for services in prosecuting cases. McCabe *v.* Goodfellow, 133 N. Y. 89 (1892). The vice-president and the treasurer of an unincorporated fair association are liable for premiums offered. Murray *v.* Walker, 83 Iowa, 202 (1891). Members of a joint-stock company are personally liable for the debts of the company. Durham Fertilizer Co. *v.* Clute, 112 N. C. 440 (1893); People *v.* Coleman, 133 N. Y. 279 (1892). In the case of Seacord *v.* Pendleton, 55 Hun, 579 (1890), the court reviewed the authorities and decided that the stockholders in a bank which was not incorporated were not liable to depositors, there being no allegation that the stockholders had any articles of association or partnership, or had performed any act, or had knowledge of the business or consented thereto.

A subscription of specified amounts by several individuals to drill and operate a gas well does not render them partners as to creditors who were aware of the terms of the subscription. Clark *v.* Rumsey, 59 N. Y. App. Div. 435 (1901). See also § 76, *supra.* A joint-stock association to organize and carry on a school is a partnership. Sebastian *v.* Booneville, etc. Co., 56 S. W. Rep. 810 (Ky. 1900). A member of an unincorporated church is not liable for its debts unless he authorized the incurring of the same or ratified them. First, etc. Bank *v.* Rector, 80 N. W. Rep. 269 (Neb. 1899). A note signed by the trustees as trustees of an unincorporated association is personally binding upon them. McKenney *v.* Bowie, 94 Me. 397 (1900). The note of an unincorporated association signed by the treasurer as treasurer may be collected from him personally. Kierstead *v.* Bennett, 93 Me. 328 (1899). A subscriber to stock in an unincorporated association is not relieved from liability, even though some of the subscriptions necessary to make up the amount required by the subscription paper were forgeries and others obtained by false representations, if it be shown that the association accepted the building to construct which it was formed. Haney, etc. Co. *v.* Adaza, etc. Co., 108 Iowa, 313 (1899). In Pennsylvania the probate court may allow the executor of an estate to loan the funds of the estate to an unincorporated association in which the estate is interested. *In re* Mustin's Estate, 188 Pa. St. 544 (1898). If proof is given by plaintiff that a copartnership existed, and the defense is that it was a corporation, the defendant must prove that fact. Although the company had a president and secretary, this in itself does not raise a presumption of a corporation. Clark *v.* Jones, 87 Ala. 474 (1889). A notice to stockholders that they will be held liable under a statute is not served on the members of an unincorporated association by serving such notice on the chief officer of such association. Wells *v.* Robb, 43 Kan. 201 (1890). Where a creditor of a bank sues the stockholders as partners, the

[1] Acquiescence in the dealings of other members with third persons binds a member. Pennsylvania Ins. Co. *v.* Murphy, 5 Minn. 36 (1860); Wells *v.* Gates, 18 Barb. 554 (1854).

creditors to that effect is discussed elsewhere.[1] The underwriters of an unincorporated Lloyds insurance association may be liable personally on its policies, even though by the terms of the policy each underwriter assumed only his proportionate part of the loss, where that provision is not prominently set forth. The rule is that the members of an association may contract against personal liability, but the notice to that effect must be so plain and fair that the person contracting with the association knew of it, or it was his own fault that he did not know it.[2] But where the articles of association of an unincorporated joint-stock association provide that the members shall not be personally liable for the debts, a person who loans money to the association on its note, which expressly states that it is given under such articles, cannot hold the members personally liable.[3] The member's subscription may be enforced by a suit at law.[4]

In enforcing the liability of members of a joint-stock company by a suit in equity, if the parties are very numerous or unknown, they need not all be joined as defendants.[5] Suits by or against un-

burden of proof is on him to prove that no corporation existed, it being shown that the bank always acted as a corporation and held itself out as such and was supposed so to be by the stockholders. Hallstead *v.* Coleman, 143 Pa. St. 352 (1891). The supposition or belief of the members that they are not liable beyond the par value of their stock does not protect them from liability. Farnum *v.* Patch, 60 N. H. 294 (1880); and see § 233, note, *supra.*

[1] See § 216, *supra.*

[2] Imperial, etc. Co. *v.* Jewett, 169 N. Y. 143 (1901). A case is not made out against the members of an insurance association by proving a policy signed by the manager, there being no proof as to who the members were, even though their names were printed on the back of the policy. Scranton Traction Co. *v.* Schlichter, 202 Pa. St. 6 (1902).

[3] Bank of Topeka *v.* Eaton, 100 Fed. Rep. 8 (1900). See 72 S. W. Rep. 875.

[4] If the subscription runs to the trustees personally they may sue thereon. Otherwise all must join as plaintiffs. Cross *v.* Jackson, 5 Hill, 478 (1843); Townsend *v.* Goewey, 19 Wend. 424 (1838). It seems that a subscription to a voluntary association is enforceable by a corporation which took the place of the proposed voluntary association, where the subscriber knew of the change of plan and did not object. Osborn *v.* Crosby, 63 N. H. 583 (1885). Subscriptions to its stock are collectible the same as subscriptions to stock of corporations. Bullock *v.* Falmouth, etc. Co., 85 Ky. 184 (1887). See ch. IV, *supra.* A subscription agreement signed by various parties to pay the amount set opposite their respective names towards a creamery is several and not joint. Cornish *v.* West, 82 Minn. 107 (1901). A citizen of Maryland who holds a loss claim against a Pennsylvania mutual insurance company which is insolvent cannot have a receiver appointed in Maryland if it is impracticable for the Maryland courts to levy the necessary assessments to wind up the affairs of the association. Stockley *v.* Thomas, 89 Md. 663 (1899).

[5] Mandeville *v.* Riggs, 2 Pet. 482 (1829), reversing Riggs *v.* Swann, 3 Cranch, C. C. 183 (1827); s. c., 20 Fed. Cas. 788. See also Phipps *v.* Jones, 20 Pa. St. 260 (1853); Dennis *v.* Kennedy, 19 Barb. 517 (1854); Wood *v.* Draper, 24 Barb. 187

incorporated associations must be brought in the name of or against all the members.[1] A member who transfers his interest is nevertheless liable for precedent debts of the association.[2] Members who sell their stock and withdraw are liable for subsequent debts where proper notice of their withdrawal has not been given, the same as in a partnership.[3] The members are liable for past contracts, even though they dissolve the association.[4] A purchaser of stock in an unincorporated association is not liable to creditors for debts contracted before he became a member.[5] The rights and liabilities of

(1857); Smith *v.* Lockwood, 1 Code Rep. (N. S.) 319 (1851); Birmingham *v.* Gallagher, 112 Mass. 190 (1873); Snow *v.* Wheeler, 113 Mass. 179 (1873); Pipe *v.* Bateman, 1 Iowa, 369 (1855); Marshall *v.* Lovelass, Cam. & N. (N. C.) 217 (1801); Lloyd *v.* Loaring, 6 Ves. Jr. 773 (1802); Deems *v.* Albany, etc. Line, 14 Blatchf. 474 (1878); s. c., 7 Fed. Cas. 348. As regards the practice in bringing actions against members of an unincorporated association, see Kneeland, Attachments, ch. XVI. The directors of an unincorporated club may be personally sued on a lease without joining the remaining members. Pelton *v.* Place, 71 Vt. 430 (1899). See also note 2, p. 1070, *supra.*

[1] Williams *v.* Bank of Michigan, 7 Wend. 539, 542 (1831); Detroit Schuetzen Bund *v.* Detroit Agitations Verein, 44 Mich. 313 (1880); Mears *v.* Moulton, 30 Md. 142 (1868); McGreary *v.* Chandler, 58 Me. 537 (1870). One or more members of an unincorporated association may sue for the benefit of all. Liggett *v.* Ladd, 17 Oreg. 89 (1888). In Perine *v.* Grand Lodge A. O. U. W., 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was not incorporated, inasmuch as it had held itself out as a corporation. The court may direct a writ of *mandamus* to be served upon the resident general agent of the company. State *v.* Adams, etc. Co., 66 Minn. 271 (1896). By statute, in Ohio, one or more of the stockholders may sue for the benefit of the association. Platt *v.* Colvin, 50 Ohio St. 703 (1893). In a suit against an unincorporated association, the members of which are so scattered as to render service upon all impossible, service upon its officers is sufficient to give the court jurisdiction over the members. An unincorporated association acting as a corporation may be sued as a corporation in its corporate name by one of its members. Fitzpatrick *v.* Rutter, 160 Ill. 282 (1895). A member of an unincorporated church may bring suit in behalf of himself and the other members for a debt due the church. Perkins *v.* Siegfried's Adm'r, 97 Va. 444 (1899). As to a bill in equity in the United States court against an unincorporated association having many members, see Amer. Steel, etc. Co. *v.* Wire Drawers', etc. Unions, 90 Fed. Rep. 598 (1898). An agreement between an improvement company and purchasers of lots that the profits will be used for certain improvements may be enforced by one lot purchaser in behalf of all. Whiting *v.* Elmira, etc. Assoc., 45 N. Y. App. Div. 349 (1899).

[2] Morgan's Case, 1 De G. & Sm. 750 (1849); Tyrrell *v.* Washburn, 88 Mass. 466 (1863). For the liability as affected by the transfer of stock, see Smith *v.* Virgin, 33 Me. 148 (1851).

[3] New York, etc. Bank *v.* Crowell, 177 Pa. St. 313 (1896).

[4] Camden, etc. R. R. *v.* Guarantors of Pennsylvania, 59 N. J. L. 328 (1896).

[5] Christy *v.* Sill, 131 Pa. St. 492 (1890). The transferee of a share in an unincorporated company is liable for all debts existing at the time of or after the transfer. Taylor *v.* Ifill, 1 N. R. 566

a member depend upon the law of the place of the domicile of the company itself.[1] The rules applicable to stockholders in corporations are, by analogy, applied to members in these companies, especially as regards their defenses to subscriptions[2] and meetings of the company.[3] These associations cannot be taxed on a franchise, as corporations may be.[4] Although a law library corporation has a capital stock which is fully paid, yet a by-law may assess annual dues upon the members.[5]

§ 509. *Actions by members against officers and the company.*— The members may bring an action to remedy the fraud,[6] *ultra vires* acts,[7] and negligence[8] of the trustees. In New York a mem-

(1863). Although a stockholder purchased his stock from the association, which was insolvent at the time, yet he cannot offset this as capital contributed by him. Barndollar *v.* Du Bois, 142 Pa. St. 565 (1891). A member is not liable for debts contracted before he became a member. Hornberger *v.* Orchard, 39 Neb. 639 (1894).

[1] Cutler *v.* Thomas, 25 Vt. 73 (1852).

[2] That the full capital stock must be subscribed before any subscription is collectible, see Bray *v.* Farwell, 81 N. Y. 600 (1880). *Contra*, Tappan *v.* Bailey, 45 Mass. 529 (1842); Boston, etc. R. R. *v.* Pearson, 128 Mass. 445 (1880); Pitchford *v.* Davis, 5 M. & W. 2 (1839). Forfeiture of stock releases the member only as to subsequent debts. Skinner *v.* Dayton, 19 Johns. 513 (1822).

[3] Notice of the time and place must be given. Irvine *v.* Forbes, 11 Barb. 587 (1852). The members cannot act except in meeting assembled. The majority do not rule. Livingston *v.* Lynch, 4 Johns. Ch. 573 (1820); Irvine *v.* Forbes, 11 Barb. 587 (1852). But the articles may provide otherwise. Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). See also § 505, *supra*.

[4] Hoadley *v.* Essex County, 105 Mass. 519 (1870); Gleason *v.* McKay, 134 Mass. 419 (1883), holding the statute to be unconstitutional. *Cf.* § 505, *supra*.

[5] Omaha L. L. Assoc. *v.* Connell, 55 Neb. 396 (1898). *Cf.* §§ 241–243, *supra*.

[6] The other members are not proper parties. Boody *v.* Drew, 46 How. Pr. 459 (1874). A farmers' co-operative store carried on by farmers who contribute to the capital and take a certificate of stock is a partnership, it being unincorporated, and if the manager by a fraudulent chattel mortgage gets possession of the assets he may be brought to account therefor by one of the members. Snyder *v.* Lindsey, 157 N. Y. 616 (1899). An officer may be enjoined, but not removed. The suit must not be in the interest of a rival company. Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). Trustees receiving gifts are liable therefor to the company. *Re* Fry, 4 Phila. Rep 129 (1860). Trustees cannot sell to the company. Robbins *v.* Butler, 24 Ill. 387 (1860). The treasurer may be compelled to pay over funds belonging to the company. Sharp *v.* Warren, 6 Price, 131 (1818). The trustees are liable in tort for their frauds on the company. Dennis *v.* Kennedy, 19 Barb. 517 (1854). A committee to build may be made to account where they secretly contract with themselves, though the contract is nominally with other persons. Whitman *v.* Bowden, 27 S. C. 53 (1887).

[7] A member cannot be compelled to accept the stock of another company for his interest, a consolidation of the two having been made. Frothingham *v.* Barney, 6 Hun, 366 (1876). But he

[8] *Re* Fry, 4 Phila. 129 (1860).

ber may, by statute, sue the company, in the same manner that a stockholder in a corporation may sue the corporation.[1] A bill in equity by a member of an unincorporated association to enjoin the directors from enforcing an alleged illegal by-law must join all the directors as defendants.[2]

§ 510. *Dissolution — Disposition of property.*— Where the term of existence of a joint-stock company is fixed by its articles of association, it cannot be dissolved at the instance of a member before the expiration of that time.[3] It may, however, be dissolved where the enterprise becomes wholly impracticable or its attainment im-

may not be able to prevent the consolidation. McVicker *v.* Ross, 55 Barb. 247 (1869). An *ultra vires* act may be enjoined. Abels *v.* McKeen, 18 N. J. Eq. 462 (1867). The members need not make good the officers' debts paid by the latter, growing out of *ultra vires* acts. Crum's Appeal, 66 Pa. St. 474 (1870). But the officers themselves are liable to third persons. Sullivan *v.* Campbell, 2 Hall (N. Y.), 271 (1829). And possibly the members. Sullivan *v.* Campbell, 2 Hall (N. Y.), 271 (1829). If a member has not participated or acquiesced in the *ultra vires* act he is not liable thereon. Roberts's Appeal, 92 Pa. St. 407 (1880). *Cf.* Van Aernam *v.* Bleistein, 102 N. Y. 355 (1886), holding the members liable for a libel; aff'g Van Aerman *v.* McCune, 32 Hun, 316.

1 Code Civ. Proc., § 1919; Westcott *v.* Fargo, 61 N. Y. 542 (1875); Saltsman *v.* Shults, 14 Hun, 256 (1878). At common law the name is not recognized and the suit would fail. Habicht *v.* Pemberton, 4 Sandf. 657 (1851); Pipe *v.* Bateman, 1 Iowa, 369 (1855); Ewing *v.* Medlock, 14 Ala. (O. S.) 82 (1837); Schmidt *v.* Gunther, 5 Daly, 452 (1874).

2 Greer, etc. Co. *v.* Stoller, 77 Fed. Rep. 1 (1896).

3 Von Schmidt *v.* Huntington, 1 Cal. 55 (1850). See also Smith *v.* Virgin, 33 Me. 148 (1851). *Cf.* Lindley, Partn. 234; Lafond *v.* Deems, 81 N. Y. 507 (1880). The minority cannot force a dissolution as in the case of partnership. Equity will not aid, unless there is good reason for dissolution. Hinkley *v.* Blethen, 78 Me. 221 (1886). The minority of an Odd Fellows' lodge cannot compel a sale of the property and distribution. Robbins *v.* Waldo Lodge, 78 Me. 565 (1887); and see Bagley *v.* Smith, 10 N. Y. 489 (1853). Where the articles of association of an unincorporated joint-stock association authorize dissolution at any time upon the vote of a majority in interest, such dissolution may be had, although it is for the purpose of transferring all the assets to a foreign corporation for stock of the latter, the privilege, however, being given to each stockholder to receive payment in cash on the basis of a certain valuation of the assets, which valuation is fair and adequate. Francis *v.* Taylor, 31 N. Y. Misc. Rep. 187 (1900). The nature of a horticultural society issuing a certificate of interest in the property to each member was considered in *Re* Jones, [1898] 2 Ch. 83, upon an application for dissolution and distribution of the assets. An unincorporated bank which is owned entirely by one individual is his private property, even though the bank has a president and cashier. Longfellow *v.* Barnard, 58 Neb. 612 (1899). A court will wind up a partnership, even before its fixed time of existence has expired, if it is insolvent or unprofitable or incapable of proceeding. Jennings *v.* Baddeley, 3 K. & J. 78 (1856); Baring *v.* Dix, 1 Cox, Ch. 213 (1786); Bailey *v.* Ford, 13 Sim. 495 (1843); Holladay *v.* Elliott, 8 Oreg. 84 (1879); Seighortner *v.* Weissenborn, 20 N. J. Eq. 172 (1869); Brien *v.* Harriman, 1

possible, but not always because of the misconduct of its officers.[1] The death of a member does not dissolve it;[2] nor does a transfer of one's interest.[3] The dissolution of one of the subordinate unincorporated organizations by the general organization does not vest in the latter the property of the former.[4] The incorporation of the association by a part of the members does not dissolve the association.[5] The incorporation of an association is a material change in the association, which is not legal unless authorized by an amendment to its articles of association.[6] Upon dissolution the trustees of the company are bound to convert the property into cash and distribute it.[7] One stockholder cannot sue another at law

Tenn. Ch. 467 (1873); Howell *v.* Harvey, 5 Ark. 270 (1843); Van Ness *v.* Fisher, 5 Lans. 236 (1871).

[1] Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 157 (1867). *Contra,* Mills *v.* Hurd, 32 Fed. Rep. 127 (1887).

[2] McNeish *v.* U. S. Hulless Oat Co., 57 Vt. 316 (1884). *Cf.* Walker *v.* Wait, 50 Vt. 668 (1878). The death of a stockholder does not dissolve the association nor release his estate from subsequently incurred debts. Phillips *v.* Blatchford, 137 Mass. 510 (1884). The death of a member does not dissolve the company, but if it has not paid dividends for twenty-three years and is not likely to pay any, a court may decree dissolution. Willis *v.* Chapman, 68 Vt. 459 (1896).

[3] A transfer of his stock by a member does not dissolve a joint-stock association under the Pennsylvania law. *Re* Globe Refining Co., 151 Pa. St. 558 (1892).

[4] Wicks *v.* Monihan, 130 N. Y. 232 (1891). The withdrawal of a charter by a higher body from one of its branches does not affect the right of the latter to its property. Wells *v.* Monihan, 129 N. Y. 161 (1891).

[5] See Schwartz *v.* Duss, 187 U. S. 8 (1902). A part of the members of an unincorporated association cannot proceed to incorporate it against the objections of the others. Rudolph *v.* Southern Ben. League, 23 Abb. N. C. 199 (1889). Where an unincorporated association appoints a committee to incorporate, and they do so, and then proceed to run an opposition business, the association cannot enjoin them from so doing. Paulino *v.* Portuguese Ben. Assoc., 18 R. I. 165 (1893). A committee appointed by a voluntary association to obtain a charter may incorporate in the name of the voluntary association, and the association cannot enjoin the use of such name. Paulino *v.* Portuguese Ben. Assoc., 18 R. I. 165 (1893).

[6] National Grand Lodge *v.* Watkins, 175 Pa. St. 241 (1896). Where the president of an unincorporated association issues treasury stock and thereby obtains control of the association and sells it out to a corporation organized by himself, the minority stockholders of the association may compel him to account for the property. As regards the person to whom the stock was issued, however, a general allegation that he acted in connection with the president is not sufficient to render him liable on the ground of fraud. Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901). Where an unincorporated association unanimously agrees to incorporate and does so, all rights pass to the new corporation. Red, etc. Club *v.* Red, etc. Club, 108 Iowa, 105 (1899).

[7] Frothingham *v.* Barney, 6 Hun, 366 (1876); Butterfield *v.* Beardsley, 28 Mich. 412 (1874). Upon the expiration of the time for which the company was organized it becomes dissolved, and the assets must be distributed if any one of the members insists thereon. Mann *v.* Butler, 2 Barb. Ch. 362 (1847).

for his part of the assets.[1] In proceedings for a dissolution all the members need not be made parties.[2]

As to the distribution of funds of an incorporated benevolent association, see Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). As to the land, see § 504, *supra.* As to the rules governing the distribution of the assets of a mutual benefit building corporation, see People *v.* Lowe, 117 N. Y. 175 (1889). Where a joint-stock association having $12,000,000 surplus invested in securities issues its bonds to the amount of $12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. D'Ooge *v.* Leeds, 176 Mass. 558 (1900). Where a majority of a voluntary association secede from the higher organization to which the lower one belongs, they cannot take the property with them. Gorman *v.* O'Connor, 155 Pa. St. 239 (1893). In general, see Clegg *v.* Ellison, [1898] 2 Ch. 83.

1 Whitehouse *v.* Sprague, 7 Atl. Rep. 17 (Me. 1886).

2 Such as non-residents who cannot be reached. Angell *v.* Lawton, 76 N. Y. 540 (1879). The complainant may bring the proceeding in behalf of himself and others having a common interest with him. Mann *v.* Butler, 2 Barb. Ch. 362 (1847).

CHAPTER XXX.

STOCKHOLDERS' RIGHT TO INSPECT THE BOOKS OF THE CORPORATION.

§ 511. *Common-law rights.*—The stockholders of a corporation had, at common law, a right to examine at any reasonable time, and for any reasonable purpose, any one or all of the books and records of the corporation.[1] This rule grew out of an analogous

[1] "At common law the stockholders of a corporation had the right to examine, at reasonable times, the records and books of the corporation." Stone *v.* Kellogg, 165 Ill. 192 (1896). Stockholders "have the right, at common law, to examine and inspect all the books and records of the corporation at all seasonable times, and to be thereby informed of the condition of the corporation and its property." Per Redfield, J., in Lewis *v.* Brainerd, 53 Vt. 519 (1881). In Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884), the court said: "In the absence of agreement, every shareholder has the right to inspect the accounts — a right subject to the necessities of the company, yet existing. . . . The doctrine of the law is that the books and papers of the corporation, though of necessity kept in some one hand, are the common property of all the stockholders." The right exists although "its exercise be inconvenient to the book-keepers and managers of the partnership business." In Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1895), the court said: "Stockholders are entitled to inspect the books of the company for proper purposes at proper times . . . and they are entitled to such inspection though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection." Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108 (1874). "The minority stockholder should have the same right to require a statement from the company." Sage *v.* Culver, 71 Hun, 42 (1893); aff'd, 147 N. Y. 241. A stockholder is not entitled as a matter of right to inspect the stock book or other books of the bank. The court will not, although it has the power, grant a *mandamus* for the inspection of the stock book or other books of a bank, unless some special grounds be disclosed to warrant it. *Re* Bank of Upper Canada *v.* Baldwin, 1 Draper (K. B. Can.), 55 (1829). A stockholder in a New York corporation has a common-law right to examine the books and papers of the corporation where a

rule applicable to public corporations and to ordinary copartnerships, the books of which, by well-established law, are always open to the inspection of members.[1] Nevertheless it seems that a stockholder has no right, aside from statute, to examine the original papers and vouchers of the corporation, unless some property right is involved, or some controversy exists, or some specific and valuable interest is in question, to settle which an inspection of these documents is necessary.[2] A by-law that no stockholder should have a right to examine the books of the corporation, except by special authority from the board of directors, is illegal under the Louisiana constitution.[3]

A director has an absolute right to examine all the books of the company,[4] even though he is hostile to the corporation.[5] But in Connecticut a contrary rule is laid down where he is seeking information in order to organize a rival company.[6]

proposition has been made for the purchase of all the stock of the company and the dividends have been greatly reduced. *Re* Application of Steinway, 31 N. Y. App. Div. 70 (1898); aff'd, 159 N. Y. 251. As to the general right of a stockholder to examine the books of a corporation and the recognition of such right in equity by discovery, see Gresley, Eq. Ev. 116, 117; Kynaston *v.* East India Co., 3 Swanst. 249 (1819); Bolton *v.* Liverpool, 3 Sim. 467 (1831); S. C., 1 Myl. & K. 88; Brace *v.* Ormond, 1 Meriv. 409 (1816).

[1] Quoted and approved in Matter of Steinway, 159 N. Y. 251 (1899). Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884). As to the right to inspection and to take copies of records in a county clerk's or register's office, see Randolph *v.* State, 82 Ala. 527 (1886); Hanson *v.* Eichstaedt, 69 Wis. 538 (1887); Brewer *v.* Watson, 71 Ala. 299 (1882); Phelan *v.* State, 76 Ala. 49 (1884); Webber *v.* Townley, 43 Mich. 534 (1880); Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883); People *v.* Cornell, 47 Barb. 329 (1866); People *v.* Reilly, 38 Hun, 429 (1886); People *v.* Richards, 99 N. Y. 620 (1885).

[2] Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895).

[3] State *v.* Citizens' Bank, etc., 51 La. Ann. 426 (1899).

[4] People *v.* Throop, 12 Wend. 181 (1834); Charlick *v.* Flushing R. R., 10 Abb. Pr. 130 (1860); *Re* Ciancimino, N. Y. L. J. Dec. 23, 1890. *Cf.* State *v.* Einstein, 46 N. J. L. 479 (1884). The president of a corporation is entitled to a *mandamus* directing the secretary to allow him and his attorney to inspect the stock book and make extracts therefrom, and it is immaterial what the motive of the president is. "An inspection of its books by the president of the company is a matter of right." People, etc. *v.* Goldstein, 37 N. Y. App. Div. 550 (1899). Where a director was not qualified and a new director has been elected in his place, the former cannot have *mandamus* to allow him to inspect the company's books and exercise other rights of a director, even though for a time he was permitted to act as director. People *v.* N. Y. etc. Co., 34 N. Y. Misc. Rep. 326 (1901). After the courts have decided that certain persons are directors, *mandamus* will be granted that the defeated parties turn over the books and papers to the former. Matter of Journal Pub. Club, 30 N. Y. Misc. Rep. 326 (1900).

[5] People *v.* Throop, 12 Wend. 181 (1834).

[6] A director who is actively organizing a rival company has no right to examine the letter files of the former in order to aid the latter. The secre-

A creditor of the corporation or any person who is a stranger to it can obtain access to its records by a bill in equity for discovery.[1] Corporate books in the hands of a receiver should be open to all parties.[2]

§ 512. *Common-law action for damages for refusal.*— The legal right of a stockholder of a corporation to examine the corporate books is a right which gives him a cause of action at law for damages against the corporate officers if they refuse to allow the inspection.[3] The plaintiff is entitled to nominal damages, and to such further damages as he may prove. It has been held that he need not allege or prove any special reason or purpose of his desire and request to examine the books;[4] but the vast size of modern corporations, with hundreds or thousands of stockholders and many

tary may forcibly take them from him. Heminway *v.* Heminway, 58 Conn. 443 (1890).

[1] A bill of discovery lies at instance of corporate creditors in the courts of one state to compel corporate officers to give the names of stockholders of the corporation in another state with a view to enforcing the statutory liability in the latter state. Post *v.* Toledo, etc. R. R., 144 Mass. 341 (1887). As to the remedy by subpœna, etc., see § 519, *infra.*

[2] See § 872, *infra; Re* Kent, etc. Syndicate, [1898] 1 Q. B. 754. A receiver of an insolvent bank must allow the district attorney to examine the books and papers to ascertain the condition of the bank and whether the officers had criminally received deposits after the bank became insolvent. McElree *v.* Darlington, 187 Pa. St. 593 (1898).

[3] Lewis *v.* Brainerd, 53 Vt. 510 (1881). A stockholder has the legal right to inspect the books of the corporation of which he is a member, but the company is not liable for a refusal of the secretary to allow a stockholder to examine the books. Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669 (1893). Where the president has custody of the books and refuses to allow a stockholder to examine them, and the stockholder desires to examine them for the purpose of ascertaining whether he should sell his stock, and is obliged to obtain a *mandamus,* he may hold the president liable in an action for damages, and if the price of the stock has fallen during the delay in obtaining access to the books his measure of damages is his loss, especially where the president was in the meantime selling his own stock. Bourdette *v.* Sieward, 52 La. Ann. 1333 (1900). In a suit by a stockholder against an officer for damages for refusal to allow him to examine the books, remote, collateral and speculative damages cannot be recovered. Even though he alleges that he would have sold his stock if he had been allowed to examine the books, and that the stock subsequently declined in price, yet if there was no mismanagement and the decline of the stock is due to causes which an inspection of the books would not disclose, he cannot recover the loss due to the decline in the stock. Bourdette *v.* Seward, 31 S. Rep. 630 (La. 1902). A minority stockholder is not entitled to a receiver in a suit brought by him for an accounting and winding up the company, even though he is refused an inspection of the books of the company, and especially so where he was denied the right for several years for the reason that he did not pay his subscription, and he finally sold his stock. Ridpath *v.* Sans Poil, etc. Co., 26 Wash. 427 (1901).

[4] Lewis *v.* Brainerd, 53 Vt. 510 (1881).

clerks, renders it impossible to open all the books to all the stockholders, and renders necessary the rule that some good reason be given by the stockholder applying to examine the books.

§ 513. *Mandamus is the preferable remedy.*—An action for damages is generally totally inadequate as a remedy.[1] The stockholder wishes to inspect the corporate books and does not wish damages or a lawsuit. Accordingly, in certain cases, upon the application of a stockholder who has been denied the privilege of examining the corporate records, it has been the practice of the courts to issue a *mandamus* to the corporate officers commanding them to allow a specified stockholder to examine the books of the corporation.[2] The remedy of a stockholder who wishes to examine the corporate books in order to bring suit against the directors for fraud is by *mandamus*, not by an order for inspection.[3] The usual statute giving to the courts the power to order a corporation to allow its stockholders to examine its books does not take away the common-law right of stockholders to have such an inspection, and does not take away the power of the court to grant a *mandamus* to enforce such common-law right.[4] A stockholder's bill against a corporation and directors may be to remedy certain alleged frauds, and also incidentally to obtain a disclosure and discovery. The stockholder need not resort to a *mandamus*.[5]

[1] In Cockburn *v.* Union Bank, 13 La. Ann. 289 (1858), the court said a suit for damages "might last for a long time and petitioner suffer great loss by being debarred from an examination" of the books. "He does not ask for damages, but for the exercise of a right. If he has the right he ought to have the exercise of it as soon as possible; for the deprivation of his right cannot, perhaps, be accurately estimated in damages. It may be many years before the amount of the damage can be known."

[2] "It would seem, from the weight of authority and in reason, that a shareholder is entitled to *mandamus* to compel the *custos* of corporate documents to allow him an inspection, and copies of them, at reasonable times, for a specific and proper purpose, upon showing a refusal on the part of the *custos* to allow it, and not otherwise." Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884); s. c. *sub nom.* Phœnix Iron Co. *v.* Commonwealth, 113 Pa. St. 563 (1886), explaining the method of procedure, and holding that the applicant need not institute a suit in a court of equity. The old rule that *mandamus* will issue only for a public purpose is no longer a rule of law so as to prevent its use herein. Commonwealth, etc., *supra*, questioning Rex *v.* Bank of England, 2 B. & Ald. 620 (1819); and Rex *v.* London Assur. Co., 5 B. & Ald. 899 (1822). See also Rex *v.* Clear, 4 Barn. & C. 899 (1825); Foster *v.* White, 86 Ala. 467 (1889).

[3] Walsh *v.* Press Co., 48 N. Y. App. Div. 333 (1900).

[4] Matter of Steinway, 159 N. Y. 251. (1899).

[5] Weir *v.* Bay State Gas Co., 91 Fed. Rep. 940 (1898). Where the suit is brought by the stockholder against the corporation alone to remedy the frauds of directors and have a receiver appointed and obtain a disclosure, the bill is defective for non-joinder of the guilty

§ 514. *Not granted as a matter of course unless the right is statutory.*— The writ of *mandamus*, however, does not issue herein as a matter of course. It is an extraordinary remedy, to be invoked only upon special occasions. The court does not grant the *mandamus* until it has taken into careful consideration all the facts and circumstances of the case. The condition and character of the books, the reasons for refusal by the corporation, the specific purpose of the stockholder in demanding inspection, the general reasonableness of the request, and the effect on the orderly transaction of the corporate business in case it is granted, are all considered in granting or refusing the writ. It is granted only in furtherance of essential justice.[1]

Where, however, a statute gives to stockholders the right to examine corporate books, *mandamus* seems to be granted as a matter of right.[2]

parties. Edwards *v.* Bay State Gas Co., 91 Fed. Rep. 942 (1898); Morse *v.* Bay State Gas Co., 91 Fed. Rep. 944 (1898).

[1] "The application is addressed to the sound discretion of the court." The reasons for granting the writ "should be clear and cogent. . . . To hold that every person who shows himself to be a stockholder of stock is at liberty to demand an examination of the transfer books when and as often as he pleases, and, if refused, to apply for a writ of *mandamus* to enforce an absolute right, would be to establish a rule highly prejudicial to the interests of all corporations and their stockholders. . . . The power of the court should be exercised in such cases with great discrimination and care." People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); affirmed *sub nom. Re* Sage, 70 N. Y. 220 (1877). See also People *v.* Northern Pac. R. R., 50 N. Y. Super. Ct. 456 (1884). "Discretion in these matters should be exercised in a reasonable manner and subject to precedent." Regina *v.* Wilts, etc. Canal Nav., 29 L. T. Rep. 922 (1874). A reference may be ordered by the court to determine the truth of the allegations in the affidavits used to obtain a *mandamus*. People *v.* St. Louis, etc. Ry., 44 Hun, 552 (1887). *Mandamus* is the preferable remedy. Legendre *v.* New Orleans Brewing Assoc., 45 La. Ann. 669 (1893).

[2] Coquard *v.* National, etc. Co., 171 Ill. 480 (1898); Cobb *v.* Lagarde, 30 S. Rep. 326 (Ala. 1901). Where the right of inspection is statutory, *mandamus* will issue, even though a stockholder desires to examine the books for the benefit of a competing concern in which he is interested. Johnson *v.* Langdon, 67 Pac. Rep. 1050 (Cal. 1902). A statute giving the right to examine the books and records gives the right to examine contracts, and this right may be enforced by *mandamus*. Stone *v.* Kellogg, 165 Ill. 192 (1896). *Mandamus* lies at the instance of a stockholder to compel his corporation to allow him to inspect the books of the company relative to the stock in accordance with the constitution of Louisiana, the object of the stockholder being to ascertain the value of his stock and to guide his future action in regard thereto. State *v.* New Orleans, etc. Co., 49 La. Ann. 1556 (1897). Under the Wisconsin statute authorizing a stockholder to examine the stock books and accounts, a *mandamus* may be issued to the officer having the books in charge. State *v.* Bergenthal, 72 Wis. 314 (1888). Under a constitutional right to see the list of stockholders, a stockholder has no absolute right to take a

§ 515. *When it will and will not be granted.*— It will not be granted to satisfy curiosity, nor to aid the stock-market speculations of the stockholders.[1] Either some property rights of the stockholder must be involved, or some controversy exist, or some specific and valuable interest be in question, to settle which an in-

list of them. Commonwealth *v.* Empire Pass. Ry., 134 Pa. St. 237 (1890). *Mandamus* lies to enforce the statutory right of inspection. People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867). *Mandamus* will lie in behalf of the wife of a deceased stockholder, who holds the certificates made out in his name, to compel the corporation to allow her to examine the transfer books in order that she may vote intelligently at a coming election. People *v.* Eadie, 63 Hun, 320 (1892); aff'd, 133 N. Y. 573. *Mandamus* lies to open for the inspection of a stockholder and for taking memoranda therefrom such corporate books as the statute prescribes shall be open to him. *Re* Martin, 62 Hun, 557 (1891). *Mandamus* lies to allow inspection as required by the statute, and the fact that the applicant holds a certificate of stock is sufficient. Martin *v.* Johnston Co., 25 Abb. N. Cas. 350 (1890). Where there is a state statute allowing stockholders to examine the corporate books, a national bank in the state is subject thereto and *mandamus* will issue. Winter *v.* Baldwin, 89 Ala. 483 (1889). Under a statute to the effect that "the stockholders of all private corporations have the right of access to, inspection, and examination of the books, records, and papers of the corporation, at reasonable and proper times," a stockholder has the "right to examine the books at any and all reasonable times," and "when this right is claimed and refused, he is entitled to a *mandamus* on the averment that he is a stockholder of the corporation; that he has demanded the right of inspection; that the time was reasonable and proper; and that the right was denied him." He may make the examination through an agent. Foster *v.* White, 86 Ala. 467 (1889). *Contra,* State *v.* National Biscuit Co., 54 Atl. Rep. 241 (N. J. 1903). Concerning the New York act requiring resident transfer agents of foreign corporations to exhibit to stockholders the transfer book and a list of stockholders, and concerning an alternative writ of *mandamus* therein, see People *v.* Crawford, 68 Hun, 547 (1893). *Mandamus* lies to compel the resident agent of a foreign corporation to open its transfer books to a stockholder as required by statute. People *v.* Paton, 20 Abb. N. Cas. 195 (1887). *Mandamus* lies to compel corporate officers to exhibit to a stockholder the books specified in the statute giving this right. Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895). See also, concerning such statutes, §§ 515, 518, *infra*. *Cf.* 54 Atl. Rep. 241.

[1] The writ will not be "granted to enable a corporator to gratify idle curiosity." Foster *v.* White, 86 Ala. 467 (1889); People *v.* Walker, 9 Mich. 328 (1861). "The interests of all the corporators require that the writ shall not go at the caprice of the curious or suspicious." Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884). "Courts should guard against all attempts by combinations hostile to the corporation or its existing officers to use its writ of *mandamus* to accomplish their personal or speculative ends." People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877). Nor will the court grant "a mere wrecking petition to ruin a going concern." *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). Mere suspicion is not enough to justify an order of inspection, even though the applicant stockholder intends to bring suit against the directors. Central, etc. R. R. *v.* Twenty-third Street Ry., 53 How. Pr. 45 (1877).

spection of the corporate records becomes necessary.[1] At common law a stockholder has a right to a *mandamus* to compel the corporate officers to allow him to examine certain books and papers of the corporation, where a proposition has been made for the pur-

[1] It has been granted to allow the applicant to ascertain whether a by-law existed entitling him to an office by promotion. Reg. *v.* Saddlers' Co., 10 W. R. 87 (1861). Mismanagement and intent to bring suit need not be alleged, "Oftentimes frauds are discoverable only by examination of the books by an expert accountant." Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1885). It is granted also to a stockholder who has a suit or controversy with a party other than the corporation itself. Rex *v.* Hostmen, 2 Stra. 1223 (1745); Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800). It has been granted to enable a stockholder to see the discount book, although there is no suit between him and the corporation, and no intent to bring one. Cockburn *v.* Union Bank, 13 La. Ann. 289 (1858). At an early day, however, it was held that "the members have no right, on speculative grounds, to call for an examination of the books and muniments in order to see if, by possibility, the company's affairs may be better administered than they think they are at present. If they have any complaint to make, some suit should be instituted, some definite matter charged, . . . or there should be some particular matter in dispute between members, or between the corporation and individuals in it; there must be some controversy, some specific purpose, in respect of which the examination becomes necessary." King *v.* Merchant Tailors' Co., 2 B. & Ad. 115 (1831). A charter provision that the corporate powers "shall be exercised by a board of directors" is immaterial herein. State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876). Where a reduction of capital stock is contemplated, a large stockholder has a right to inspection to ascertain whether the business is being "prudently and profitably" carried on. State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876). The general purpose of ascertaining "the condition of the company" was held insufficient in People *v.* Walker, 9 Mich. 328 (1861). The stockholder may take memoranda or a list of the stockholders. Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884); Cotheal *v.* Brouwer, 5 N. Y. 562 (1851), affirming Brouwer *v.* Cotheal, 10 Barb. 216 (1850); Hide *v.* Holmes, 2 Molloy, 372 (1825). In Stettauer *v.* New York, etc. Co., 42 N. J. Eq. 46 (1886), where a stockholder filed a bill in equity to compel corporate officers to allow himself and his accountant to examine the corporate books, its business having been closed and distribution of assets made, but a statement of its affairs refused, the court held that the bill would not lie, since no fraud or insufficient distribution of assets was alleged. *Mandamus* is the proper remedy. Swift *v.* Richardson, 7 Houst. (Del.) 338 (1886), holds that *mandamus* will issue to the officers of a foreign corporation to exhibit its books then in the state, and allow copies of records to be taken by a stockholder who intends to commence suit against a pledgee of his stock; the controversy turning on the question of the earnings and expenses of the corporation. *Mandamus* to open the stock-ledger was denied in a case where the owner of four shares of stock alleged that little or no dividends were paid, and the stock was depreciating, no mismanagement being charged. A by-law authorizing inspection of books of account does not authorize inspection of the stock-ledger. Lyon *v.* American Screw Co., 16 R. I. 472 (1889). *Mandamus* may lie to compel the resident officers of a foreign corporation to per-

chase of all the stock of the corporation, and a large reduction has been made in the dividends, and the stockholder is unable to ascertain the real value of his stock.[1] Where the charter of a national bank has expired the state court may compel its directors to allow its stockholders to examine its books and papers.[2] Where there had been no dividends for nine years, and the officers were partners in a competing concern, and refused to allow inspection, it was granted in order to enable the applicant to ascertain whether the real facts justified an action for fraud on the part of the officers.[3] Where a Michigan stockholder in a Connecticut corporation is suing in Michigan other stockholders, on contracts relative to stock, he may obtain in Delaware a *mandamus* compelling the president, who resides there and has corporate books and papers there, to allow him to examine the same and take copies.[4] A resident stockholder in a foreign corporation having an office in the state for the transaction of business is entitled under the New York statutes to inspect the stock book kept within the state, and, if the corporation has no such book, to inspect any other books in the state which will give the information.[5]

mit inspection. State *v.* Farmer, 7 Ohio C. C. 429 (1892). A stockholder sued by a corporation on an ordinary debt, and who sets up in defense that he was induced to buy stock from outside parties by fraudulent statements made by the company, cannot have a *mandamus* to compel the company to allow him to examine its books. His application in such a case is as a creditor and not as a stockholder. Investment Co. *v.* Eldridge, 2 Pa. Dist. 394 (1893).

[1] *Re* Application of Steinway, 31 N. Y. App. Div. 70 (1898); aff'd, 159 N. Y. 251.

[2] Matter of Tuttle *v.* Iron Nat. Bank, 170 N. Y. 9 (1902).

[3] Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111 (1884).

[4] Richardson *v.* Swift, 7 Houst. (Del.) 137 (1885), a carefully considered case; also Richardson *v.* Swift, 7 Houst. (Del.) 137 (1885).

[5] People *v.* Knickerbocker T. Co., 38 N. Y. Misc. Rep. 446 (1902). *Mandamus* as a separate proceeding not connected with any suit will not be granted in New York as against a New Jersey corporation to compel the opening of the corporate books to a stockholder. The application should be made in New Jersey. Matter of Rappleye, 43 App. Div. 84 (1899). In the Matter of Crosby, 28 N. Y. Misc. Rep. 300 (1899), the New York court granted a *mandamus* in behalf of a Texas stockholder in a Colorado corporation which did all its business in Mexico, it being shown, however, that all the books were kept in New York and that the officers resided in New York, and that the applicant had pledged all his stock and was unable to redeem the same for want of information as to the value of the stock. The court held also that in one and the same proceeding *mandamus* may issue to two such corporations which are practically one from a business point of view. The penalty imposed by statute in New York for refusal of a foreign corporation having an office in the state to exhibit its stock book to a stockholder was applied in Cox *v.* Island, etc. Co., 65 N. Y. App. Div. 508 (1901). See § 514, *supra*, and § 518, *infra*. *Mandamus* may issue to an officer of a foreign corporation in the state commanding him to show to stockholders books that are within the

The New York court of appeals has sustained a *mandamus* granted in order to enable the applicant to ascertain who are stockholders, with a view to canvassing their votes for an election,[1] and during the past few years there has been a large number of decisions in the New York courts defining the limits within which *mandamus* will be granted in behalf of stockholders.[2]

state, but not books that are outside of the state. State *v.* North American, etc. Co., 31 S. Rep. 172 (La. 1902).

[1] *Mandamus* was granted in People *v.* Eadie, 63 Hun, 320 (1892); aff'd, 133 N. Y. 573, to open the stock books to a stockholder who wished to ascertain who were stockholders in order to confer with them for the purpose of changing the board at an approaching election. *Mandamus* was granted to a stockholder who wished to persuade other stockholders not to appeal a suit in which he was interested adversely to the corporation, the defeated party. Reg. *v.* Wilts, etc. Canal Nav., 29 L. T. Rep. 922 (1874). See also People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); aff'd *sub nom. Re* Sage, 70 N. Y. 220 (1877). A stockholder in Pennsylvania may have a *mandamus* to compel the company to allow him to inspect and take a copy of the list of stockholders, his purpose being to consult them and obtain proxies from other stockholders. It is immaterial that a receiver is in charge of the property under a foreclosure. Such a receiver has nothing to do with the stock book. Commonwealth *v.* Philadelphia, etc. R. R., 3 Pa. Dist. 115 (1893).

[2] A *mandamus* will not issue in behalf of a stockholder who is a mere dummy for others, whose purpose is to get control of the company and sell it out. A *mandamus* should not give a stockholder the right to examine all books, vouchers, records, papers and minutes without restriction as to time and place and without provision against interfering with the regular business of the company. Matter of Coats, 73 N. Y. App. Div. 178 (1902). But a *mandamus* will be granted commanding a corporation to allow a stockholder to examine the by-laws unless a very strong case of bad faith is made out against him. Matter of Coats, 75 N. Y. App. Div. 567 (1902). A stockholder will not be granted a peremptory writ of *mandamus* allowing him to examine all the books and accounts of the corporation on the allegation that he wishes to ascertain the names and addresses of the stockholders, and the further allegation that no dividends have been paid, there being no allegation that a demand has been made or that it is necessary to examine all the books and papers, or that there has been any mismanagment, or that the stock has depreciated in value. Matter of Latimer *v.* Herzog, etc. Co., 75 N. Y. App. Div. 522 (1902). *Mandamus* will not be granted to enable a stockholder to obtain proof concerning an alleged improper loan made by the corporation in order that the proof may be used to hold the directors personally liable. People *v.* Produce, etc. Co., 53 N. Y. App. Div. 93 (1900). The president of a corporation is entitled to a *mandamus* directing the secretary to allow him and his attorney to inspect the stock book and make extracts therefrom, and it is immaterial what the motive of the president is. "An inspection of its books by the president of the company is a matter of right." People, etc. *v.* Goldstein, 37 N. Y. App. Div. 550 (1899). *Mandamus* will not be granted to allow a stockholder to examine the books of the company where such stockholder owns only one-thirtieth of one per cent. of the preferred stock, and his reason for examining the books is that he believes the company is selling its product at less than cost by reason of

A pledgee of stock which still stands in the name of the pledgor is not entitled to a *mandamus* to allow him to inspect the corporate books, even though the pledgor is insolvent and is dead.[1] *Mandamus* does not lie where the applicant is not a stockholder of record.[2] A stockholder who has made a contract for the sale of his stock and received a partial payment cannot claim the right to inspect the books, the other payments being not yet due.[3] It has been held in Pennsylvania that *mandamus* will not be granted to allow a stockholder to make a list of the stockholders where the only purpose is to combine them in attacking a lease made by the corporation.[4]

§ 516. *Allegation and form of writ.*— The writ should run to the person or officer who has control of the records.[5] The stock-

competition, and that consequently he has received no dividends, it not being shown that the market price of the stock has been decreased. Matter of Pierson, 28 N. Y. Misc. Rep. 726 (1899). *Mandamus* does not lie to compel a corporation to allow a stockholder to examine its books and records, where the only reason given therefor is that the corporation, a gas company, has reduced its price of gas, and the stockholder wishes to ascertain whether it is selling the same at a loss and whether it is paying its fixed charges; it being shown that the reduction was due to other companies having reduced their price. Matter of Pierson, 44 N. Y. App. Div. 215 (1899). *Mandamus* will not lie to compel a corporation to allow a stockholder to examine its books, even though he alleges it is necessary in order to fix the taxable value of the stock in determining an inheritance tax, where it is shown that the real object is to obtain information for the benefit of a competing concern, to the injury of the former. Matter of Kennedy, 75 N. Y. App. Div. 188 (1902). A stockholder has not an absolute right to examine the books in order to enable him to prosecute a suit against the corporation, and *mandamus* will not issue where he has already been defeated in one action. People *v.* American, etc. Co., 31 N. Y. Misc. Rep. 617 (1900).

[1] Matter of First, etc. Bank, 28 Misc. Rep. 662 (1899). An unregistered pledgee cannot maintain a suit under the New York statute against the treasurer for the penalty for refusing to furnish to him a statement of the affairs of the company. Pray *v.* Todd, 71 N. Y. App. Div. 391 (1902).

[2] Matter of Reiss, 30 N. Y. Misc. Rep. 234 (1900).

[3] State *v.* Whited, etc., 104 La. 125 (1900).

[4] Commonwealth *v.* Empire Pass. Ry., 134 Pa. St. 237 (1890), and note. See criticism on this case in N. Y. L. J., Oct. 13, 1890.

[5] "The writ shall be directed to him who is to do the thing required to be done." People *v.* Throop, 12 Wend. 183 (1834). *Mandamus* lies to enforce a statutory right of inspection. Unreasonable delay after a request is sufficient to sustain the *mandamus*. The *mandamus* may run to the president and general manager who has control of the business. The fact that the stockholder is interested in a rival company and is unfriendly towards the officers is immaterial. Cobb *v.* Lagarde, 129 Ala. 488 (1901). A *mandamus* to compel the production of the books of the corporation should run to the corporation itself and not to the manager. State *v.* North American, etc. Co., 105 La. 379 (1901). *Mandamus* may be di-

holder may make the inspection through an agent, and may have the aid of an interpreter, attorney, or expert.[1] The request to inspect the books, for refusal of which the *mandamus* is asked, must be alleged to have been made at a proper time and place, and of the proper person, and to have been refused.[2] The application

rected against the officer having charge of the books. People *v.* Knickerbocker T. Co., 38 N. Y. Misc. Rep. 446 (1902).

[1] In examining the books a stockholder may have with him his attorney and stenographer. Ellsworth *v.* Dorwart, 95 Iowa, 108 (1895). A stockholder who is entitled to examine corporate books may have with him an attorney or other person familiar with that line of business. People *v.* Nassau Ferry Co., 86 Hun, 128 (1895). He may inspect through his duly authorized agent. State *v.* Bienville Oil Works Co., 28 La. Ann. 204 (1876); Cincinnati, etc. Co. *v.* Hoffmeister, 62 Ohio St. 189 (1900). The executrix of an estate may obtain a *mandamus* allowing her to examine the books of a bank in which the estate holds stock in order to ascertain the real value of the stock. A by-law prohibiting such examination, except by special authority by the board of directors, is illegal under the Louisiana constitution. The examination may be by an expert representing the executrix. State *v.* Citizens' Bank, etc., 51 La. Ann. 426 (1899). Such inspection may be through agents. Bonnardet *v.* Taylor, 1 J. & H. 383 (1861); Draper *v.* Manchester, etc. Ry., 7 Jur. (N. S.) pt. 1, 86 (1861). But see *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884); Bank of Utica *v.* Hillard, 6 Cow. 62 (1826). It includes the agent, solicitor, counsel, or expert of the party asking the inspection. Hide *v.* Holmes, 2 Molloy, 372 (1825); Blair *v.* Massey, L. R. 5 Eq. 623 (1871); Joint-stock Discount Co.'s Case, 36 L. J. (Eq.) 150 (1867); Bonnardet *v.* Taylor, 1 Johns. & H. 383 (1861); Attorney-General *v.* Whitwood Local Board, 40 L. J. (Ch.) 592 (1871); Lindsay *v.* Gladstone, L. R. 9 Eq. 132 (1869); Williams *v.* Prince of Wales Ins. Co., 23 Beav. 338 (1875); State *v.* Bienville, etc. Co., 28 La. Ann. 204 (1376); Ballin *v.* Ferst, 55 Ga. 546 (1875). But see Bartley *v.* Bartley, 1 Drew. 233 (1852); Summerfield *v.* Pritchard, 17 Beav. 9 (1853); Draper *v.* Manchester, etc. R. R., 3 De G., F. & J. 23 (1861); *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). And a shareholder who is also the solicitor of opposing litigants is nevertheless so entitled. Reg. *v.* Wilts, etc. Canal Nav. Co., 29 L. T. Rep. 922 (1874); Kingsford *v.* Great Western Ry., 16 C. B. (N. S.) 761 (1864). But see Hutt's Case, 7 Dowl. Pr. 690 (1839); Herschfeld *v.* Clarke, 11 Exch. 712 (1856). See also notes *supra.* The manner of inspection must be gentlemanly. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857).

[2] The stockholder must first apply to the proper corporate officer having authority to grant inspection. Rex *v.* Wilts, etc. Canal Nav., 3 Ad. & El. 477 (1835). And must state to him the reason why he desires inspection. Rex *v.* Wilts, etc. Canal Nav., 3 Ad. & El. 477 (1835); also Rex *v.* Clear, 4 Barn. & C. 899 (1825); People *v.* Walker, 9 Mich. 328 (1861). *Mandamus* lies at the instance of a stockholder to examine the corporate books to enable the stockholder to learn the true condition of the company and of its management and of the value of the stock. There is no presumption that the inspection is hostile to the interest of the company, and it need not be alleged that a demand was made during business hours at the company's office, or that the person making the demand represented the stockholder, where it is shown that the officers refused to grant inspection under any circumstances. State *v.* Pacific, etc. Co., 21

should also state what information the applicant needs, and what books of the corporation he wishes to inspect.[1] "The order should be so drawn as not to inconvenience the transaction of business."[2] In a stockholder's application at common law for a *mandamus* to compel the corporation to allow him to inspect the cash book and other books, the papers must show for what purpose the inspection is desired.[3] Even though a corporation does not allow inspection of its stock book, as required by statute, yet if, after a *mandamus* has been applied for, the corporation offers to pay the costs and open the stock book for inspection, the applicant is bound to discontinue the proceedings.[4]

§ 517. *Right to inspect minutes of meetings of directors.*— It would take a strong case to induce a court to issue a *mandamus* commanding the corporate officers to allow a stockholder to inspect the minutes of the meetings of the directors.[5] The success of the corporate enterprise depends frequently upon the secrecy of the plans of the directors. In connection with litigations the rule, of course, is different; but, aside from this, it seems that a stockholder

Wash. 451 (1899), giving a very satisfactory discussion and review of the authorities.

[1] Morgan's Case, L. R. 28 Ch. D. 620 (1884). This case also states that in England it is customary for many banking companies to insert in their constitutions a provision forbidding the inspection of customers' accounts by shareholders or creditors. Irrelevant parts of the books may be sealed up. Jones *v.* Andrews, 58 L. T. Rep. 601 (1888); Earp *v.* Lloyd, 3 K. & J. 549 (1857); Napier *v.* Staples, 2 Molloy, 270 (1828); Hill *v.* Great Western Ry., 10 C. B. (N. S.) 148 (1861); Clifford *v.* Taylor, 1 Taunt. 167 (1808); Gerard *v.* Penswick, 1 Swanst. 533 (1818); Dias *v.* Merle, 2 Paige, 494 (1831); Titus *v.* Cortelyou, 1 Barb. 444 (1847); People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867); Pynchon *v.* Day, 118 Ill. 9 (1886). But if such irrelevant matter cannot be separated, the party must produce the whole. Carew *v.* White, 5 Beav. 172 (1842).

[2] Duffy *v.* Mutual Brewing Co., N. Y. L. J., Oct. 3, 1892, p. 18, approving the above text.

[3] Bruning *v.* Hoboken, etc. Co., 50 Atl. Rep. 906 (N. J. 1902). The applicant must allege the extent of his interest, also wherein his object of inspection is just and useful. Hatch *v.* City Bank, 1 Rob. (La.) 470 (1842). The case of State *v.* Bienville Oil Works, 28 La. Ann. 204 (1876), states that the preceding case "failed through want of precision and definiteness in stating some well-defined purpose, some reasonable cause, and showing that they had some interest in the matter."

[4] Boardman *v.* Marshalltown, 105 Iowa, 445 (1898).

[5] "It is highly proper that an inspection of the books containing the proceedings of the directors should be obtained on special occasions and for special purposes; . . . but the proposed daily and hourly inspection and publication of all their proceedings would be tantamount to admitting the presence of strangers at all their meetings, and would probably ere long be found very prejudicial to the shareholders." Regina *v.* Mariquita, etc. Min. Co., 1 El. & El. 289 (1858). "A private stockholder of an incorporated company has no right to have access to the minutes of the proceedings of the directors unless that right is expressly

is not entitled as a matter of right to a *mandamus* to allow him to inspect the minutes of the directors' meetings. The same rule would seem to apply to miscellaneous questions asked of the directors at stockholders' meetings.

§ 518. *Statutes giving right of inspection.*— The right to inspect corporate records is frequently given to stockholders by statutory provisions. In New York the statute gives to all stockholders the right to examine the corporate stock book,[1] and this statute has been applied to foreign corporations having an office and a stock book within the state.[2] Sometimes the statute provides for the inspection of all corporate records.[3] *Mandamus* lies to enforce

given by the charter; and consequently, and of necessity, he must remain ignorant of their action until they choose to make that action known" (dictum). Alabama, etc. R. R. *v.* Rowley, 9 Fla. 508, 514 (1861). See also Lindley, Companies, under "Inspection" in Index. In Streit *v.* Citizens' F. Ins. Co., 29 N. J. Eq. 21, 31 (1878), the court said: "The officers ought not to have denied to any stockholder an opportunity, properly applied for, to examine the minutes of the meetings of the directors."

[1] The New York statute was construed in Cotheal *v.* Brouwer, 5 N. Y. 562 (1851); People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867); Kennedy *v.* Chicago, etc. R. R., 14 Abb. N. Cas. 326 (1884); People *v.* Mott, 1 How. Pr. 247 (1845); Kelsey *v.* Pfaudler, etc. Co., 3 N. Y. Supp. 723 (1889); People *v.* Throop, 12 Wend. 183 (1834). The New York statute in relation to transfer agents in this state of foreign corporations was construed in People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); aff'd *sub nom. Re* Sage, 70 N. Y. 220; People *v.* Northern Pacific R. R., 50 N. Y. Super. Ct. 456 (1884); Kennedy *v.* Chicago, etc. R. R., 14 Abb. N. Cas. 326 (1884); People *v.* U. S. etc. Co., 20 Abb. N. Cas. 192 (1888); People *v.* Paton, 20 Abb. N. Cas. 195 (1887); *Re* Commerford *v.* William J. Johnston Co., N. Y. L. J., Oct. 7, 1890; Ervin *v.* Oregon Ry. etc. Co., 22 Hun, 566 (1880). A delay of one day in allowing the inspection, owing to the absence of the person having charge of the books, does not cause the penalty to attach. Kelsey *v.* Pfaudler, etc. Co., 41 Hun, 20 (1886). See also §§ 514, 515, *supra.*

[2] See § 515, *supra.*

[3] Ohio Rev. Stat. (1886), § 3312; Cal. Civ. Code, §§ 377, 378; Penal Code, 565; R. I. Pub. St., ch. 153, § 21, and ch. 158, § 24 (1882): Mich. Gen. Stat., § 3173, for banks. See also Colo. Gen. Stat. (1882), § 249; Mo. Rev. Stat. (1879), §§ 720, 721; Vermont R. Laws (1880), §§ 3294, 3295; Mass. 1860, ch. 68, § 10; Ill. Rev. Stat. (1874), ch. 32, § 13. The pleading in a cause of action arising under a statute herein must clearly bring the case within the statute. Lewis *v.* Brainerd, 53 Vt. 510 (1881). The purpose of the inspection need not be stated to the officer. That the officer had notice of plaintiff's stockholdership must be alleged. Williams *v.* College Corner, etc. Co., 45 Ind. 170 (1873). *Cf.* Queen *v.* Grand Canal, 1 Ir. L. R. 337 (1839). For New Jersey, see Huylar *v.* Cragin Cattle Co., 40 N. J. Eq. 392 (1885); s. c., 7 Atl. Rep. 521 (1887). Under the statutes of New Jersey the court will order the books of the company to be brought within the state on the petition of the president and a director. A person having a right to examine the books of the company may do so through an attorney. It is immaterial what the motive of the applicant may be. Mitchell *v.* Rubber Reclaiming Co., 24 Atl. Rep. 407 (N. J. 1892). As to the law in Connecticut, see Pratt *v.* Meriden Cutlery Co., 35 Conn. 36 (1868). See, in general,

this right.[1] Injunction lies to prevent a corporation refusing the statutory right of a stockholder to examine the books of a private corporation, and it is immaterial what his motive may be.[2] Frequently the charter itself states that the stockholder shall have certain rights of inspection. In England the Companies Act regulates specifically the stockholders' right of inspection, and provides for a committee of investigation in behalf of the stockholders whenever an investigation is desired by them.[3] The common-law right of inspection remains, although a special statutory right is also given.[4]

§ 519. *Orders to corporation to allow inspection — Subpœna duces tecum — Bill of discovery.*— An inspection of corporate records is often desired by a stockholder in connection with an action which is pending in the courts, and it has been the practice of the courts to grant applications for this purpose.[5] The order to

Cain *v.* Pullen, 34 La. Ann. 511 (1882). Where the statutes give a stockholder the right to examine all accounts of corporate transactions a stockholder is entitled to a *mandamus* to enforce this right, even though he desires to get information to use in his own business in competition with that of the corporation, but the examination must be at a reasonable time. Weinhenmayer *v.* Bitner, 88 Md. 325 (1898).

[1] See § 514, *supra*.

[2] Cincinnati, etc. Co. *v.* Hoffmeister, 62 Ohio St. 189 (1900). *Cf.* 54 Atl. Rep. 241.

[3] 25 & 26 Vict., c. 89, Table A. In England, under a statute allowing a stockholder to inspect the register of stockholders, etc., an injunction lies to restrain corporate officers from refusing this right. Holland *v.* Dickson, L. R. 37 Ch. D. 669 (1888). A company which by statute is bound to allow an inspection of the register must allow a party to take copies of the same, and an injunction lies in case of refusal. Nelson *v.* Anglo-American, etc. Co., [1897] 1 Ch. 130. A stockholder has the right to make a copy of corporate records which he is examining. Boord *v.* African, etc. Co., [1898] 1 Ch. 596. A penalty for not allowing inspection of the corporate books does not apply to a liquidator. *Re* Kent, etc. Syndicate, [1898] 1 Q. B. 754. Under the English statute a stockholder may inspect the transfer book and take copies, even though he is acting in the interest of a rival company. Mutter *v.* Eastern, etc. Ry., L. R. 38 Ch. D. 92 (1888). A stockholder suing to set aside a fraudulent contract may have inspection even of privileged matters between the company and its attorney. Gouraud *v.* Edison, etc. Co., 59 L. T. 813 (1888).

[4] Matter of Steinway, 159 N. Y. 251 (1899); People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877).

[5] The evidence sought must be directly material to the cause. Rex *v.* Hostmen, 2 Stra. 1223 (1745); Rex *v.* Babb, 3 T. R. 579 (1790); Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800), holding that a stranger has no more right to have an inspection here than in a case where he sues a copartnership. See Central Nat. Bank *v.* White, 37 N. Y. Super. Ct. 297 (1874), holding that in New York the inspection is proper if the evidence is material and cannot otherwise be obtained; Clinch *v.* Financial Corp., L. R. 2 Eq. 271 (1866), where a director was compelled to produce. In the federal courts an inspection will not be granted in order to frame a complaint. Paine *v.* Warren, 33 Fed. Rep. 357 (1888).

allow an inspection may be made at any stage of the action. A stockholder has this right to aid him in suits with strangers, and of course his right herein is more extensive than the rights of the other party to the action. In fact, a person who is not a stock-

In a bill alleging fraud on the part of the directors, whereby complainant, a stockholder, has been injured, the latter may obtain such inspection. Walburn *v.* Ingilby, 1 Myl. & K. 61 (1833). See Bassford *v.* Blakesley, 6 Beav. 131 (1842). On a verified petition by a single stockholder stating that a mine owned by the company is being worked at a loss, an inspection of the company's books will be granted. *Re* West Devon, etc. Mine, L. R. 27 Ch. D. 106 (1884). In a suit to hold the directors of a life insurance company personally responsible for large losses alleged to have been caused by moneys improperly paid on policies, an inspection has been allowed, although plaintiff was said to have but a trifling interest in the company and was desirous of injuring it, and had published prejudicial statements in regard to the matter. Williams *v.* Prince of Wales Ins. Co., 23 Beav. 338 (1857). Where a company was being wound up, an application on behalf of twenty-four out of eight hundred and fifty-six stockholders, who had associated themselves together for an investigation into the company's affairs, was allowed, with permission to employ an accountant to carry on the examination of the books. Joint-stock Discount Co.'s Case, 36 L. J. Eq. 150 (1867). See Emma Silver Min. Co.'s Case, L. R. 10 Ch. App. 194 (1875); People *v.* Lake Shore, etc. R. R., 11 Hun, 1 (1877); 70 N. Y. 220; *Ex parte* Buchan, 36 L. J. (Ch.) 150 (1866). An inspection will not be granted for the purpose of fishing out a defense to a suit. Birmingham, etc. Ry. *v.* White, 1 Q. B. 282 (1841); Imperial Gas Co. *v.* Clarke, 7 Bing. 95 (1830). See Hoyt *v.* American Exch. Bank, 1 Duer, 652 (1853); Shoe & Leather Assoc. *v.* Bailey, 49 N. Y. Super. Ct. 385 (1883). Nor to furnish materials to the other side for a new trial. Pratt *v.* Goswell, 9 C. B. (N. S.) 706 (1861). Nor to ascertain whether petitioner might better accept, with the other stockholders, what was offered her for her holding in an old company, which was being wound up, instead of proceeding with an arbitration. *Re* Glamorganshire Banking Co., L. R. 28 Ch. D. 620 (1884). Nor to establish a justification in an action against the petitioner for libel, imputing insolvency to the company. Metropolitan, etc. Co. *v.* Hawkins, 4 H. & N. 146 (1859). See Finlay *v.* Lindsay, 7 Ir. L. R. (N. S.) 1 (1857); Collins *v.* Yates, 27 L. J. (Exch.) 150 (1858); Opdyke *v.* Marble, 44 Barb. 64 (1864). Nor to examine all the books of the company for fifty years back, because petitioner alleges that he is dissatisfied with the management of the company and with the accounts, besides other grounds. Regina *v.* Grand Canal, 1 Ir. L. R. 337 (1839). Nor where the petition does not specify the particular books asked for, nor the object of the petitioner in making the application to the officers and to the court. Regina *v.* London, etc. Docks Co., 44 L. J. (Q. B.) 4 (1874). See Hunt *v.* Hewitt, 7 Exch. 236 (1852); Pepper *v.* Chambers, 7 Exch. 226 (1852); New England Iron Co. *v.* New York Loan, etc. Co., 55 How. Pr. 351 (1878); Central, etc. R. R. *v.* Twenty-third St. Ry., 53 How. Pr. 45 (1877); Forsyth Comm'rs *v.* Lemly, 85 N. C. 341 (1881); Walker *v.* Granite Bank, 44 Barb. 39 (1865). The court may direct the *manner* of the examination. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857).

An appeal may be taken from an order granting a party leave to inspect and examine the books of a corporation, the appellant. Thompson *v.* Erie Ry., 9 Abb. Pr. (N. S.) 212 (1870); Lan-

holder has no more right to an inspection of the corporate books than he has to inspect the books of a copartnership. This is the rule, even though he is suing or being sued by a stockholder.[1] But in a suit against stockholders for malicious prosecution, they may be required by *mandamus* to produce certain books of the corporation for the inspection of the plaintiff.[2] *Mandamus*, and not an order under a statute, is the sole remedy of a stockholder wishing to inspect the books of the company, there being no suit pending.[3] The remedy of a stockholder who wishes to examine the corporate

cashire, etc. Co. *v.* Greatorex, 14 L. T. Rep. 290 (1866); People *v.* Kent County Judge, 38 Mich. 351 (1878); Forsyth Comm'rs *v.* Lemly, 85 N. C. 341 (1881). See Saxby *v.* Easterbrook, L. R. 7 Exch. 207 (1872); Bustros *v.* White, L. R. 1 Q. B. D. 423 (1876); Clyde *v.* Rogers, 24 Hun, 145 (1881); appeal dismissed in s. c., 87 N. Y. 625; McCargo *v.* Crutcher, 27 Ala. 171 (1855); Sage's Case, 70 N. Y. 221 (1877). As to the costs of an inspection, see Hill *v.* Philp, 7 Exch. 232 (1852); Davey *v.* Pemberton, 11 C. B. (N. S.) 628 (1862); Gardner *v.* Dangerfield, 5 Beav. 385 (1842). Stockholders obtaining inspection may be ordered not to disclose the information received. *Ex parte* Buchan, 36 L. J. (Ch.) 150 (1866); Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857). May examine through an attorney. Williams *v.* Prince of Wales, etc. Co., 23 Beav. 338 (1857). A professional accountant may be employed. Bonnardet *v.* Taylor, 1 J. & H. 383 (1861); 1 Greenl. Ev., § 474. An inspection of the stock-ledger was allowed in People *v.* Pacific Mail S. S. Co., 50 Barb. 280 (1867). So also of the discount book. Cockburn *v.* Union Bank, 13 La. Ann. 289 (1858); People *v.* Throop, 12 Wend. 183 (1834). So also of the by-laws. Harrison *v.* Williams. 3 B. & C. 162 (1824); Reg. *v.* Saddlers' Co., 10 W. R. 87 (1861). See also Walburn *v.* Ingilby, 1 Myl. & K. 61 (1833), where the order was to a third person having charge of the books. "The courts of common law may also make an order for the inspection of writings in the possession of one party to a suit in favor of the other." 1 Greenl. Ev., § 559. An article of the company taking away the right of inspection does not prevent a rule issuing requiring its allowance in pending litigation. Hall *v.* Connell, 3 Y. & C. (Exch.) 707 (1840). The rule stated in the text above applies to joint-stock companies. Woods *v.* De Figaniere, 1 Rob. (N. Y.) 681 (1863). In the federal courts the right is statutory. U. S. Rev. Stat., § 724. In regard to the act of congress authorizing courts to require the production of books and writings, see Victor G. Bloede Co. etc. *v.* Joseph Bancroft, etc. Co., 98 Fed. Rep. 175 (1899). The opinions of counsel in the case of a fraudulent transaction are not privileged. Williams *v.* Quebrada Ry. etc. Co., [1895] 2 Ch. 751.

[1] Strangers have no more right to demand inspection of the books of a corporation during litigation in which the corporation is not interested than they have to demand a similar right of any other person. Mayor of Southampton *v.* Graves, 8 T. R. 590 (1800), overruling earlier cases. See also Opdyke *v.* Marble, 44 Barb. 64 (1864); Morgan *v.* Morgan, 16 Abb. Pr. (N. S.) 291 (1874). A corporation will not be compelled to open its records for the purposes of a litigation in which it is not a party. Henry *v.* Travelers' Ins. Co., 35 Fed. Rep. 15 (1888).

[2] Eddy *v.* Bay Circuit Judge, 114 Mich. 668 (1897).

[3] Fuller *v.* Alex. Hollander, etc. Co., 47 Atl. Rep. 646 (N. J. 1900).

books in order to bring suit against the directors for fraud is by *mandamus*, not by an order for inspection.[1] If a stockholder, and sometimes a third person, is suing or being sued by a corporation, he is entitled to the usual right of giving a notice to produce documents,[2] or to a discovery by an order.[3] Even though the secretary of a company refuses in the trial of a case to produce the books of the company as ordered by the court, yet an order committing

[1] Walsh *v.* Press Co., 48 N. Y. App. Div. 333 (1900).

[2] See Wait, Insolv. Corp., § 519. See also § 714, *infra.* Where a defendant corporation does not produce its minute book in accordance with the notice to do so, the evidence of its president is admissible that the board of directors had approved of his action in entering into the contract involved in the suit. Strawbridge *v.* Clamond Tel. Co., 195 Pa. St. 118 (1900).

[3] Rex *v.* Travannion, 2 Chitty, 366 (1818); Swansea Vale Ry. *v.* Budd, L. R. 2 Eq. 274 (1866); Macintosh *v.* Flint, etc. R. R., 1 Ry. & Corp. L. J. 384 (Mich. 1887), a stockholder's case. An order to allow examination of the corporate records was granted in Kirkpatrick *v.* Pope Mfg. Co., 61 Fed. Rep. 46 (1894), where the defendant company said that it had not violated a contract, but that its successor was liable. Where a stockholder files a bill to obtain an accounting, and charges misappropriation, and makes a motion that he be allowed to examine the books, the court will wait until the corporation pleads or answers before granting the motion. Ranger *v.* Champion, etc. Co., 51 Fed. Rep. 61 (1892). Under the Nebraska statute, in a suit instituted by the state to enjoin a foreign corporation from doing business in the state on the ground that it is violating an anti-trust statute, the court may order the defendant to allow the plaintiff to examine the defendant's books and records for the purpose of obtaining evidence in the case. State *v.* Standard Oil Co., 61 Neb. 28 (1900). Under the statutory practice in Rhode Island the court may order the production of the record book of the corporation in court or for an inspection. Arnold *v.* Pawtuxet, etc. Co., 18 R. I. 189 (1893). The affidavit to obtain the order must show that the information sought is essential. Imperial Gas Co. *v.* Clarke, 7 Bing. 95 (1830); Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418, 428 (1851). The officers may be orally examined by the court with reference to where the books are. Lacharme *v.* Quartz Rock, etc. Min. Co., 1 H. & C. 134 (1862). They may be required to make affidavits. Ranger *v.* Great Western Ry., 4 De G. & J. 74 (1859); *Re* Burton, 31 L. J. (Q. B.) 62 (1861). In an action against a corporation the plaintiff is entitled to inspect all the minutes and entries in the company's books having reference to the subject in litigation. Hill *v.* Great Western Ry., 10 C. B. (N. S.) 148 (1861); Harrison *v.* Williams, 3 B. & C. 162 (1824); *Re* Burton, 31 L. J. (Q. B.) 62 (1861); Sinclair *v.* Gray, 9 Fla. 71 (1860). See Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833); Rex *v.* Buckingham, 8 B. & C. 375 (1828); Imperial Gas Co. *v.* Clarke, 7 Bing. 95 (1830). The plaintiff may have inspection of corporate minutes in a suit by a superintendent against the corporation. Hill *v.* Great Western Ry., 10 C. B. (N. S.) 148 (1861). Or in a suit by a claimant of office. *Re* Burton, 31 L. J. (Q. B.) 62 (1861). See also § 714, *infra.* An order will not be granted for the purpose of fishing out a defense. Birmingham, etc. Ry. *v.* White, 1 Q. B. 282 (1841). See also Credit Co. *v.* Webster, 53 L. T. Rep. 419 (1885).

him for contempt of court is illegal if the original order amounted to an unreasonable seizure and search of the company's records, especially where the statutes provided for an inspection of corporate books by a different procedure, and it was not shown that the books would contain the evidence expected.[1]

In a suit in equity against a corporation interrogatories may be attached to the bill of complaint and the corporate officers may be compelled to answer them.[2] In certain cases a bill of discovery may be filed.[3]

[1] *Ex parte* Clarke, 126 Cal. 235 (1899).

[2] Where one of the purposes of a bill is to require the production of the records and minutes of the meetings of a corporation, and such records are necessary for the plaintiff to prove his case, the court may order the defendants to produce them under penalty of having their answer stricken from the files of the court. Ramsdell *v.* National, etc. Co., 104 Fed. Rep. 16 (1900). A stockholder's bill against a corporation and directors may be to remedy certain alleged frauds, and also incidentally to obtain a disclosure and discovery. The stockholder need not resort to a *mandamus.* Weir *v.* Bay State Gas Co., 91 Fed. Rep. 940 (1898). But where the suit is brought by the stockholder against the corporation alone to remedy the frauds of directors and have a receiver appointed and obtain a disclosure, the bill is defective for nonjoinder of the guilty parties. Edwards *v.* Bay State Gas Co., 91 Fed. Rep. 942 (1898); Morse *v.* Bay State Gas Co., 91 Fed. Rep. 944 (1898). Where suit is brought against a corporation, and its officers are made parties defendant for purposes of discovery, the latter are

[3] A cross-bill for discovery lies against a corporation, even though the officers might be called as witnesses. Indianapolis Gas Co. *v.* City of Indianapolis, 90 Fed. Rep. 196 (1898). A bill for discovery against the corporation alone is not good. The officers should be joined. Roanoke St. Ry. *v.* Hicks, 96 Va. 510 (1898). A bill in equity at the instance of a stockholder to obtain an inspection of the books in order to ascertain the financial condition of the company does not lie where he does not allege that he has been refused an inspection or the required information. Moreover, his remedy is by *mandamus.* Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). Where discovery is sought from an officer he should be made a party defendant. Virginia, etc. Co. *v.* Hale, 93 Ala. 542 (1890). A bill lies in equity to compel a corporation to discover, in aid of a suit at law for damages for infringement of patent. Colgate *v.* Compagnie Française, 23 Fed. Rep. 82 (1885). See also as to a bill of discovery, McComb *v.* Chicago, etc. R. R., 19 Blatchf. 69 (1881); Costa Rica *v.* Erlanger, L. R. 1 Ch. D. 171 (1875); Glasscott *v.* Copper-Miners, 11 Sim. 305 (1840); Moodalay *v.* Morton, 1 Bro. C. C. 469 (1785); Stettauer *v.* New York, etc. Co., 42 N. J. Eq. 46 (1886); French *v.* First Nat. Bank, 7 Ben. 488 (1874); s. c., 9 Fed. Cas. 786. But a bill of discovery will not lie against one who is merely a witness. Fenton *v.* Hughes, 7 Ves. Jr. 287 (1802); Dummer *v.* Chippenham, 14 Ves. Jr. 245 (1807). As to the difference between a bill of discovery and other bills, see McIntyre *v.* Union College, 6 Paige, 239 (1837); Many *v.* Beekman Iron Co., 9 Paige, 188 (1841). A discovery will not be granted where there is no allegation that information is refused, or that the party cannot examine the books, or that a *mandamus* would be inadequate. Wolfe *v.* Underwood, 96 Ala. 329 (1892).

A bill of discovery may be filed to discover the names of stockholders, in order to enforce their statutory liability.[1] In New York an examination before trial is sometimes granted by the court.[2] Sometimes a *subpœna duces tecum*, issued in behalf of a

not merely nominal parties. Doyle *v.* San Diego, etc. Co., 43 Fed. Rep. 349 (1890). Where an answer under oath is waived, and no discovery is sought in an action against a corporation, the officers are not proper parties defendant. Colonial, etc. Co. *v.* Hutchinson Mortgage Co., 44 Fed. Rep. 219 (1890). A person may be made a party defendant for purposes of discovery only. See Lewis *v.* St. Albans, etc. Works, 50 Vt. 477 (1878). In an action by a person against a corporation for any cause of action, a secretary and bookkeeper may be made a party defendant for the purpose of getting an answer of discovery under oath, which the corporation cannot make. Wych *v.* Meal, 3 P. Wms. 310 (1734); Chase *v.* Vanderbilt, 62 N. Y. 307, 314 (1875); Many *v.* Beekman Iron Co., 9 Paige, 188 (1841); Masters *v.* Rossie, etc. Co., 2 Sandf. Ch. 301 (1845); Brumly *v.* Westchester, etc. Soc., 1 Johns. Ch. 366 (1815); McIntyre *v.* Union College, 6 Paige, 239 (1837); Vermilyea *v.* Fulton Bank, 1 Paige, 37 (1828). But not where the corporation is not a party. Ellsworth *v.* Curtis, 10 Paige, 105 (1843). An officer of the company, in answering interrogatories propounded to the company, need not give information which he obtained outside of the service of the company or which he knows as an officer of a predecessor company. Welsbach, etc. Co. *v.* New, etc. Co., [1900] 2 Ch. 1. In equity suits it is the practice to join as codefendants with the corporation such officers as may answer under oath such matters as the complainant desires to know. See § 738, *infra;* Glasscott *v.* Copper-Miners, 11 Sim. 305 (1840); *Re* Barned's Bkg. Co., L. R. 2 Ch. App. 350 (1867); French *v.* First Nat. Bank, 7 Ben. 488 (1874); S. C., 9 Fed. Cas. 786. This rule prevails because the corporation itself cannot be convicted of perjury. McKim *v.* Odom, 3 Bland, Ch. (Md.) 407, 420 (1828); Wych *v.* Meal, 3 P. Wms. 311 (1734); Bevans *v.* Dingman's Choice Turnp., 10 Pa. St. 174 (1849). The corporation itself may be compelled to answer fully. See Gamewell, etc. Co. *v.* New York, 31 Fed. Rep. 312 (1887), citing cases. A corporate officer may be joined with the corporation as a defendant to obtain from him a discovery. Lord Eldon said as to this rule: "It originated with Lord Talbot, who reasoned thus upon it: that you cannot have a satisfactory answer from a corporation, therefore you make the secretary a party, and get from him the discovery you cannot be sure of having from them; and it is added that the answer of the secretary may enable you to get better information." Continental Nat. Bank *v.* Heilman, 66 Fed. Rep. 184 (1895).

[1] Post *v.* Toledo, etc. R. R., 144 Mass. 341 (1887). A bill in equity for discovery lies at the instance of a judgment creditor of a corporation to ascertain the names and addresses of the stockholders, the object being to enforce the statutory liability, but such bill must allege such liability. Clark *v.* Rhode Island, etc. Works, 53 Atl. Rep. 47 (R. I. 1902).

[2] A corporation may appeal from an order for the examination of one of its officers. Sherman *v.* Beacon, etc. Co., 58 Hun, 143 (1890). By examination before trial, plaintiff may ascertain whether defendants are proper defendants, or whether they are a corporation. Sweeney *v.* Sturgis, 24 Hun, 162 (1881). Where persons sued as partners deny the partnership, the plaintiff may have an examination before trial, in order to ascertain what the company is and of whom it consists. Clark *v.*

stockholder or of a third person, may serve the purpose.[1] The officers of a corporation cannot be compelled to produce its books, in a suit in which the corporation is not a party, even though the books may disclose facts material to the issues.[2]

Most of the states have statutes regulating this subject, and these statutes frequently displace the common-law procedure.[3] A cor-

Wilcklow, 75 Hun, 290 (1894). A stockholder who brings a suit against parties who have received from the corporation $3,000,000 of stock for $10,000 worth of patents may examine the defendants before trial, in order to prove what the patents were worth. Insurance Press *v.* Montauk, etc. Co., 70 N. Y. App. Div. 50 (1902). As to the Massachusetts statute allowing an examination of the president before trial, see Gunn *v.* New York, etc. R. R., 171 Mass. 417 (1898). A stockholder who has exchanged his stock for bonds, and who sues the directors for fraud, inducing him to make such exchange, cannot examine them before trial. Butler *v.* Duke, 39 N. Y. Misc. Rep. 235 (1902). So also as to a stockholder who sues the directors for an accounting, on the ground that they are interested in four corporations and had diverted the business. Elmes *v.* Duke, 39 N. Y. Misc. Rep. 244 (1902).

1 New York Code Civ. Proc., §§ 868, 869, 872, 873. See New York, etc. R. R. *v.* Carhart, 36 Hun, 288 (1885); Reichmann *v.* Manhattan Co., 26 Hun, 433 (1882); ch. 536, L. 1880; Fenlon *v.* Dempsey, 50 Hun, 131 (1888); Russell *v.* Manhattan Ry., N. Y. D. Reg., Dec. 8, 1887; People *v.* Mutual, etc. Co., 74 N. Y. 434 (1878); Wainwright *v.* Tiffiny, 13 N. Y. Civ. Pro. 222 (1887). The transfer book may be thus examined. See Fenlon *v.* Dempsey, 50 Hun, 131 (1888). The right of a stockholder to compel a corporation to produce in court the corporate records has been the subject of some controversy. In New York, under the old Code, it was held that a *subpœna duces tecum* would not always lie herein, but that an order to the corporation to allow an inspection was the proper remedy. La Farge *v.* La Farge F. Ins. Co., 14 How. Pr. 26 (1857); Central Nat. Bank *v.* White, 37 N. Y. Super. Ct. 297 (1874). In a stockholder's suit to hold the directors liable for misfeasance, an inspection of the books will not be granted where the cause is at issue, and the same result can be reached by a *subpœna duces tecum.* Clarke *v.* Eastern, etc. Assoc., 89 Fed. Rep. 779 (1898). In Iowa a corporate servant who is required by a subpœna to produce the corporate books, which show that the corporation has violated the liquor laws, need not do so if the books are not in his possession. But otherwise he is guilty of contempt. U. S. Express Co. *v.* Henderson, 69 Iowa, 40 (1886). The president may be compelled by *subpœna duces tecum* to produce drawings owned by the company in a suit in which it is a party. Johnson, etc. Co. *v.* North Branch Steel Co., 48 Fed. Rep. 195 (1891). Stock-exchange books, as evidence, must be proved by the secretary. Terry *v.* Birmingham Nat. Bank, 93 Ala. 599 (1891). Where the books of a corporation are within the jurisdiction of the court, their production may be compelled in a litigation in which the corporation itself is a party. State *v.* Allen, 104 La. 301 (1900).

2 Southern Ry. *v.* North Car. etc. Com., 104 Fed. Rep. 700 (1900).

3 In New York the right of inspection by order is regulated by statute. Code Civ. Proc., §§ 803, 809. See Boorman *v.* Atlantic, etc. R. R., 78 N. Y. 599 (1879); Ervin *v.* Oregon Ry. etc. Co., 22 Hun, 566 (1880), holding that where the books are in use, only sworn copies can be required; Johnson *v.* Consolidated, etc. Min. Co., 2 Abb. Pr. (N. S.) 413

poration may enjoin the secretary of state from taking its certificate of incorporation out of the state, even though he proposes to prove perjury by the officers in swearing to the certificate.[1] The books of the corporation are evidence in a suit against a stockholder on a call, even though the entries are not proved to be correct by the person actually making them.[2] In a suit by a receiver of a national bank to recover back dividends illegally paid, the books of the bank are competent evidence to prove the acts of the corporation and its financial condition, except as to dealings between the corporation and the defendant.[3]

(1867); Walker *v.* Granite Bank, 19 Abb. Pr. 111 (1865); Thompson *v.* Erie Ry., 9 Abb. Pr. (N. S.) 230 (1870); Fenton *v.* Dempsey, 10 N. Y. St. Rep. 733 (1887); People *v.* U. S. Mercantile Rep. Co., 20 Abb. N. Cas. 192 (1888); Shipherd *v.* Cohen, N. Y. D. Reg., Jan. 26, 1888.

[1] Delaware, etc. Co. *v.* Layton, 50 Atl. Rep. 378 (Del. 1901).

[2] Sigua, etc. Co. *v.* Brown, 171 N. Y. 488 (1902). See also § 727, *infra.*

[3] Hayden *v.* Williams, 96 Fed. Rep. 279 (1899).

CHAPTER XXXI.

LIENS OF THE CORPORATION ON STOCK FOR THE STOCKHOLDER'S DEBTS TO THE CORPORATION.

§§ 520, 521. *No lien at common law.*— Corporations, both in this country and in England, frequently possess and exercise a lien on a stockholder's stock for debts due from that stockholder to the corporation. In this chapter it is proposed to consider the origin of the lien; the extent to which it may be exercised and enforced; the waiver of it by the corporation; and its effect generally upon the transfer of shares.

It is clear that at common law a corporation has no lien upon the shares of its stockholders for debts due from them to the company.[1] The policy of the common law has always been to discountenance secret liens, inasmuch as they hamper trade and restrict the safe and speedy transfer of property.[2] It is upon this ground that

[1] Gemmell *v.* Davis, 75 Md. 546 (1892); Massachusetts Iron Co. *v.* Hooper, 61 Mass. 183 (1851); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802); Steamship Dock Co. *v.* Heron, 52 Pa. St. 280 (1866); Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883); Fitzhugh *v.* Bank of Shepherdsville, 3 T. B. Mon. (Ky.) 126 (1825); Williams *v.* Lowe, 4 Neb. 382, 398 (1876); Dana *v.* Brown, 1 J. J. Marsh. (Ky.) 304 (1829); Hart *v.* State Bank, 2 Dev. Eq. (N. C.) 111 (1831); Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336 (1878); People *v.* Crockett, 9 Cal. 112 (1858); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Neale *v.* Janney, 2 Cranch, C. C. 188 (1819); s. c., 17 Fed. Cas. 1266; McMurrich *v.* Bond Head Harbor Co., 9 U. C. Q. B. 333 (1852); Clise Inv. Co. *v.* Washington Sav. Bank, 18 Wash. 8 (1897). *Cf.* Weston's Case, L. R. 4 Ch. 20 (1868). See also Gibson *v.* Hudson's Bay Co., MS. Rep. Mich. T. 12 Geo. I. (1726); 7 Vin. Abr. (2d Lond ed.) 125; Pinkett *v.* Wright, 2 Hare, 120 (1842); Byrne *v.* Union Bank, 9 Rob. (La.) 433 (1845); Hussey *v.* Manufacturers', etc. Bank, 27 Mass. 415 (1830); Bryon *v.* Carter, 22 La. Ann. 98 (1870); Bank of Attica *v.* Manufacturers', etc. Bank, 20 N. Y. 501 (1859); Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96 (1874).

[2] Quoted and approved in Boyd *v.* Redd, 120 N. C. 335 (1897).

the courts refuse to enforce a lien upon stock when such lien is not created by charter or by by-law. A stockholder has a right to sell his stock and have it transferred on the corporate books, although there are unpaid calls due on the stock at the time of transfer, and for refusal to transfer he may sue for conversion.[1] A trustee issuing certificates to represent an interest in a reorganized property has no lien on a certificate for costs in a litigation concerning it.[2]

§ 522. *A lien may be created by statute, by charter, or possibly by by-law or contract.*— Such a lien as this in favor of the corporation may be created by statute[3] or by charter,[4] and the weight of authority holds that it may be created by by-law.

With respect to the right of a corporation to enact a by-law creating such a lien, it is held in many jurisdictions that such a by-law is valid and binding upon all persons who buy or transfer the shares.[5] There is nevertheless strong authority for the rule

[1] Craig *v.* Hesperia, etc. Co., 113 Cal. 7 (1896).

[2] Cassagne *v.* Marvin, 143 N. Y. 292 (1894).

[3] Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877); Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881). An amendment to a banking act whereby a lien is given to banks on stock of its stockholders for debts due the bank from them does not apply to stock already issued. Southern, etc. Co. *v.* Fidelity, etc. Co., 105 Ga. 487 (1898). A statute giving a bank a lien on its stock for debts due to the bank from the stockholder is not nullified by another statutory provision prohibiting the bank from loaning money on its stock. Battey *v.* Eureka Bank, 62 Kan. 384 (1901). The repeal of a statute giving a corporation a lien on stock does not affect a lien which has already accrued. Wright, etc. Co. *v.* Hixon, 105 Wis. 153 (1889).

[4] Union Bank *v.* Laird, 2 Wheat. 390 (1817); Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832); Reese *v.* Bank of Commerce, 14 Md. 271 (1859); Brent *v.* Bank of Washington, 10 Pet. 596 (1836); German Security Bank *v.* Jefferson, 10 Bush (Ky.), 326 (1874); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847); Bohmer *v.* City Bank, 77 Va. 445 (1883); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306 (1835); Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849); Cross *v.* Phenix Bank, 1 R. I. 39 (1840); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870).

[5] Knight *v.* Old Nat. Bank, 3 Cliff. 429 (1871); s. c., 14 Fed. Cas. 772; McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 27 (1832); Bank of Holly Springs *v.* Pinson, 58 Miss. 421 (1880); Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310; People *v.* Crockett, 9 Cal. 112 (1858); Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); s. c., 19 Fed. Cas. 135; Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308 (1869); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Geyer *v.* Western Ins. Co., 3 Pittsb. 41 (1867); *Re* Dunkerson, 4 Biss.

that such a by-law cannot create a lien on the stock so as to bind a *bona fide* purchaser, or other person into whose hands the stock may come, to whom actual knowledge of the by-law cannot be imputed. It has been so held in New York,[1] Louisiana,[2] Massachusetts,[3] Ala-

227 (1868); s. c., 8 Fed. Cas. 48; Young *v.* Vough, 23 N. J. Eq. 325 (1873); Brent *v.* Bank of Washington, 10 Pet. 596, 615 (1836); Child *v.* Hudson's Bay Co., 2 P. Wms. 207 (1723); Planters', etc. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879); Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 304 (1893). *Cf.* Heart *v.* State Bank, 2 Dev. Eq. (N. C.) 111 (1831); Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336, 340 (1878). In Tuttle *v.* Walton, 1 Ga. 43 (1846), it was said that as between the corporators themselves such a by-law will be held valid. A by-law creating a lien in behalf of the corporation on stock is valid as against a stockholder and any one who purchases his stock with notice that such by-law exists. John, etc. Co. *v.* Woodside, 87 Md. 146 (1898). In the case of Costello *v.* Portsmouth, etc. Co. 69 N. H. 405 (1899), the court upheld a by-law of a brewing company which gave the corporation a lien on the stock of its stockholders for any debts due from them to the corporation, and also gave the corporation a right to appropriate such stock at its par value in liquidation of such debts when overdue three months. The corporation actually did so appropriate the stock of one of its stockholders in that manner and afterwards sold the stock to a third party, and the court upheld the transaction. Under the English statutes a by-law may provide that the company shall have a lien on the stockholders' stock for debts due from them to the company. Allen *v.* Gold Reefs, etc. Limited, [1900] 1 Ch. 656, rev'g [1899] 2 Ch. 40.

[1] Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96 (1874); Bank of Attica *v.* Manufacturers', etc. Bank, 20 N. Y. 501 (1859); Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. 495 (1868); Conklin *v.* Second Nat. Bank, 53 Barb. 512, note (1868); s. c. aff'd, 45 N. Y. 655 (1871). In the case last cited it was held that not even where the certificate of stock contained a provision that the stock was not transferable until all the liabilities of the stockholder to the bank were paid did the bank acquire a lien upon the shares for the subsequent indebtedness of the stockholder. And all the New York decisions proceed upon the broad ground that the policy of the law is to protect a *bona fide* vendee of shares of stock against secret or equitable claims thereto. *Cf.* Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); McCready *v.* Rumsey, 6 Duer, 574 (1857); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857). A by-law preventing the transfer or voting upon stock while dues remain unpaid is invalid, even though the stockholder agreed to be bound by such by-laws. Kinnan *v.* Sullivan, etc., 26 App. Div. 213 (1898).

[2] Bryon *v.* Carter, 22 La. Ann. 98 (1870); Pitot *v.* Johnson, 33 La. Ann. 1286 (1881). *Cf.* New Orleans, etc. Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881).

[3] In Nesmith *v.* Washington Bank, 23 Mass. 324 (1828), the court doubted whether a by-law could under any circumstances create a lien on stock as against the creditors of the stockholder, but did not decide the point. In Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829), there is a somewhat decided ground taken against the validity of any by-law which tends to limit the free transfer of stocks. In Plymouth Bank *v.* Bank of Norfolk, 27 Mass. 454 (1830), Chief Justice Shaw seems to doubt the validity of a by-law giving a bank a lien on its own stock.

bama,[1] Pennsylvania,[2] California,[3] Missouri,[4] Mississippi,[5] and, it seems, in some other states.[6]

The question sometimes arises whether or not the corporation has authority to enact a by-law creating a lien upon its stock in favor of the corporation for debts due it by the stockholders, where the charter or statute contains unusual words in defining the powers of the corporation. It has been held that, where the directors are authorized to make "regulations" as to transfers, they may make a by-law creating a lien.[7] So various other phrases have been held sufficient to confer this power.[8] Where, in addition to the articles of incorporation, the statute provides for articles of association, the corporation may in the latter provide for a

[1] Planters', etc. Mut. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879).

[2] Steamship Dock Co. *v.* Heron, 52 Pa. St. 280 (1866); Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883).

[3] Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883).

[4] A by-law giving the corporation a lien on stock is not good as against a *bona fide* purchaser of the certificate who had no notice of the by-law. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). So, also, as to a pledgee. Bank of Atchison County *v.* Durfee, 118 Mo. 431 (1893).

[5] Bank of Holly Springs *v.* Pinson, 58 Miss. 421 (1880).

[6] Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880); Evansville Nat. Bank *v.* Metropolitan Nat. Bank, 2 Biss. 527 (1871); s. c., 8 Fed. Cas. 891; Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298 (1872). *Cf.* Neale *v.* Janney, 2 Cranch, C. C. 188 (1819); s. c., 17 Fed. Cas. 1266. A lien of the corporation on stock is prevented by a statutory provision that the company should not loan money on the security of its own stock. Nicollet Nat. Bank *v.* City Bank, 38 Minn. 85 (1887). As to national banks, see § 533, *infra.*

[7] Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); s. c., 19 Fed. Cas. 135. *Cf.* Tuttle *v.* Walton, 1 Ga. 43 (1846).

[8] Bryon *v.* Carter, 22 La. Ann. 98 (1870); Brent *v.* Bank of Washington, 10 Pet. 596, 613 (1836); Pendergast *v.* Bank of Stockton, 2 Sawyer, 108 (1871); s. c., 19 Fed. Cas. 135. Except when such power is expressly given to the directors it can only be exercised by vote of the stockholders. Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). A charter power given to the directors of a corporation "to make all by-laws not inconsistent with any existing law of the state for the management of its property, the regulation of its affairs, and the transfer of its stock." has been held in Missouri to include the power in question. Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870). But in New York the same language used in the general statute was held not to include it. Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96 (1874). See also St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); Bank of Attica *v.* Manufacturers' Bank, 20 N. Y. 501 (1859). For a discussion of this question as applied to national banks, see § 533, *infra.* A statute that the transfer of stock need not be recorded on the corporate books except as against the claims of the corporation does not give the corporation a lien on the stock. Buena Vista, etc. Bank *v.* Grier, 114 Ga. 398 (1901).

lien on the stock.[1] Inasmuch as by the laws of England an English corporation may amend its by-laws so as to give it a lien on stock which will be prior to any existing unregistered pledge or assignment of the certificates of stock, an American pledgee or holder of such certificates of stock is bound by such by-law.[2]

Upon the whole it may be said that the question whether a corporation may, by by-law, create a lien in its own favor upon the shares of its stockholders for debts due by them to the corporation is not settled. The weight of authority in this country is against the validity of the by law, and such would seem to be a result most in accord with public policy.

In New Hampshire such liens upon stock are forbidden by statute.[3] The right to create a lien by contract is considered elsewhere.[4]

§ 523. *Notice of the lien.*— When a lien is expressly given to the corporation by its charter or by statute, all persons purchasing the stock are affected by the statute and must take notice of it.[5] A statutory lien need not be set out in the certificate of stock in order to give notice to the transferee.[6]

[1] Mohawk Nat. Bank *v.* Schenectady Bank, 78 Hun, 90 (1894); aff'd, 151 N. Y. 665. Where the statute allows the incorporators to include special provisions in their articles of incorporation, and a lien right is inserted, and the certificate of stock on its face refers to the articles of association, a purchaser of a certificate buys subject to such lien. Gibbs *v.* Long Island Bank, 83 Hun, 92 (1894); aff'd, 151 N. Y. 657.

[2] Hudson, etc. Co. *v.* Warner & Co., 99 Fed. Rep. 187 (1900).

[3] Hill *v.* Pine River Bank, 45 N. H. 300, 309 (1864).

[4] See § 523, *infra.*

[5] Bishop *v.* Globe Co., 135 Mass. 132 (1883); Dorr *v.* Life Ins. etc. Co., 71 Minn. 38 (1898); Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 111 Mich. 313 (1896); Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 304 (1893); Union Bank *v.* Laird, 2 Wheat. 390 (1817); Bohmer *v.* City Bank, 77 Va. 445 (1883); Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833); Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826); St. Louis, etc. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828). *Cf.* Stebbins *v.* Phenix F. Ins. Co., 3 Paige, 350 (1832); Newberry *v.* Detroit, etc. R. R., 17 Mich. 141 (1868); Titcomb *v.* Union M. & F. Ins. Co., 8 Mass. 326 (1811); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513 (1870); Tuttle *v.* Walton, 1 Ga. 43 (1846); Dorr *v.* Life Ins. etc. Co., 71 Minn. 38 (1898).

[6] National Bank *v.* Rochester Tumbler Co., 172 Pa. St. 614 (1896); McCready *v.* Rumsey, 6 Duer, 574 (1857); Reese *v.* Bank of Commerce, 14 Md. 271 (1859); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877). A lien on stock created by statute gives the corporation a prior right in the stock as against a subsequent pledgee and purchaser at the pledgee's sale, even though the certificate of stock gives no intimation of a lien. Hammond *v.* Hastings, 134 U. S. 401 (1890). A purchaser or pledgee of stock is bound to take notice of a statutory lien which the corporation has on such stock. Wright, etc. Co. *v.* Hixon, 105 Wis. 153 (1899). A pledgee of stock is bound to take notice of a

§§ 524, 525. It is a salutary rule that a lien created by by-law can bind only those who take the stock with notice of the by-law. This is because by-laws do not of themselves impart or convey notice.[1] A transferee of a certificate of stock is not bound to take notice of a by-law giving a corporation a lien on the stock for debts due from the registered owner to the corporation, even though the certificate of stock stated on its face that it was subject to the by-laws.[2] So, too, a by-law enacted subsequently to a transfer, although the transfer has not been recorded on the corporate books, cannot affect the rights of the parties as to that transfer.[3] Where, however, a prospectus, offering for sale trustee's transferable certificates, states that such certificates represent stock deposited with the trustee, the stock being in an English corporation, the trustee is personally liable if it turns out that the English corporation had a prior lien on the stock to the full extent of its value. The trustee was bound to take notice of the lien created by the by-laws of the English corporation.[4] By-laws creating liens on stock have been held valid and enforceable as against assignees in bankruptcy or in insolvency.[5] A lien created by by-law is binding upon a purchaser of the stock with notice of such by-law, and when taken in pledge for an antecedent debt without any agreement to postpone collection, the pledgee is bound to take notice of the by-law.[6]

A clause in a charter declaring that debts due from the stockholders must be paid before a transfer will be allowed is sufficient

statute giving the corporation a lien upon the stock. Curtice *v.* Crawford, etc. Bank, 110 Fed. Rep. 830 (1901).

[1] Driscoll *v.* West Bradley, etc. Co., 59 N. Y. 96, 109 (1874); Bank of Holly Springs *v.* Pinson, 58 Miss. 421, 435 (1880); Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883). See also People *v.* Miller, 39 Hun, 557 (1886); aff'd, 114 N. Y. 636, concerning the validity and effect of by-laws regulating the sale and transfer of seats or membership in the commercial exchanges, and the enforcement of the liens created thereupon by such by-laws in favor of other members of the corporation. Where the by-law under which the lien is claimed directs that notice of the lien should be given in the certificate of stock, this provision must be regarded as meaning that the lien should not be asserted against a person not having notice by the certificate. And the issuance of certificates not containing this notice is a waiver of the lien contemplated by such by-law. Bank of Holly Springs *v.* Pinson, 58 Miss. 421 (1880).

[2] Des Moines, etc. Bank *v.* Warren, etc. Bank, 97 Iowa, 204 (1896).

[3] People *v.* Crockett, 9 Cal. 112 (1858).

[4] The rule of *caveat emptor* has been relaxed so as to create an implied warranty of title on the part of the seller. Even though the trustee acted as agent, yet, the principal not being disclosed, the trustee is liable. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900).

[5] Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73 (1822); s. c., 11 Am. Dec. 575; Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); *Re* Bigelow, 1 Nat. Bankr. Reg. 632, 667 (1868); s. c., 3 Fed. Cas. 341, 343.

[6] Bronson, etc. Co. *v.* Rheubottom, 122 Mich. 608 (1900).

to create a lien on the stock without other action on the part of the corporation.[1] So, also, a power conferred by the charter upon the directors to refuse a transfer so long as the stockholder who wishes to transfer is indebted to the corporation, supports the lien.[2]

A lien may be created by special agreement among the stockholders.[3] And even a mere usage of a corporation not to transfer stock while the owner is indebted to the corporation is sufficient to create a lien on stock, as between the corporation and its stockholders, and it will bind a stockholder who borrows money with a knowledge of it.[4] An unwarranted claim of lien by a corporation, and consequent refusal to register a transfer until the debt as to which the lien is asserted is paid, is a conversion of the stock, and the transferrer may have his action against the corporation therefor.[5]

In Ohio it is held that where the certificates of stock issued by a bank contain a provision on their face that the bank shall have a lien on the stock for all debts due to it from the registered owner, such lien is valid and applies as well to a debt contracted after the certificate was sold but before it was presented for transfer on the

[1] Farmers' Bank Case, 2 Bland, Ch. (Md.) 394 (1830); Kenton Ins. Co. *v.* Bowman, 84 Ky. 430 (1886).

[2] Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857).

[3] Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857). The stockholders may assent to a lien in behalf of the corporation on stock for debts due to the corporation from the stockholder, and the method of foreclosing it may also be so prescribed. The statute of limitations does not run against it. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1890). The corporation cannot create a lien on stock by a by-law; but where the surety of the debt secured by the stock as collateral pays the debt, his equities are not superior to the corporation, and he cannot claim the certificate free from the lien, he having aided in passing the by-law. Bank of Atchison County *v.* Durfee, 118 Mo. 431 (1893).

[4] Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73, 88 (1822); s. c., 11 Am. Dec. 575. *Cf.* Vansands *v.* Middlesex Bank, 26 Conn. 144 (1857). Where the certificates of stock contain on their face a statement that a corporation has a lien on the stock for debts due from the registered owner, and for many years all the stockholders acquiesced therein, such a lien may be upheld, although there is no charter provision or by-law authorizing the lien. So held where a stockholder brought an action for himself and other stockholders complaining of various misfeasances and malfeasances, including the charge that such an illegal claim of lien existed. Reynolds *v.* Bank of Mt. Vernon, 6 N. Y. App. Div. 62 (1896); aff'd, 158 N. Y. 740 (1899). So in Bryon *v.* Carter, 22 La. Ann. 98 (1870), it is held that a by-law creating a lien, while it may be valid as between the parties if it be brought to their knowledge, is not binding on the judgment creditors of the stockholders.

[5] Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873). *Cf.* Dickinson *v.* Central Nat. Bank, 129 Mass. 279 (1880); Case *v.* Bank, 100 U. S. 446 (1879); Skinner *v.* City of London M. Ins. Corp., L. R. 14 Q. B. D. 882 (1885), holding also that only nominal damages could be recovered where the terms of the transfer were secret.

books of the bank. The lien exists even though neither the statutes nor the by-laws nor the resolutions of the board of directors provided for such lien. It is sufficient that such certificate of stock was the one used by the corporation.[1] And the same rule has been upheld in Pennsylvania[2] and in California, Connecticut and elsewhere.[3] A national bank, however, cannot claim a lien on stock for a stockholder's debt, even though notice of such lien is printed on the face of the certificates of stock.[4]

§ 526. *The lien, when established, covers all the stockholder's shares and dividends.*— A valid lien in favor of the corporation, when regularly established, attaches to all the stock and dividends of the indebted stockholder. Thus, it attaches to all the stock the stockholder owns, although the debt be for calls due and unpaid upon only a part of them.[5] It may, moreover, hold the whole amount of the stockholder's stock, although the amount of the debt be less than the value of the stock. It cannot be compelled to transfer so much

[1] Stafford *v.* Produce, etc. Co., 61 Ohio St. 160 (1899).

[2] Where the certificate of stock itself provides that the stock is liable to the company for indebtedness of the registered stockholder to the company, this constitutes a contract which will be upheld and enforced by the courts, and dividends on the stock may be applied towards such indebtedness. *In re* Hovey's Estate, 198 Pa. St. 385 (1901).

[3] By inserting in the certificate of stock a statement that the corporation has a lien on it for debts due to the corporation, a purchaser takes subject thereto. It is a contract lien. Jennings *v.* Bank of California, 79 Cal. 323 (1889). In Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857), it is held that a statement on the face of the certificate of stock that it is issued subject to all debts due from the owners to the corporation will bind a transferee as a qualification or restriction of the transferrer's title, and that, too, although no charter provision or by-law authorizes such a lien on the stock. So, also, Jennings *v.* Bank of California, 79 Cal. 323 (1889). A by-law of a corporation, organized to own and maintain a hunting park, may authorize assessments on the stock to pay any annual deficiency, and such by-law is binding on stockholders who accept the certificate of stock, which on its face refers to the by-law. The by-law is valid as a contract, even though it is not valid as a by-law. Blue Mountain, etc. Assoc. *v.* Borrowe, 51 Atl. Rep. 670 (N. H. 1901). A lien created by a by-law when printed on the face of the certificate of stock is legal as a contract. Morrison, etc. Bank *v.* Kerdolff, 75 Mo. App. 297 (1898).

[4] Buffalo, etc. Co. *v.* Third, etc. Bank, 162 N. Y. 163 (1900); Conklin *v.* Second Nat. Bank, 45 N. Y. 655 (1871).

[5] Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832). *Cf.* Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); s. c., 4 Fed. Cas. 61. In Virginia, however, it seems that there can be no lien on wholly paid-up stock to secure the payment of an unpaid subscription to other stock. Shenandoah Valley R. R. *v.* Griffith, 76 Va. 913 (1882). *Cf.* Va. Code, 1887, §§ 1127, 1128, 1130; Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327 (1881). And in England a lien on stock for unpaid calls is a lien only on those particular shares upon which the call is made and not on other shares. Hubbersty *v.* Manchester, etc. Ry., L. R. 2 Q. B. 471 (1867).

of the stock as is in excess of the amount of the debt.[1] The lien attaches not only to the stock itself, but to dividends declared on the stock.[2] It is accordingly held that a corporation may lawfully retain dividends, and apply them to the payment of a debt due to it from the stockholder, since in an action by the stockholder to enforce payment of his dividends the corporation may plead the debt by way of set-off.[3] But dividends declared after the death of the stockholder are not subject to a lien for his debts.[4] The lien attaches to the shares even after the liquidation or dissolution of the company.[5] It attaches not only to valid stock, but to spurious stock obtained by forgery.[6]

§ 527. *The lien protects the corporation as to all the debts due to it from the stockholder.*— It is a general rule that a lien upon stock is a lien for all debts of the stockholder due to the corporation;[7] and it is not necessary that the debt be due and payable at the time when the lien is sought to be enforced. It cover debts which are not due as well as those that are due, and all indebtedness to the corporation, whether payable presently or at a future time.[8] The lien will continue for the benefit of the corporation, although

[1] Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); Pierson *v.* Bank of Washington, 3 Cranch, C. C. 363 (1828); s. c., 19 Fed. Cas. 671.

[2] Thus, it attaches to the dividends, even though only "shares and stock" be specifically named in the statute or charter as subject to the lien (Hague *v.* Dandeson, 2 Exch. 741 — 1848), and though, in the absence of express provision, it is held that no such lien impliedly exists. Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). So, in Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874), it was held that the terms of the act of 1864 which are inconsistent with the existence of a stock lien do not preclude a lien on dividends.

[3] Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). *Cf.* Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883); Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); s. c., 4 Fed. Cas. 61. See also § 544, *infra.*

[4] Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); s. c., 4 Fed. Cas. 61; Merchants' Bank *v.* Shouse, 102 Pa. St. 488 (1883).

[5] *Re* General Exchange Bank, L. R. 6 Ch. App. 818 (1871).

[6] Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513 (1882).

[7] Union Bank *v.* Laird, 2 Wheat. 390 (1817); Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558 (1873); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); *Ex parte* Stringer, L. R. 9 Q. B. D. 436 (1882); *Re* Peebles, 2 Hughes, 394 (1875); s. c., 19 Fed. Cas. 94; Planters', etc. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879). *Quære,* whether the lien attaches for funds embezzled by the stockholder. Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895).

[8] Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310; Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833); Brent *v.* Bank of Washington, 10 Pet. 596 (1836); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); McCready *v.*

the debt be barred by the statute of limitations.[1] The lien attaches whether the stockholder's debt to the corporation accrued before or after he became a stockholder.[2] A lien created by statute applies to debts due from the stockholder to the corporation prior to the passage of the statute.[3] It also secures debts for which the stockholder is liable only as indorser or surety,[4] and debts due from a partnership in which the stockholder is a partner.[5] So, also, it secures the corporation for unpaid calls upon the original subscription.[6]

Rumsey, 6 Duer, 574 (1857); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Cunningham *v.* Alabama, etc. Co., 4 Ala. (N. S.) 652 (1843); Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862). *Cf. Re* Stockton, etc. Co., L. R. 2 Ch. D. 101 (1875). In Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826), it was held that a bank organized under the Pennsylvania law of March 21, 1814, might lawfully refuse to permit the transfer of the stock of a stockholder who was the drawer of a bill discounted by the bank, but not payable at the time the transfer was demanded — both the stockholder and his indorser having, since the discount of the paper, become insolvent. So, also, Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833). But where the lien is expressly made a security for debts "actually due and payable," it will be held to cover only debts due and payable. Reese *v.* Bank of Commerce, 14 Md. 271 (1859). *Cf.* Downer *v.* Zanesville Bank, Wright (Ohio), 477 (1833).

1 Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847); Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41 (1867); Brent *v.* Bank of Washington, 10 Pet. 596, 617 (1836). See also § 530, *infra.*

2 Schmidt *v.* Hennepin, etc. Co., 35 Minn. 511 (1886).

3 Birmingham Trust, etc. Co. *v.* East Lake Land Co., 101 Ala. 304 (1893).

4 McLean *v.* Lafayette Bank, 3 McLean, 587 (1846); s. c., 16 Fed. Cas. 264; Leggett *v.* Bank of Sing Sing, 24 N. Y. 283 (1862); Union Bank *v.* Laird, 2 Wheat. 390 (1817); McDowell *v.* Bank of Wilmington, 1 Harr. (Del.) 27 (1832); Bank *v.* Bonnie, 43 S. W. Rep. 407 (Ky. 1897); Brent *v.* Bank of Washington, 10 Pet. 596, 615 (1836); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845). *Cf.* Miles *v.* New Zealand, etc. Co., L. R. 32 Ch. D. 266 (1886); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861). A corporation, on discounting a bill or note, may take security from one of the parties, and also hold the stock of another party as security for the same loan. Union Bank *v.* Laird, 2 Wheat. 390 (1817). *Cf.* Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); Helm *v.* Swiggett, 12 Ind. 194 (1859); Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

5 Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 111 Mich. 313 (1896); *Re* Bigelow, 2 Ben. 469 (1868); s. c., 3 Fed. Cas. 341; Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41 (1867); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879).

6 Spurlock *v.* Pacific R. R., 61 Mo. 319 (1875); McCready *v.* Rumsey, 6 Duer, 574 (1857); Regina *v.* Wing, 33 Eng. L. & Eq. 80 (1855); *Re* Hoylake Ry., L. R. 9 Ch. 257 (1874); Companies Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 16, § 16); Shaw *v.* Rowley, 5 Eng. Ry. & Can. Cas. 47 (1847); *Ex parte* Tooke, 6 Eng. Ry. & Can. Cas. 1 (1849). *Cf.* Newry, etc. Ry. *v.* Edmunds, 2 Exch. 118 (1848); Ambergate, etc. Ry. *v.* Mitchell, 4 Exch. 540 (1849); Great North, etc. Ry. *v.* Biddulph, 7 M. & W. 243 (1840); Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327 (1881). The

But the lien does not attach until a call is made.[1] The fact that the corporation has other security does not prevent it from enforcing its charter lien on the stock.[2] The lien also attaches to the stock of a depositor who has overdrawn his account.[3] Where a corporation has a lien on stock for debts of the stockholder, an embezzlement by the stockholder as an officer is such a debt.[4] Where by charter the amount which a bank may loan to a single person shall not exceed ten per cent. of its capital stock, a lien which it has by charter on stock is not good for the excess of a loan over ten per cent.[5]

§ 528. *Right of lien as against miscellaneous parties.*— There is no lien on the stock as to debts of an intervening unrecorded owner of the stock.[6] Where, however, the corporation is notified of the sale and transfer of the certificates of stock, without a return of the certificates to the corporation and the taking out new certificates in the name of the purchaser, and the corporation notes the fact in its certificate book, the corporation has a lien on the stock for a debt due from the purchaser, and not even a *bona fide* purchaser from him can avoid such lien.[7] A lien of a corporation on stock for debts due it from its stockholders does not attach to stock purchased by another corporation, the latter having no power to purchase.[8] The lien attaches to trust stock for debts due from a trustee who holds stock in trust, but in his own name, and without any indication of the trust.[9] Where a *cestui que trust* owes the corporation a debt, the lien attaches to his stock though held for him in the name of a trustee.[10] And stock standing on the corpo-

lien secures general debts as well as unpaid calls. National Bank, etc. *v.* Rochester Tumbler Co., 172 Pa. St. 614 (1896).

[1] Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484 (1847). *Cf. Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310; Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857). A director transferring his shares before the call avoids the lien, although he knew the call was to be made. The call is made when the date of payment is fixed, and not by a mere general resolution. *Re* Cawley, etc. Co., L. R. 42 Ch. D. 209 (1889). The lien attaches when a call is made, and not when it becomes due. Queen *v.* Londonderry, etc. Ry., 13 Q. B. 998 (1849).

[2] German Nat. Bank *v.* Kentucky T. Co., 40 S. W. Rep. 458 (Ky. 1897); Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

[3] Reese *v.* Bank of Commerce, 14 Md. 271 (1859).

[4] Commonwealth *v.* Standard, etc. Co., 50 Atl. Rep. 1003 (Pa. 1902).

[5] People's Bank *v.* Exchange Bank, 43 S. E. Rep. 269 (Ga. 1902).

[6] Helm *v.* Swiggett, 12 Ind. 194 (1859).

[7] Bank of Commerce *v.* Bank of Newport, 63 Fed. Rep. 898 (1894).

[8] Lanier Lumber Co. *v.* Rees, 103 Ala. 622 (1894).

[9] New London, etc. Bank *v.* Brocklebank, L. R. 21 Ch. D. 302 (1882); Young *v.* Vough, 23 N. J. Eq. 325 (1873); Burns *v.* Lawrie, 2 Sc. Ct. of Sess. Cas. (2d ser.) 1348 (1840), otherwise cited, 2 Dunlop, 1348.

[10] Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832).

rate books in the name of a fictitious person is subject to a lien for the indebtedness of the real owner.[1] The corporation, in transferring stock to the trustee in bankruptcy of a stockholder, has no right to write on the face of the certificate that it is subject to a lien belonging to the corporation, even though such lien exists, all other certificates of stock not having any such writing on them.[2] An executor is entitled to have stock belonging to the estate transferred into his own name as executor, and the corporation is liable in damages for refusal to make such transfer, even though the corporation has a lien on the stock for a debt owed it by the decedent.[3]

§ 529. *The lien can be enforced for the benefit of the corporation only.*— The right of a corporation to a lien on the stock of its stockholders as security for the payment of their debts to the corporation is a right to be enforced only by the corporation and exclusively for its own benefit. Accordingly, it is held that the corporation cannot become the assignee of the claim of some third person against one of its stockholders in order to enforce payment of that claim for the benefit of the third person by a recourse to the corporate lien on the stockholder's stock.[4] Neither can the corporation be compelled, for the benefit of sureties as to a part of the stockholder's indebtedness, to apply the proceeds of the sale of the stock to the liquidation of that part of their claim which is secured.[5] The lien does not extend to claims against the stockholder on paper made by the stockholder and purchased by the

[1] Stebbins *v.* Phœnix F. Ins. Co., 3 Paige, 350 (1832), where the president of a corporation with fraudulent intent procured shares to be recorded in a fictitious name, and, having himself become indebted to the corporation, procured an assignment of the shares to another creditor, who sought to have the transfer recorded. *Held,* that the lien still attached for the debts of the original holder.

[2] *Re* W. Key, etc., 86 L. T. Rep. 374 (1902).

[3] Under the statutes of California this rule applies to an alien corporation doing business in that state, the statutes of the state requiring such corporations to make transfers in that state. It applies even though the statutes of Great Britain forbid transfers of stock "without administration upon such property under the laws of England and Great Britain." London, etc. Bank *v.* Aronstein, 117 Fed. Rep. 601 (1902).

[4] A bank having a lien by statute for any debt held by it against a stockholder cannot purchase notes of the stockholder for the express purpose of acquiring such lien, the bank at the time of the purchase knowing that the stock had been pledged by the stockholder to another creditor. Bank *v.* Bonnie, 43 S. W. Rep. 407 (Ky. 1897); White's Bank *v.* Toledo, etc. Ins. Co., 12 Ohio St. 601 (1861). To the point that this lien is one exclusively for the benefit of the corporation, see Bank of Utica *v.* Smalley, 2 Cow. 770 (1824).

[5] Cross *v.* Phenix Bank, 1 R. I. 39 (1840). But see Kuhns *v.* Westmoreland Bank, 2 Watts (Pa.), 136 (1833), where it is said that "the principle that a surety is entitled to the benefit of all the creditor's securities is of

corporation.[1] The lien, however, is for the benefit of the corporation, and it may apply the proceeds of the sale of the stock in such a way as best to subserve its own interest.[2]

§ 530. *Methods of enforcing the lien.*— When a corporation has a lien upon the stock of those of its stockholders who are indebted to it, it may refuse to allow a transfer of the stock until the debt is paid or secured to its satisfaction.[3] And the corporation may insist upon its lien and hold the stock even against a *bona fide* purchaser, inasmuch as purchasers of stock are bound to take notice of legal liens.[4]

The corporation may proceed by an attachment of the stock.[5] So also, upon non-payment of the debt, the corporation may file a bill in a court of chancery and have the stock sold in the usual way, as in other cases of property held under a lien.[6] In Michigan, however, it is held that a suit in equity will not lie to enforce

such universal application that it would require strong evidence of legislative intention to make the present case an exception to it." *Cf.* also Klopp *v.* Lebanon Bank, 46 Pa. St. 88 (1863); Petersburg Sav. etc. Co. *v.* Lumsden, 75 Va. 327, 340 (1881).

[1] Boyd *v.* Redd, 120 N. C. 335 (1897).

[2] Planters', etc. Ins. Co. *v.* Selma Sav. Bank, 63 Ala. 585 (1879); Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513 (1882); Anglo-Californian Bank *v.* Grangers' Bank, 63 Cal. 359 (1883); Bishop *v.* Globe Co., 135 Mass. 132 (1883).

[3] Reese *v.* Bank of Commerce, 14 Md. 271 (1859); First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877); Vansands *v.* Middlesex County Bank, 26 Conn. 144 (1857); Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847); McCready *v.* Rumsey, 6 Duer, 574 (1857); Tuttle *v.* Walton, 1 Ga. 43 (1846); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828); Rogers *v.* Huntingdon Bank, 12 Serg. & R. (Pa.) 77 (1824); Grant *v.* Mechanics' Bank, 15 Serg. & R. (Pa.) 140 (1826). *Cf.* Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861). In Bishop *v.* Globe Co., 135 Mass. 132 (1883), the rule is declared that if by the law of the state under which a corporation is organized the corporation has a lien on the stock of any stockholder for a debt due from him to the corporation, the lien is a good defense to an action in another state against the corporation by a person to whom the stockholder has transferred his stock, but in whose name, by reason of the lien, the corporation has refused to register the transfer. In Farmers' Bank's Case, 2 Bland, Ch. (Md.), 394 (1830), and Brent *v.* Bank of Washington, 10 Pet. 596 (1836), bills were filed by the owners of the stock to compel a transfer, and the corporation defended on the ground of its lien.

[4] See § 523, *supra*.

[5] Sabin *v.* Bank of Woodstock, 21 Vt. 353 (1849).

[6] A lien of a corporation may be enforced by a suit in equity. Wright, etc. Co. *v.* Hixon, 105 Wis. 153 (1899); *Re* Morrison, 10 Nat. Bankr. Reg. 105 (1873); s. c., 17 Fed. Cas. 831. Under the California code a corporation may by suit foreclose a lien which it has on its stock. Mechanics', etc. Assoc. *v.* King, 83 Cal. 440 (1890). To enforce a lien upon stock under the Alabama statute no action on the part of the board of directors is necessary. Elliott *v.* Sibley, 101 Ala. 344 (1893). A suit to enforce a statutory lien of a bank on shares of its own capital stock held by

a statutory lien which a corporation has on stock of its stockholders for debts due from them to it.[1] It was on very much the same theory as this that the New England and Pennsylvania courts originally held that a chancery court had no inherent jurisdiction to foreclose a mortgage lien — decisions which for half a century embarrassed those states until the legislature created the jurisdiction which ought never to have been denied.[2] In a suit to foreclose a lien the transferrer of the stock is not a necessary party.[3] A lien may be enforced, even though the debt is barred by the statute of limitations.[4] A decree authorizing the sale of stock for the payment of the debt need not give the stockholder the right of redemption. An absolute and valid title may pass to the purchaser immediately upon the sale.[5] A valid lien in favor of a bank upon shares of stock in the bank belonging to the estate of a deceased person does not yield to a prior claim against the estate in favor of the government.[6] Where the stockholder has died, and his estate is being distributed, the portion going to the corporation, by reason of its lien, will not be decreased by the amount of such dividends.[7] In order to put the corporation in the wrong for a refusal to transfer where it claims more than is due, the stockholder must tender what he admits to be due.[8] The fact that a stockholder claims that the corporation owes him more money than he owes it

one of its debtors was sustained in McIlroy, etc. Co. *v.* Dickson, 66 Ark. 327 (1899).

[1] Aldine Mfg. Co. *v.* Phillips, 118 Mich. 162 (1898).

[2] See §§ 823, 824, 834, *infra.*

[3] Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 111 Mich. 313 (1896).

[4] Commonwealth *v.* Standard, etc. Co., 50 Atl. Rep. 1003 (Pa. 1902). See also § 527, *supra.*

[5] Reese *v.* Bank of Commerce, 14 Md. 271, 284 (1859). In one case the lien was held to be equivalent to a pledge; and it was held that, after giving due notice to the delinquent stockholder, the corporation might sell at public auction without filing a bill to foreclose. Farmers' Bank's Case, 2 Bland, Ch. (Md.) 394 (1830). In this case it is also held that, where the corporation neglects or refuses to sell the stock of a deceased stockholder who is in arrears, the administrator may file a bill and obtain an order of sale directed to the corporation.

[6] Brent *v.* Bank of Washington, 10 Pet. 596 (1836). A judgment creditor's execution lien on bank stock is subject to the lien of the corporation itself by statute on the stock for debts due to it from the judgment debtor, and a further statutory provision that the enforcement of the corporation's lien shall not affect attachment or execution liens goes merely to the remedy and does not affect the priority. Springfield, etc. Co. *v.* Bank of Batesville, 68 Ark. 234 (1900).

[7] *In re* Hovey's Estate, 198 Pa. St. 385 (1901). See also § 473, *supra.*

[8] Pierson *v.* Bank of Washington, 3 Cranch, C. C. 363 (1828); s. c., 19 Fed. Cas. 671. In German Security Bank *v.* Jefferson, 10 Bush (Ky.), 326 (1874), it was held that, where the stock sold under the lien realized a sum insufficient to satisfy the corporate debt, the unpaid balance of the claim of the corporation could not be paid until there had been a proportionate payment of

is not sufficient to sustain a bill in equity to enjoin the corporation from selling the stock in order to pay the amount due the corporation. Some other ground of equitable jurisdiction must be set forth.[1] Where a corporation has other security also, a court of equity may compel it to resort to that first.[2] A corporation is liable in damages for selling the stock of a stockholder for non-payment of dues, where such sale was irregular and illegal.[3] Where by statute bank stock may be sold for non-payment of assessments levied upon it to restore the capital stock, the money for which it is sold belongs to the stockholder and not to the bank.[4]

§ 531. *The corporation may waive its lien.*— A corporation which has a lien upon its stockholders' stock for debts due to it from them need not necessarily depend upon or insist upon its lien for the collection of the debt. It may collect the debt as though there was no lien.[5] Hence it is that the lien of a corporation on stock

the claims of other creditors of the stockholder out of his general assets. *Cf. Re* Peebles, 2 Hughes, 394 (1875); s. c., 19 Fed. Cas. 94, and §§ 473, 476, *supra*.

[1] Elliott *v.* Sibley, 101 Ala. 344 (1893). This case holds, also, that in a suit in equity by a stockholder to enjoin a sale of his stock by the corporation for a debt due the corporation, the corporation is a necessary party defendant, and that the complainant must aver a readiness to pay whatever may be found due.

[2] Covington, etc. Bank *v.* Commercial Bank, 65 Fed. Rep. 547 (1895). Where the company has a lien on stock, and the stockholder sells a part, the purchaser may require the company to first have recourse to the unsold part to collect its debt. A subsequent execu tion levied on the unsold part does not deprive the purchaser of the other part of his rights stated above. Gray *v.* Stone, 69 L. T. Rep. 282 (1893).

[3] The sale here was contrary to the requirements of the by-laws. The corporation bought the stock itself at such sale. The fact that a surplus realized at the sale was sent to the stockholder by check, and was received by him, did not bar his remedy, he being in ignorance of the illegality. Allen *v.* American Building, etc. Assoc., 49 Minn. 544 (1892).

[4] Chicago T. & T. Co. *v.* State Bank, 86 Fed. Rep. 863 (1898). In Tennessee it has been held that where stock is only partly paid, and the corporation issues a certificate reciting on its face how much is still due, and the holder pledges it, and no transfer to the pledgee is made on the corporate books, the corporation can have a sale of the stock for non-payment of the balance remaining due, but such proportion of the proceeds will be paid to the pledgee as the amount already paid on the stock bears to the par value of the stock. Ingles, etc. Co. *v.* Knoxville, etc. Co., 53 S. W. Rep. 1111 (Tenn. 1899).

[5] A subscriber for stock cannot avoid liability to the corporation by setting up that the corporation has a lien on the stock therefor and may enforce it. Lankershim, etc. Co. *v.* Herberger, 82 Cal. 600 (1890). Even though by the statutes under which an English corporation is organized the company has a lien on the stock for unpaid assessments and may forfeit the stock for non-payment, yet this does not prevent a suit to collect the assessment. Nashua, etc. Bank *v.* Anglo-American, etc. Co., 108 Fed. Rep. 764 (1901). See also § 124,

may be asserted and enforced, or, in the discretion of the corporation, it may be waived.[1]

Where the corporation has other security it is not obliged to resort to the lien.[2] Cases may arise, however, where the intervening rights of other creditors of the stockholder render it inequitable for the corporation to waive its lien on the stock.[3]

Accordingly, where a note discounted for a stockholder was protested for non-payment, it was held that the bank might proceed directly against the indorser without resorting to its lien.[4] The corporation, by waiving its lien, does not discharge a surety, unless the surety has given the corporation express notice not to waive the lien.[5] But where a corporation has a lien on stock and at the same time owes a stockholder a certain debt which is guaranteed by a third person, and the stockholder causes the corporation to waive the lien without the consent of the guarantor, the guarantor is thereby discharged.[6] The corporation will not be held to have waived its lien upon the stock of its debtor merely because it has taken other or additional security for the debts;[7] nor because it assents to a general assignment by the stockholder for the benefit of creditors.[8] But of course if a corporation, having a statutory lien on stock, agrees to take other security in place thereof, it thereby waives its lien.[9] The corporation may allow the transfer of a portion of a stockholder's stock without waiving its lien on the rest.[10] The fact that the corporation transfers other stock belonging to the same stockholder is no waiver of its lien on stock as against a pledgee of some of the stock, the debt being greater

supra. Where the statute provides that stock shall be taxed, and that the corporation shall pay the tax and have a lien therefor on the stock, the stockholder is not personally liable to the corporation which has paid such tax. Mercantile, etc. Co. *v.* Mellon, 196 Pa. St. 176 (1900).

[1] National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306 (1835); Hall *v.* U. S. Ins. Co., 5 Gill (Md.), 484 (1847); *Re* Hoylake Ry., L. R. 9 Ch. 257, 259 (1874). But see Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); *Re* Bigelow, 1 Nat. Bankr. Reg. 667 (1868); s. c., 3 Fed. Cas. 341. A waiver is the intentional relinquishment of a known right. It is not to be inferred and imputed to a corporation in the absence of proof of it, and a mere failure to assert the lien is not equivalent to a relinquishment or waiver of it. First Nat. Bank *v.* Hartford, etc. Ins. Co., 45 Conn. 22, 44 (1877).

[2] Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882).

[3] *Re* Bachman, 12 Nat. Bankr. Reg. 223 (1876); s. c., 2 Fed. Cas. 310.

[4] Cross *v.* Phenix Bank, 1 R. I. 39 (1840).

[5] Perrine *v.* Fireman's Ins. Co., 22 Ala. 575 (1853).

[6] Robertson *v.* Sully, 157 N. Y. 624 (1899).

[7] Union Bank *v.* Laird, 2 Wheat. 390 (1817).

[8] Dobbins *v.* Walton, 37 Ga. 614 (1868).

[9] St. Paul Nat. Bank *v.* Life Ins. etc. Co., 71 Minn. 123 (1898).

[10] First Nat. Bank of Hartford *v.* Hartford, etc. Ins. Co., 45 Conn. 22 (1877).

than the value of all the stock.[1] A waiver of the lien for a limited time is fatal, provided the stock is transferred during that time.[2]

A waiver which will bind the corporation may, in the absence of something to qualify the power, be made by the cashier of a bank, acting by virtue of an express or implied authority, for the board of directors;[3] or the secretary of an insurance company;[4] or the general manager or properly-qualified general agent of the corporation, especially if that is a general custom of the company.[5] Accordingly, where one buys stock on the faith of a representation of the corporate officers that the stock is unincumbered, he is entitled to the stock free from any corporate lien.[6]

Where the corporate officers allow a transfer to be registered, and a new certificate to be issued, there is a waiver of the corporate lien as to the debts of the transferrer.[7] Where the corporation sells a claim it has against a stockholder it thereby loses its lien.[8] The lien is not waived by a by-law that stockholders must offer their stock to the bank before selling elsewhere, and that after

But *cf.* Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847).

[1] Commonwealth *v.* Standard, etc. Co., 50 Atl. Rep. 1003 (Pa. 1902).

[2] Thus, if within such time the stock is pledged for a debt, the right of the corporation, after the expiration of the time to acquire its charter lien, is subordinate to the right of the pledgee until the debt is paid or the pledge is released. Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873).

[3] National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881). So, also, the refusal of the cashier to permit a transfer is the act of the bank, for which it may be charged. Case *v.* Bank, 100 U. S. 446 (1879). Where the cashier of a bank takes part in the pledging of stock by one of the stockholders, the bank cannot subsequently claim a lien on the stock for debts incurred by the stockholder after such pledge. Birmingham Trust, etc. Co. *v.* Louisiana Nat. Bank, 99 Ala. 379 (1893).

[4] Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849). *Cf.* Kenton Ins. Co. *v.* Bowman, 84 Ky. 430 (1886).

[5] See Bishop *v.* Globe Co., 135 Mass. 132 (1883); Young *v.* Vough, 23 N. J. Eq. 325 (1873).

[6] Moore *v.* Bank of Commerce, 52 Mo. 377 (1873).

[7] Hill *v.* Pine River Bank, 45 N. H. 300 (1864); Higgs *v.* Northern Assam Tea Co., L. R. 4 Exch. 387 (1869); *Re* Northern Assam Tea Co., L. R. 10 Eq. 458 (1870). After transfer on the books the transferrer is no longer liable for the subscription price, and the transferee is liable even though the corporation has a lien on the stock by statute, the transfer having been allowed by the officers of the corporation. Rochester, etc. Co. *v.* Raymond, 158 N. Y. 576 (1899). So, also, a by-law requiring the consent of the board of directors to a transfer by one indebted to the corporation is held to be repealed where a custom of disregarding it has been shown, it appearing also that the secretary had been allowed to exercise his own discretion about such transfers without consulting the directors. In such a case the consent of the secretary to the transfer is a waiver of the lien. Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120 (1849); 94 N. W. Rep. 200.

[8] Ralston *v.* Bank of California, 112 Cal. 208 (1896).

ten days they may sell elsewhere.[1] Where a party about to take stock in pledge inquires of the corporation as to its value, and as to whether there was any lien upon the stock, and no lien is claimed, and he then takes the stock in pledge, and causes an indorsement thereof to be made on the stub of the stock book of the corporation, the corporation cannot thereafter claim a lien as against him; and moreover, a subsequent transfer of the stock by the pledgor to the corporation as security for a debt due from him to it does not take precedence over the first pledge, the certificates themselves having been transferred to the first pledgee, but not transferred on the books.[2] The fact that the debt of the corporation has existed several years and has not been enforced does not affect the company's statutory lien upon stock of its creditor.[3]

§ 532. *The lien as affected by transfers and notice.*— A purchaser of stock is bound to take notice of the statute giving a lien upon the stock.[4] Nevertheless, upon a transfer of stock, the title thereto passes absolutely as between transferrer and transferee, even though the corporation, in the assertion of a lien upon the stock for the indebtedness of the transferee, refuses to register the transfer until a certain debt is paid or secured.[5] But of course the assignee or transferee, or whoever succeeds to the rights of the stockholder in the stock, takes it subject to the lien of the corporation.[6] And when

[1] Citizens', etc. Bank *v.* Kalamazoo, etc. Bank, 111 Mich. 313 (1896).

[2] Des Moines, etc. Co. *v.* Des Moines, etc. Bank, 97 Iowa, 668 (1896). Where the cashier of a bank tells a purchaser of stock that the bank has no lien upon the stock, a statutory lien of the bank on the stock is waived as to him. Oakland C. S. Bank *v.* State Bank, 113 Mich. 284 (1897).

[3] Wright, etc. Co. *v.* Hixon, 105 Wis. 153 (1899).

[4] See § 523, *supra.*

[5] National Bank *v.* Watsontown Bank, 105 U. S. 217 (1881); Johnston *v.* Laflin, 103 U. S. 800 (1880); Fitzhugh *v.* Bank of Shepherdsville, 3 T. B. Mon. (Ky.) 126 (1825); St. Louis, etc. Ins. Co. *v.* Goodfellow, 9 Mo. 149 (1845); Commercial Bank *v.* Kortright, 22 Wend. 348 (1839); s. c. *sub nom.* Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 (1838); Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); McNeil *v.* Tenth Nat. Bank. 46 N. Y. 325 (1871); People *v.* Miller, 39 Hun, 557, 563 (1886); aff'd, 114 N. Y. 636. *Cf.* Dunn *v.* Commercial Bank, 11 Barb. 580 (1852); Merchants' Bank *v.* Livingston, 74 N. Y. 223 (1878); Pittsburgh, etc. R. R. *v.* Clarke, 29 Pa. St. 146 (1857); Sargent *v.* Essex Marine Ry., 26 Mass. 202 (1829); Carroll *v.* Mullanphy Sav. Bank, 8 Mo. App. 249 (1880). Corporations having a statutory lien on stock for debts nevertheless must allow transfer to one who takes subject to the corporate lien for part of the unpaid subscription. Herdegen *v.* Cotzhausen, 70 Wis. 589 (1888). A corporate lien for a salary paid to a stockholder, on his agreement to repay any amount in excess of dividends on his stock, has precedence as against a pledgee of the stock. Russell, etc. Co. *v.* Hammond, etc. Co., 89 N. W. Rep. 590 (Mich. 1902).

[6] Mobile Mut. Ins. Co. *v.* Cullom, 49 Ala. 558 (1873); New Orleans Nat. Banking Assoc. *v.* Wiltz, 10 Fed. Rep. 330 (1881).

the stock is sold by the corporation to pay the debts of the transferrer, the transferee is entitled to the surplus, if any there be, which remains after the claim of the corporation is satisfied.[1]

The corporation cannot, after it has been regularly notified of the transfer, assert a lien upon the stock to secure an indebtedness of the transferrer contracted subsequently to the notice.[2] A mere notice to the bank is, in such a case, sufficient to protect the transferee. It is immaterial that the transfer was not registered.[3] Where the directors of a corporation know that a stockholder of record has transferred his stock, the corporation cannot claim a lien for debts incurred subsequently.[4] But where there is neither a register of the transfer nor notice of it served upon the corporation, the stock may properly be subjected to a corporate lien for the indebtedness of the transferrer incurred subsequently to the transfer.[5] A

[1] Tuttle *v.* Walton, 1 Ga. 43 (1846); Foster *v.* Potter, 37 Mo. 525 (1866); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Weston *v.* Bear River, etc. Co., 5 Cal. 186 (1855).

[2] Conant *v.* Seneca County Bank, 1 Ohio St. 298 (1853); Nesmith *v.* Washington Bank, 23 Mass. 324 (1828). The same rule applies where the stock is pledged. Bradford Banking Co. *v.* Briggs, L. R. 12 App. Cas. 29 (1886). But where the stockholder transfers his stock, and subsequently, without notifying the corporation of the transfer, borrows money from the corporation in regular course of business, the corporation may refuse to register the transfer and may insist upon the lien. Platt *v.* Birmingham Axle Co., 41 Conn. 255 (1874). Where it is the custom to have the corporation, upon request, certify that it has no lien, such a request operates as notice to the corporation. Covington, etc. Bank *v.* Commercial Bank, 65 Fed. Rep. 547 (1895). This case holds also that notice to the corporation by a loaner of money to the stockholder does not inure to the benefit of a purchaser who knew nothing thereof. 94 N. W. Rep. 200.

[3] Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873). See also §§ 258, 382, 383, 490, 523, *supra*. A debt incurred after notice to the corporation of a transfer of stock by the stockholder is not protected by the lien, but knowledge acquired by the president in another capacity is not such a notice. People's Bank *v.* Exchange Bank, 43 S. E. Rep. 269 (Ga. 1902).

[4] Prince, etc. Co. *v.* St. Paul, etc. Co., 68 Minn. 121 (1897). A lien of a bank on stock for a debt due from a stockholder to the bank is subject to a pledge of the stock where such pledge was made before the debt was incurred, and the bank incurred the debt with knowledge of the pledge. Knowledge of the facts by the president is notice to the bank. Curtice *v.* Crawford, etc. Bank, 118 Fed. Rep. 390 (1902).

[5] Platt *v.* Birmingham Axle Co., 41 Conn. 255 (1874); Jennings *v.* Bank of California, 79 Cal. 323 (1889); Gemmell *v.* Davis, 75 Md. 546 (1892). Where the statute gives a lien for debts due, the lien applies as against a transfer of the certificate made before the debt became due, but presented to the corporation for transfer after the debt became due. Michigan, etc. Co. *v.* State Bank, 111 Mich. 306 (1896). As to the rule in England, see Miles *v.* New Zealand, etc. Co., L. R. 32 Ch. D. 266 (1886): Dunlop *v.* Dunlop, L. R. 21 Ch. D. 583 (1882); Société Générale *v.* Tramways Union Co., L. R. 14 Q. B. D. 424 (1884); New London, etc. Bank *v.* Brocklebank,

pledgee whø is duly registered on the corporate books as a stockholder, but to whom no certificate has been issued, is nevertheless protected against liens upon his stock for the indebtedness of the pledgor.[1] A corporate lien will not attach to stock for the debts of a legatee unless the legatee accepts the stock.[2]

Where one pays a debt as surety for a stockholder, he is entitled to be subrogated to the rights of the corporation by way of lien on the stockholder's stock.[3] And where the transferee pays the transferrer's debt to the corporation in order to obtain a registry of the transfer, he of course may have his action to recover back from his transferrer the amount so paid.[4]

Where the company has a lien upon the stock of a stockholder, the latter may compel the company to assign their lien to a third person who will advance the money, and to whom the shares are at the same time transferred.[5]

§ 533. *Liens on national-bank stock.*— National banks were formerly held to have power to enact by-laws creating a lien on stock in the bank for debts owed by its owner to the bank.[6] But the supreme court of the United States, when the question came before it, refused to enforce such a by-law, and decided that its enactment was not within the spirit of those provisions of the National Bank-

L. R. 21 Ch. D. 302 (1882). In England, however, unrecorded transferees of stock have few, if any, rights as against the corporation. It is held in Ohio that where the certificates of stock issued by a bank contain a provision on their face that the bank shall have a lien on the stock for all debts due to it from the registered owner, such lien is valid and applies as well to a debt contracted after the certificate was sold but before it was presented for transfer on the books of the bank. The lien exists even though neither the statutes nor the by-laws nor the resolutions of the board of directors provided for such lien. It is sufficient that such certificate of stock was the one used by the corporation. Stafford *v.* Produce, etc. Co., 61 Ohio St. 160 (1899). See also § 522, *supra.* Until the corporation has notice of a sale or a pledge of the certificate of stock it may continue to loan money to the stockholder and have a lien therefor. People's Bank *v.* Exchange Bank, 43 S. E. Rep. 269 (Ga. 1902).

[1] Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217 (1881).

[2] Farmers' Bank *v.* Iglehart, 6 Gill (Md.), 50 (1847).

[3] Young *v.* Vough, 23 N. J. Eq. 325 (1873); Hodges *v.* Planters' Bank, 7 Gill & J. (Md.) 306, 310 (1835); West Branch Bank *v.* Armstrong, 40 Pa. St. 278 (1861); Klopp *v.* Lebanon Bank, 46 Pa. St. 88 (1863). *Cf.* Higgs *v.* Northern Assam Tea Co., L. R. 4 Exch. 387 (1869); *Re* Northern Assam Tea Co., L. R. 10 Eq. 458 (1870); National Exch. Bank *v.* Silliman, 65 N. Y. 475 (1875).

[4] Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802). See also § 262, *supra.*

[5] Everitt *v.* Automatic, etc. Co., [1892] 3 Ch. 506.

[6] The leading case was Knight *v.* Old Nat. Bank, 3 Cliff. 429 (1871); s. c., 14 Fed. Cas. 772, upholding the lien. To the same effect, see Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308 (1869); *Re* Dunkerson, 4 Biss. 227 (1868); s. c., 8 Fed. Cas. 48; Young *v.* Vough, 23 N. J. Eq. 325 (1873).

ing Act of 1864 which confer power upon the management of a national bank to regulate the business of the bank and to conduct its affairs.[1] In the present state of the law, therefore, no national bank can, by any by-law, create any lien upon shares of stock in the bank to secure the payment of any indebtedness which the owner of the stock may contract to the bank.[2] A national bank cannot claim a lien on stock for a stockholder's debt, even though notice of such lien is printed on the face of the certificates of stock.[3]

[1] Bullard *v.* Bank, 18 Wall. 589 (1873). See also Bank *v.* Lanier, 11 Wall. 369 (1870); Case *v.* Bank, 100 U. S. 446 (1879). One reason for denying this power to national banks is that they are prohibited from loaning money to stockholders on the security of their stock.

[2] Delaware, etc. R. R. *v.* Oxford Iron Co., 38 N. J. Eq. 340 (1884); Meyers *v.* Valley Nat. Bank, 18 Nat. Bankr. Reg. 34 (1879); s. c., 17 Fed. Cas. 250; Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); New Orleans Nat. Bank *v.* Wiltz, 10 Fed. Rep. 330 (1881); Goodbar *v.* City Nat. Bank, 78 Tex. 461 (1890); Second Nat. Bank *v.* National State Bank, 10 Bush (Ky.), 367 (1874); Lee *v.* Citizens' Nat. Bank, 2 Cin. Super. Ct. (Ohio), 298, 306 (1872); Evansville Nat. Bank *v.* Metropolitan Nat. Bank, 2 Biss. 527 (1871); s. c., 8 Fed. Cas. 891. In the case last cited, which upon appeal was affirmed by the supreme court of the United States, it was held that such a by-law was in its operation the same thing as though a loan were made by the bank upon the security of the stock — a transaction forbidden by the thirty-fifth section of the National Banking Act. Conklin *v.* Second Nat. Bank, 45 N. Y. 655 (1871). *Cf.* Xenia Nat. Bank *v.* Stewart, 107 U. S. 676 (1882); Rosenback *v.* Salt Springs Nat. Bank, 53 Barb. 495 (1868). A bank, however, may attach the stock of one of its stockholders for debts due from him to it. Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874).

[3] Buffalo, etc. Co. *v.* Third, etc. Bank, 162 N. Y. 163 (1900).

CHAPTER XXXII.

DIVIDENDS.

§ 534. *Definition of a dividend and the four kinds of dividends.*— A dividend is a corporate profit set aside, declared, and ordered by the directors to be paid to the stockholders on demand or at a fixed time.[1] Until the dividend is declared these corporate profits belong to the corporation, not to the stockholders, and are liable for corporate indebtedness.[2] But the board of directors of a bank has no power to pledge its future profits, unless the stockholders assent thereto.[3]

[1] Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875); Chafee *v.* Rutland R. R., 55 Vt. 110, 129 (1882); Hyatt *v.* Allen, 56 N. Y. 553 (1874). "The term 'dividend,' in its technical as well as in its ordinary acceptation, means that portion of its profits which the corporation, by its directory, sets apart for ratable division among its shareholders." Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486, 496 (1894).

[2] Goodwin *v.* Hardy, 57 Me. 143, 145 (1869); Rand *v.* Hubbell, 115 Mass. 461, 474 (1874); Minot *v.* Paine, 99 Mass. 101 (1868); Hyatt *v.* Allen, 56 N. Y. 553 (1874); Mickles *v.* Rochester City, etc. Bank, 11 Paige, 118 (1844), holding that stockholders are neither tenants in common nor copartners of corporate property.

[3] Brown *v.* Bradford, 103 Iowa, 378 (1897). A percentage of the net profits going to an employee for his services is a part of the expenses of the business, and not a part of the accumulated profits. Bennett *v.* Millville Imp. Co., 51 Atl. Rep. 706 (N. J. 1902). A corporation by the action of its board of di-

A corporation may, in general, make four different kinds of dividends: namely, a dividend payable in cash, in stock, in bonds or scrip, or in property.

Dividends are declared by the directors and not by the stockholders.[1] A division of profits without the formality of declaring a dividend is equivalent to a dividend.[2] A division of the profits is a dividend even though not called such and not considered such by the directors and stockholders.[3] It is legal for a corporation to distribute its profits by the payment of salaries, provided all the stockholders assent thereto.[4] A stockholder cannot prove by parol

rectors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement, and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902). *Cf.* § 678, *infra.*

[1] See § 545, *infra.*

[2] Rorke *v.* Thomas, 56 N. Y. 559 (1874); Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1890); McKusick *v.* Seymour, etc. Co., 48 Minn. 172 (1892). See also § 572*a*, *infra.* Where a fixed per cent. is paid annually to stockholders instead of dividends and charged to them, and the stock held in pledge for the same, such a payment to the life tenant does not create a valid lien on the stock as against the remainderman. Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1890). The stockholders may agree among themselves informally to distribute a certain sum as dividends without going through the form of corporate action. No formal declaration is necessary, either by the stockholders or board of directors, and a distribution of profits by a unanimous consent without corporate action is legal. Groh's Sons *v.* Groh, 80 N. Y. App. Div. 85 (1903).

[3] Commonwealth *v.* Pittsburg, etc. Ry., 74 Pa. St. 83, 90 (1873), holding that a stock dividend was not such a dividend as entered into a rate of taxation. Lehigh Crane Iron Co. *v.* Commonwealth, 55 Pa. St. 448 (1867), where the capital stock was $100,000, but dividends were declared on an assumed capital of $1,000,000, the property being worth the latter figure by reason of profits invested in it. The same device was resorted to in Citizens', etc. Ry. *v.* Philadelphia, 49 Pa. St. 251 (1865). "Dividends declared," as used in an employee's contract of payment for services, the rate of payment being according to such "dividend," were construed to mean profits, even though not distributed by dividends, the intent being clear. Acceptance of part payment is no bar to an action to collect. Scase *v.* Gillette-Herzog Mfg. Co., 55 Minn. 349 (1893). Where large salaries are paid, instead of declaring dividends, the object being "concealment and delusion," the court will not hold that such "salaries" are a part of the manufacturing expense of a defendant guilty of infringing a patent. Rubber Co. *v.* Goodyear, 9 Wall. 788 (1869); Seabury *v.* Am Ende, 152 U. S. 561 (1894). A stockholder cannot maintain a suit for a dividend which the stockholders informally agreed should be declared, but which never was declared. American Wire Nail Co. *v.* Gedge, 96 Ky. 513 (1895).

[4] Fitchett *v.* Murphy, 46 N. Y. App. Div. 181 (1899). Where all the stockholders are officers, and, instead of divi-

that a dividend was declared, the records not showing the same. His remedy is by proceedings to correct the corporate record.[1]

Numerous cases on the definition of the word "dividend" have arisen in connection with the taxation of corporations.[2] Corporations have inherent power to declare and pay dividends, even though they have no capital stock.[3]

§ 535. *Scrip dividends, property dividends, and bond dividends.* A scrip dividend is a dividend of certificates giving the holder certain rights which are specified in the certificate itself. These dividends are usually declared when the company has profits which are not in the shape of money, but are in other forms of property, and the company wishes to anticipate the time when the property may be sold for cash, and the cash distributed by a money dividend. The certificate sometimes entitles the holder to a sum of money payable with interest at a certain time after date, or at the option of the company, or when the company shall have accumulated sufficient surplus to pay the certificates in full. Sometimes the certificates are certificates of indebtedness, and are made convertible, at the option of the holder, into bonds or stock;[4] and

dends, the corporation distributes its profits by large salaries, there is danger that upon the death of one of them others may continue the payment of such salaries to themselves, even though they are executors of the deceased officer's estate. Matter of Schaefer, 65 N. Y. App. Div. 378 (1901).

[1] Dennis *v.* Joslin Mfg. Co., 19 R. I. 666 (1896).

[2] A tax upon the receipts of a railroad is not a tax upon dividends. Comm'rs, etc. *v.* Buckner, 48 Fed. Rep. 533 (1891). Profits applied to betterments are not "dividends earned" within the meaning of a statute imposing taxation. State *v.* Comptroller, 54 N. J. L. 135 (1891). Where all the shares are reduced in par value from $50 to $38, and the $12 difference is paid to the stockholders in cash, this is a reduction of capital stock, and not a dividend, and cannot be taxed as a dividend. Commonwealth *v.* Central Transp. Co., 145 Pa. St. 89 (1891). Where a tax is levied on dividends the officers cannot defend on the ground that the dividend was illegal. Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890). In Commonwealth *v.* Pittsburg, etc. Ry., 74 Pa. St. 83 (1873), a lessor company having twelve per cent. dividends guaranteed on its stock declared a stock dividend so that the guarantee should be seven per cent. on the stock thus increased. The court held that such a dividend did not subject the company to a tax based on dividends. In Louisiana taxes are assessed on franchises, the value of which is ascertained from the earning capacity of the corporation. Crescent City R. Co. *v.* New Orleans, 44 La. Ann. 1057 (1892); New Orleans, etc. R. Co. *v.* New Orleans, 44 La. Ann. 1053 (1892); New Orleans, etc. R. Co. *v.* New Orleans, 44 La. Ann. 1055 (1892).

[3] In McKean *v.* Biddle, 181 Pa. St. 361 (1897), where a mutual insurance company for one hundred and thirty-two years had not paid dividends, but had accumulated a surplus of over four million dollars, the court held that the company might resume the payment of dividends. The court also held that every corporation has the inherent right to declare dividends.

[4] Chaffee *v.* Rutland R. R., 55 Vt. 110 (1882); State *v.* Baltimore, etc. R. R., 6

sometimes the certificate entitles the holder to exchange the certificate for lands of the corporation to an amount equivalent in value to the face value of the certificate; or to receive from the corporation any other benefit or advantage which the corporation may lawfully confer. Sometimes the certificate so far partakes of the

Gill (Md.), 363 (1848). In Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892), land had been sold to the company for a certain amount of preferred stock, and also a certain amount of "land scrip," such scrip entitling the holder to exchange them for land so conveyed at a price to be thereafter determined. The company had the right to pay off the scrip and retire it. The company sold part of the land, and then proceeded to make a scrip dividend of the scrip so taken up by it. A dissenting scripholder brought suit to undo the transaction on the ground that the scrip taken up by the company should be canceled. The court sustained his action, and held that from the original contract it was clear that the land was received as a trust fund to ultimately pay off the scrip. Reversing Rogers *v.* Phelps, 9 N. Y. Supp. 886 (1890). In Brown *v.* Lehigh, etc. Co., 49 Pa. St. 270 (1865), a dividend of scrip had been declared, the scrip being as follows:

"No. ——. SCRIP. Shares.

"This is to certify that —— ——, —— heirs or assigns, will be entitled, upon the surrender of this certificate, to —— shares in the capital stock of the Lehigh Coal and Navigation Company so soon as the present funded debt of the company has been paid off, or adequate provision made for its discharge when due and payment demanded; and will also be entitled to a *pro rata* share of any future distribution of scrip; but not to any cash dividend until this certificate has been converted into stock, as above provided.

"Or this certificate may at any time, at the option of the holder thereof, be converted into stock upon payment by said holder, either in cash or in the six per cent. loans of the company, of the par value of said stock, and the surrender of this certificate.

"This certificate is transferable only at the office of the company.

"Witness," etc.

Several years after the issue, the mortgage being paid off, the scripholders claimed that they were entitled to back dividends equal to past dividends paid on the stock. The court held, however, that the terms of the contract did not give any such right, and that dividends commenced only from the time the scrip was converted into stock.

The holder of a certificate of indebtedness convertible into stock cannot claim an interest in a stock dividend until he has converted the scrip into stock. Miller *v.* Illinois Central R. R., 24 Barb. 312 (1857); Brundage *v.* Brundage, 65 Barb. 397 (1873); aff'd, 60 N. Y. 544 (1875), holding that assignable "interest certificates" representing earnings spent for improvements, and payable out of future earnings with dividends, or convertible into stock at the company's option, did not pass with a bequest of a life interest in certain shares of the stock. See also, in general, Butler *v.* Glen Cove, etc. Co., 18 Hun, 47 (1879). Also § 283, *supra*. *Cf.* Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876). The court in this case, speaking of a dividend of interest-bearing securities, said: "That the company had no lawful authority for issuing the certificates cannot be doubted." In Merz *v.* Interior Conduit, etc., 87 Hun, 430 (1895), the issue of bonds to pay certificates of indebtedness which had been issued as a dividend was enjoined. The dissenting opinion in this case seems the better view. A scrip entitling a person named to bonds may be assigned, even though by its terms it can be assigned only with the assent of the corporation issuing the same. Hubbard *v.* Manhattan Trust Co., 87 Fed. Rep. 51 (1898).

character of a certificate of stock as to entitle the holder to dividends.[1] Where the corporation, having a large surplus, issues such certificates, they are held not to transfer the title to that surplus from the corporation to the holders of the certificates.[2] In general the issue of scrip dividends may be entirely lawful, and they are

[1] Bailey *v.* Railroad Co., 22 Wall. 604 (1874). *Cf.* Brundage *v.* Brundage, 60 N. Y. 544 (1875).

The character of the scrip in this case is shown by the resolution authorizing it, as follows:

"Whereas, this company has hitherto expended of its earnings for the purpose of constructing and equipping its road, and in the purchase of real estate and other properties with a view to an increase of its traffic, moneys equal in amount to eighty per cent. of the capital stock of the company; and whereas, the several stockholders of the company are entitled to evidence of such expenditure, and to reimbursement of the same at some convenient future period:

"Now, therefore, resolved, that a certificate signed by the president and treasurer of this company be issued to the stockholders severally, declaring that such stockholder is entitled to eighty per cent. of the amount of capital stock held by him, payable ratably with the other certificates issued under this resolution, at the option of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid on shares of the capital stock of the company, and that such certificates may be, at the option of the company, convertible into stock of the company, whenever the company shall be authorized to increase its capital stock to an amount sufficient for such conversion."

This was the famous scrip dividend made by the New York Central R. R. Co. under the management of Commodore Vanderbilt.

The form of the certificate was as follows:

"THE NEW YORK CENTRAL RAILROAD COMPANY.

"No. ——. Interest Certificate.

"Under a resolution of the board of directors of this company, passed December 19th, 1868, of which the above is a copy, the New York Central Railroad Company hereby certifies that A. B., being the holder of —— shares of the capital stock of said company, is entitled to —— dollars, payable ratably with the other certificates issued under said resolution, at the pleasure of the company, out of its future earnings, with dividends thereon, at the same rates and times as dividends shall be paid upon the shares of the capital stock of said company.

"This certificate may be transferred on the books of the company on the surrender of this certificate.

"In witness whereof, the said company has caused this certificate to be signed by its president and treasurer, this 19th day of December, 1868.

"—— ——,
"President."

"—— ——,
"Treasurer."

At the foot of each certificate there was a form of transfer in blank:

"For a valuable consideration, I, A. B., do hereby sell, assign, and transfer all interest in the above certificate to C. D., and do hereby irrevocably appoint E. F. attorney, to execute a transfer thereof on the books of the railroad company therein mentioned."

See Bailey *v.* Railroad Co., 22 Wall. 604, 608 (1874). This dividend was declared, although the company by its charter was limited to ten per cent. dividends.

A dividend of scrip — *i. e.*, a paper entitling the holder to dividends equal to dividends thereafter declared on the capital stock — is practically a stock dividend, except that the scrip cannot vote, and provision is generally made for taking it up in some manner. Such a dividend was involved in Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884).

[2] People *v.* Board of Assessors, 76 N. Y. 202 (1879), affirming S. C., 16 Hun, 196. In this case it was held that the issue of these certificates could not operate to relieve the corporation from their obligations to pay their tax upon the surplus, because the surplus remained in the hands of the company, and as such was liable to assessment and taxation. See also Bailey *v.* Railroad Co., 22 Wall. 604 (1874). See also Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884).

upheld by the courts. But when they are declared in fraud of the rights of third parties they may be set aside.[1]

Scrip may be practically the same thing as shares of stock, except that it has no voting power. It is issued sometimes because the company cannot issue any more capital stock, the whole capital stock being already out; sometimes to avoid taxes, and sometimes to increase the transferable shares without giving to the new shares a voting power.[2] If the interest or dividends are payable only from the profits, the issue of the scrip is legal whenever a stock dividend would be legal, that is, whenever the property of the company is equal in value to the capital stock plus the scrip dividend.

A property dividend is where property is divided instead of that property being sold for cash and the cash then used to pay a dividend.[3] A property dividend occurs where a corporation sells all its property to another corporation and takes in payment therefor the stock and the bonds of the purchasing corporation and then makes a distribution of the same among its stockholders. It has been held that any one of its stockholders may object and insist on payment for his stock in cash.[4] This, however, is practically a dissolution of the company and a distribution of its assets, a subject which is considered elsewhere.[5]

1 While negotiations were pending between two gas companies for their consolidation by one company buying the stock of the other, upon a certain basis of capital and indebtedness, one of them, without the knowledge of the other, passed a resolution declaring a scrip dividend of ten per cent. on its capital stock, thus increasing its indebtedness by that amount. The certificates were accordingly issued; but after the consolidation, upon a bill filed for that purpose, the scrip was declared void. Bailey *v.* Citizens' Gas Light Co., 27 N. J. Eq. 196 (1876).

2 Where one street railway company takes a lease of the street railways of three other companies on an agreement whereby the stock of the latter companies is deposited with a trustee, and the lessee issues "stock trust certificates" therefor, being its obligation to pay a fixed rate of interest per year, with an option on its part to pay the principal sum or not at its option at a specified time, the stock being security therefor to be sold by the trustee in case the principal and interest are not paid, this form of financing does not create a debt, and hence such certificates are not subject to taxation as a bond and mortgage, the transaction being really a guaranteed dividend or rental. Commonwealth *v.* Union, etc. Co., 192 Pa. St. 507 (1899).

3 An amendment to the charter may prescribe that unnecessary corporate real estate shall be divided among or partitioned between the stockholders. Merchant *v.* Western Land Assoc., 56 Minn. 327 (1894). Where a company has in its treasury stock in another company, and distributes it among its stockholders, this is a dividend. Allegheny *v.* Pittsburg, etc. Ry., 179 Pa. St. 414 (1897). Where corporate land is deeded by way of dividend or distribution among stockholders, there is no warranty of title. Olsen *v.* Homestead, etc. Co., 87 Tex. 368 (1894).

4 See § 671, *infra.*

5 See § 548, *infra.*

A dividend or distribution of the company's bonds among its stockholders is legal, if the capital stock is not thereby impaired.[1] Unless some statute prohibits it, or some one objects, a corporation may declare a dividend out of its capital stock, subject to the common-law liability for so doing.[2]

In the absence of a special provision to the contrary, dividends will be presumed to be payable in cash, and in lawful or current money.[3] But where the dividend is paid in depreciated currency, a stockholder cannot insist that he shall be paid any more than what the depreciated currency is worth in regular currency.[4]

§ 536. *Stock dividends.*— A stock dividend, as the name imports, is a dividend of the stock of the corporation. Such a dividend is lawful when an amount of money or property equivalent in value to the full par value of the stock distributed as a dividend has been

[1] See § 766, *infra.* Where a joint-stock association having $12,000,000 surplus invested in securities issues its bonds to the amount of $12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. D'Ooge *v.* Leeds, 176 Mass. 558 (1900), the court saying: "If this company had been a corporation, and had wished to make a dividend of preferred stock to its shareholders, it would have done it in just this way. There has been no dividend of any money or property among the shareholders. There has been merely a change of the form of the ownership in the property by dividing it into two classes, and by making a different provision in regard to dividends for each class, and by giving one class a preference over the other in its right to the assets on final liquidation. Not a dollar's worth of the property of the company is taken out of the business, or changed in its relation to the business. . . . It is plain that the action of the company was like making a dividend of preferred stock. It was a more formal capitalization of earnings which previously had been capitalized in substance and effect."

[2] A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability. People *v.* Barker, 141 N. Y. 251 (1894). See also §§ 546, 548, 671, *infra.*

[3] Ehle *v.* Chittenango Bank, 24 N. Y. 548 (1862).

[4] Back dividends may be recovered on stock which has been illegally confiscated; but where the dividends to other stockholders were paid in Confederate currency, the back dividends paid after the war to a northern stockholder should be a sum equal in value to the Confederate currency when the dividends were declared. Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); S. C., 14 Fed. Cas. 357; Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868). In this case two of the three judges held that though the dividends were declared without specifying how they should be paid, yet where they were paid as a matter of fact in depreciated Confederate currency, a northern stockholder could not, after the war, claim the same dividends payable in United States currency.

accumulated and is permanently added to the capital stock of the corporation. Corporations frequently make a dividend of this character when improvements of the corporate property or extensions of the business have been made out of the profits earned. It is also made when the corporate plant has increased in value, and it seems better to issue new stock to represent the excess of value than to sell the increase and declare a cash dividend. In this country these dividends are frequently made, and are sustained by the courts.[1]

[1] Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 188 *et seq.* (1883); Dock *v.* Schlichter, etc. Co., 167 Pa. St. 370 (1895); Farwell *v.* Great Western Tel. Co., 161 Ill. 522 (1896), a dictum; City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856); Howell *v.* Chicago, etc. Ry., 51 Barb. 378 (1868); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Simpson *v.* Moore, 30 Barb. 637 (1859); Gordon *v.* Richmond, etc. R. R., 78 Va. 501, 521 (1884); Minot *v.* Paine, 99 Mass. 101 (1868); Boston, etc. R. R. *v.* Commonwealth, 100 Mass. 399 (1868); Daland *v.* Williams, 101 Mass. 571 (1869); Rand *v.* Hubbell, 115 Mass. 461, 474 (1874); Gibbons *v.* Mahon, 4 Mackey, 130 (1885); Jones *v.* Morrison, 31 Minn. 140 (1883); Earp's Appeal, 28 Pa. St. 368 (1857); Wiltbank's Appeal, 64 Pa. St. 256 (1870); Commonwealth *v.* Pittsburgh, etc. R. R., 74 Pa. St. 83 (1873); Brown *v.* Lehigh Coal, etc. Co., 49 Pa. St. 270 (1865); Commonwealth *v.* Cleveland, etc. R. R., 29 Pa. St. 370 (1857); Parker *v.* Mason, 8 R. I. 427 (1867); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848). A stock dividend is not in itself injurious to the corporation or its creditors, and the creditors cannot complain of it, and hold the stockholders liable thereon, but a subsequent gratuitous issue of stock to stockholders, a part of which they then contribute to go with a sale of bonds by the corporation, a portion of the price therefor to be paid to the stockholders, is illegal, and such proportion so paid to the stockholders may be recovered back by bondholders upon the corporation becoming insolvent. Great Western, etc. Co. *v.* Harris' Estate, 111 Fed. Rep. 38 (1901). Harris *v.* San Francisco Sugar, etc. Co., 41 Cal. 393 (1871), holds that one who is entitled to and receives a stock dividend cannot claim also a part of the cash profits which are used for improvements, even though a contract calls for cash. See also § 51, *supra*, and ch. XXXIII, *infra.* As to the taxation of stock dividends, see § 572*a*, *infra.* In England a stock dividend has been declared to be *ultra vires* so for as dissenting stockholders are concerned. It cannot be forced upon a stockholder. Hoole *v.* Great Western Ry., L. R. 3 Ch. 262 (1867). In *Re* Eastern, etc. Co., 68 L. T. Rep. 321 (1893), a stock dividend was involved, but its legality was not passed upon. It is discretionary with the directors as to whether they will declare a stock or a cash dividend. Howell *v.* Chicago, etc. Ry., 51 Barb. 378 (1868). Where a consolidation of three corporations is made by increasing the capital stock of one and issuing the increased stock to the stockholders of all three corporations in the proportion agreed upon, this is not a stock dividend, even though the aggregate capital stock was $400,000, but by the consolidation is $1,000,000. Allegheny *v.* Federal, etc. Ry., 179 Pa. St. 424 (1897). Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. R. R., 179 Pa. St. 414 (1897). In the case of Rose *v.*

The stockholders, having voted to declare such a dividend, may, at any time before the certificates are issued, reconsider the matter and revoke the dividend.[1] Preferred stockholders may be entitled to share in the distribution of stock by a stock dividend according to the terms of their preferred stock.[2] In some of the states a stock dividend is prohibited by statute or constitutional provision.[3] This, however, does not prevent a cash dividend and the issue of new stock for cash at the same time.[4]

§ 537. *Interest-bearing stock.*—It has already been shown that a corporation may issue stock and may make a contract with the subscriber that the company will pay interest upon the sums paid in by the subscriber.[5] Such a contract is legal, however, only when the interest is to be paid from the net profits of the enterprise, and not from the capital stock. Unless net profits have been earned the stipulated interest cannot legally be paid. Consequently there is little difference between interest-bearing stock and preferred stock.

§ 538. *To whom the corporation is to pay the dividend.*—The question as to whom a dividend shall be paid after it has been reg-

Barclay, 191 Pa. St. 594 (1899), the validity of a stock dividend whereby a gas company having $300,000 capital stock distributed $300,000 additional capital stock among its stockholders as a stock dividend to represent the enhanced value of the property was not questioned. A stock dividend is to be counted as a part of the capital stock to sustain a debt of the corporation under a charter which limits the debts to one-half of the capital stock. Cunningham *v.* German, etc. Bank, 101 Fed. Rep. 977 (1900). A stock dividend was sustained in Cole *v.* Adams, 19 Tex. Civ. App. 507 (1898), to the extent that such dividend represented profits which had been used in the property, but not to the extent that such dividends represented a rise in the value of the property of the company. In the case of Shaw *v.* Gilbert, 111 Wis. 165 (1901), where a so-called "dividend stock" had been issued, it was assumed, under the circumstances of the issue, that the stockholders receiving the same were liable thereon to corporate creditors with interest from the date of issue. Where the life tenant refuses to pay for increased capital stock which is issued at fifty cents on a dollar, the remaining fifty cents being a stock dividend, and the trustee takes the stock for himself, and ten years have elapsed since the life tenant claimed the stock, the statute of limitations is a bar to his suit to compel the trustee to account for the stock. Matter of Smith, 66 N. Y. App. Div. 340 (1901).

[1] Terry *v.* Eagle Lock Co., 47 Conn. 141 (1879). After cancellation there is no statutory liability on such stock. Hollingshead *v.* Woodward, 35 Hun, 410 (1885); aff'd, 107 N. Y. 96 (1887). A stock dividend after declaration cannot be revoked, except possibly for some extraordinary cause. Dock *v.* Schlichter, etc. Co., 167 Pa. St. 370 (1895). *Cf.* § 541, *infra.*

[2] Gordon *v.* Richmond, etc. R. R., 78 Va. 501 (1884). See also Phillips *v.* Eastern R. R., 138 Mass. 122 (1884), and ch. XVI, *supra.*

[3] See §§ 51, 287, *supra.*

[4] In Massachusetts a stock dividend is practically declared by a large cash dividend and simultaneously the issue of new stock at par. Jones *v.* Brown, 171 Mass. 318 (1898). See 66 N. E. Rep. 423.

[5] See ch. XVI, *supra.*

ularly declared is one which sometimes involves the corporation in considerable difficulty. It is not always easy to decide which one of two or more claimants is entitled to the dividend.

The general rule is that the corporation may pay the dividend to the person in whose name the stock stands registered upon the corporate stock book at the time the dividend is declared.[1] It may do so without inquiring whether he has transferred the stock, and without requiring the production of the certificate.[2] In fact, it is a well-settled rule that the corporation is protected in paying dividends to a recorded stockholder, although he may have transferred his stock, no notice of the transfer having been given to the company.[3] But after notice of a transfer the corporation must pay the dividend to the transferee, although no registry has been made.[4]

[1] Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883), affirming 25 Hun, 438 (1881); Donnally *v.* Hearndon, 41 W. Va. 519 (1895); Jones *v.* Terre Haute, etc. R. R., 29 Barb. 353 (1859); affirmed, 57 N. Y. 196; Northrop *v.* Newtown, etc. Co., 8 Conn. 544 (1821). *Cf.* Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881), in regard to the assignment of dividends. The guaranty accumulations of an insurance company conducted both on the mutual and stock principle belong to the stockholders and not to the policy-holders. Traders', etc. Ins. Co. *v.* Brown, 142 Mass. 403 (1886). As to dividends on a tontine insurance policy, see Pierce *v.* Equitable Life Ass. Soc., 145 Mass. 56 (1887). In a few instances there have been attached to certificates of stock what are called "dividend warrants," the object being to enable such warrants to be cut off like coupons, and sold and collected like coupons. A form of such warrants is as follows:

THE SOUTHERN PACIFIC COMPANY
Dividend Warrants.

The bearer is entitled to the first dividend on one hundred shares of the capital stock of this company represented by certificate No. —, on or after the date upon which said dividend shall be made payable. Payable in the city of New York and elsewhere, as may be designated by said company.

—— ——, Secretary.

[2] Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883), aff'g 25 Hun, 438; Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880).

[3] Bank of Commerce's Appeal, 73 Pa. St. 59 (1873), where a distribution of assets was made; Bell *v.* Lafferty, 1 Pa. Supr. Ct. 454 (1881), where the assignee of a dividend without a certificate obtained payment, and the court held the company not liable to an unrecorded pledgee; Bank of Utica *v.* Smalley, 2 Cow. 770 (1824); Smith *v.* American Coal Co., 7 Lans. 317 (1873); Cleveland, etc. R. R. *v.* Robbins, 35 Ohio St. 483 (1880), the corporation not having been notified.

[4] See same cases as in preceding note. The corporation is liable to a transferee for dividends declared after a registry has been requested and improperly refused. Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). Where the transferee and holder of the certificate notifies the corporation of his purchase after a dividend has been declared, but before it is paid, he is entitled to the dividend, and may sue the corporation for it. Timberlake *v.* Shippers' Compress Co., 72 Miss. 323 (1894). A bill in equity lies to compel a corporation which has declared a stock dividend to stockholders of record July 1st to deliver such stock dividend to a purchaser on July 6th whose purchase included such dividend. Rose *v.* Barclay, 191 Pa. St. 594 (1899).

As between two claimants of the dividend, one being the *cestui que trust* and the other a *bona fide* transferee, the corporation may interplead.[1]

The right to dividends does not, however, depend upon the issue of the certificate, and the owner of shares may claim his dividends though no certificate has ever been issued by the corporation.[2] The corporation is protected if it pay dividends to the administrator without notice of a transfer by him.[3] Under the statutes of California, even though stock is distributed by executors in accordance with a decree of distribution, and the distributees sell the stock and it is transferred on the books of the company, nevertheless, if the decree is reversed on appeal, the transfers are void and the company is liable for dividends paid in the meantime to such purchasers. In a suit by the executors to recover such dividends the purchasers need not be made parties.[4] Where stock in a bank stands in the name of a person for sixty-five years without the identity of the stockholder being known and without dividends being claimed by him, although the bank annually advertised the unclaimed dividends, clear proof of the identity of such stockholder must be given by his alleged descendants who do not produce the certificate of stock.[5]

With respect to the dividends on the stock of a married woman, the corporation must pay them to the husband or not, according to the law of the domicile of the corporation, and not according to the law of the domicile of the married woman.[6] The husband, by

[1] Salisbury Mills *v.* Townsend, 109 Mass. 115 (1871); Cross *v.* Eureka, etc. Co., 73 Cal. 302 (1887), a case between pledgor and pledgee. See also § 387, *supra*, and § 543, *infra*. *Cf.* Stone *v.* Reed, 152 Mass. 179 (1890), where a corporate creditor sued the treasurer for distributing property among the stockholders. A corporation cannot interplead as between stockholders for the purpose of determining the ownership of stock, there having been no claim made upon it in regard to registry or in regard to dividends. It must be shown also that the company has not acted in a partisan manner as between the different claimants. Hinckley *v.* Pfister, 83 Wis. 64 (1892). The corporation interpleaded between claimants to a dividend on stock in Amberson *v.* Johnson, 127 Ala. 490 (1900). Where a stockholder assigns the future dividends, and afterwards sells his stock, the corporation may interplead to ascertain to whom to pay the dividends. Price *v.* Morning, etc. Co., 83 Mo. App. 470 (1899).

[2] Ellis *v.* Essex Merrimack Bridge, 19 Mass. 243 (1824).

[3] Brisbane *v.* Delaware, etc. R. R., 94 N. Y. 204 (1883). The heirs of a stockholder must, in order to entitle themselves to dividends, procure a transfer of their ancestor's shares into their own names on the corporate books, where the certificates have been pledged and the company notified. State *v.* New Orleans, etc. R. R., 30 La. Ann. 308 (1878).

[4] Ashton *v.* Zelia Min. Co., 134 Cal. 408 (1901). See also § 330, *supra*.

[5] Moss *v.* Manhattan Co., 48 N. Y. App. Div. 561 (1900).

[6] Graham *v.* First Nat. Bank of Norfolk, 84 N. Y. 393 (1881), affirming s. c.,

collecting dividends on his wife's shares, does not thereby reduce the stock to possession.[1]

Even though the corporation closes its transfer book several days before a dividend is declared, nevertheless those are entitled to the dividend who apply for registry on or before the day of the declaration of the dividend.[2]

If the holder of a certificate of stock has applied for transfer and been refused, he may sue for the dividend before bringing a suit in equity to obtain a transfer of his stock.[3]

§ 539. *To whom the dividend belongs.*— As between the vendor and vendee of shares of stock, it is a settled rule that the vendee is entitled to all the dividends on the stock which are declared after the sale of the stock. Even though the transfer has not been recorded, the transferee has a right to the dividends as against the transferrer. The law, moreover, refuses to investigate the question when the dividend was earned. In contemplation of law the net profits are earned at the instant the dividend is declared. This rule is just, inasmuch as the accrued profits and expected dividends enter into the value and price at which the stock is sold.[4]

20 Hun, 326. As to the rule in California, see Dow *v.* Gould, etc. Co., 31 Cal. 629 (1867).

[1] Burr *v.* Sherwood, 3 Bradf. (N. Y. Surr.) 85 (1854). *Cf.* Harcum *v.* Hudnall, 14 Gratt. (Va.) 369, 382 (1858); Searing *v.* Searing, 9 Paige, 283 (1841). A receipt of dividends by the husband only reduces the dividends into possession and not the stock. See § 319, *supra.*

[2] Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196, 205 (1874); Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). Frequently, however, the charter or statutes provide otherwise.

[3] Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo. 1893); Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884). But not if the transferee has treated the refusal to transfer as a conversion. Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207 (1878). Where the purchaser of the certificate of stock applies for transfer on the corporate books, which is refused, he can hold the corporation liable for dividends subsequently paid on such stock. Blooming Grove, etc. Co. *v.* First Nat. Bank, etc., 56 S. W. Rep. 552 (Tex. 1900).

[4] Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883); March *v.* Eastern R. R., 43 N. H. 515, 520 (1862); Ryan *v.* Leavenworth, etc. Ry., 21 Kan. 365, 403 (1879); Foote *v.* Worthington, 39 Mass. 299 (1839); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Currie *v.* White, 45 N. Y. 822 (1871); Brundage *v.* Brundage, 65 Barb. 397, 408 (1873); affirmed, 60 N. Y. 544; Goodwin *v.* Hardy, 57 Me. 143 (1869); Hill *v.* Newichawanick Co., 8 Hun, 459 (1876); aff'd, 71 N. Y. 593 (1877); Bates *v.* Mackinley, 31 L. J. (Ch.) 389 (1862); King *v.* Follett, 3 Vt. 385 (1831); Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850). See also ch. XXXIII, *infra.* *Cf.* Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823). A person who guarantees to another a dividend, and is obliged to pay it himself, cannot claim a subsequent dividend by way of reimbursement. Parks *v.* Automatic, etc. Co., 14 Daly, 424 (1888). A dividend declared after the certificates have been sold belongs to the transferee as against the transferrer. Gemmell *v.* Davis, 75 Md. 546 (1892), approving the text herein. Where a stockholder assigns by contract the stock and all dividends

A transfer of stock passes, of course, all dividends declared subsequently to the transfer, although the dividend was earned before the transfer was made.[1]

A dividend is something distinct and separable from the fund upon which it is declared, and it may be the subject of assignment by a stockholder before it is received from or declared by the corporation.[2]

A pledgee is entitled to dividends on the stock held in pledge, but must account for them when the pledge is redeemed.[3]

to another, he must pay to the latter any subsequent dividends which he receives. Cook *v.* Monroe, 45 Neb. 349 (1895). A purchaser of stock is entitled to subsequently declared dividends from the vendor irrespective of whether a transfer has been made on the books. Farmers', etc. Bank *v.* Mosher, 88 N. W. Rep. 552 (Neb. 1901). Even though a transfer has not been recorded, yet the transferee is entitled to the dividends as against the transferrer, and may recover this from him. Houser *v.* Richardson, 90 Mo. App. 134 (1901). Where stock is sold at auction on August 1st and a deposit paid, the balance to be paid August 29th, a dividend declared on August 24th belongs to the purchaser. Black *v.* Homersham, L. R. 4 Exch. D. 24 (1878). Where a company purchases shares of its own stock and subsequently uses it to declare a stock dividend, a stockholder who sold part of his stock in the interim is entitled to the dividend on only such stock as he owned when the dividend was declared. Coleman *v.* Columbia Oil Co., 51 Pa. St. 74 (1865). Where defendant purchased stock for the plaintiff and accounted therefor, but refused to account for dividends received while he held the stock, the defendant is guilty of conversion. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887). Although the purchaser of stock is entitled to a dividend declared after the contract of sale is made, even though the contract has not yet been carried out, yet the purchaser cannot insist on the vendor's giving an order on the corporation for such dividends. The purchaser should collect without such order. He rescinds the sale by insisting on such order. Phinizy *v.* Murray, 83 Ga. 747 (1889). An alleged vendee's suit for a dividend is *res judicata* as to a suit for the stock. Shepard *v.* Stockham, 45 Kan. 244 (1891). Where an agent to sell was to have all that he sold for above a certain price, a sum in excess thereof belongs to him, although it was for dividends not yet declared. Blakeslee *v.* Ervin, 40 Neb. 130 (1894).

[1] Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823), by Chancellor Kent; Goodwin *v.* Hardy, 57 Me. 143 (1869); March *v.* Eastern R. R., 43 N. H. 515 (1862); Phelps *v.* Farmers', etc. Bank, 26 Conn. 269 (1857); Brundage *v.* Brundage, 1 Thomp. & C. 82; aff'd, 60 N. Y. 544 (1875); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Currie *v.* White, 45 N. Y. 822 (1871). And a purchaser of stock at a tax sale, if the proceedings are legal and regular, is entitled to a certificate and to dividends subsequently declared. Smith *v.* Northampton Bank, 58 Mass. 1 (1849).

[2] Marten *v.* Gibbon, 33 L. T. Rep. 561 (1875). *Cf.* Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883). Bargains in prospective dividends are transactions which, by rule 61 of the stock exchange, the committee will not recognize or enforce. The contract is, however, one which is not contrary to law, and it is good between the parties. Marten *v.* Gibbon, 33 L. T. Rep. 561 (1875). *Cf.* § 536, *supra.*

[3] See § 468, *supra.*

When a dividend is made payable on a day subsequent to the day on which it is formally declared, it belongs to the stockholder who owns the shares on the day the dividend is declared, and not to the owner at the time it is payable,[1] unless, of course, the resolution declaring the dividend makes it payable to stockholders of record of a later date.[2]

Where stock is bought deliverable at the seller's option, the dividends declared between the day of the purchase and the delivery belong to the purchaser.[3] But a contract to sell on demand entitles the vendor to dividends declared before the demand is made.[4] But of course any agreement between vendor and vendee, modifying or changing the above rules, will be upheld. Dividends are a proper subject for a contract, and a valid contract may be made in reference to them.[5] The vendor may provide by

[1] Wheeler *v.* Northwestern Sleigh Co., 39 Fed. Rep. 347 (1889); Wright *v.* Tuckett, 1 Johns. & H. 266 (1860); De Gendre *v.* Kent, L. R. 4 Eq. 283 (1867); Hill *v.* Newichawanick Co., 71 N. Y. 593 (1877), affirming s. c., 8 Hun, 459; 48 How. Pr. 427 (1874); Spear *v.* Hart, 3 Rob. (N. Y.) 420 (1865); Bright *v.* Lord, 51 Ind. 272 (1875), where an option had been given. *Cf.* Hopper *v.* Sage, 112 N. Y. 530 (1889); Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881); Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157, 178 (1881); *Re* Kernochan, 104 N. Y. 618 (1887); Clive *v.* Clive, Kay, 600 (1854). *Contra*, Burroughs *v.* North Carolina R. R., 67 N. C. 376 (1872). The transfer of stock does not transfer past stock dividends which have been declared, even though the stock dividend has not been actually delivered. City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856). See also ch. XVI, *supra.*

[2] A sale of stock July 6th, "including all dividends due or to become due thereon," carries a stock dividend declared June 5th and payable to stockholders of record July 1st, and the sale is not fraudulent although the seller did not know of such stock dividend and the buyer did know. Rose *v.* Barclay, 191 Pa. St. 594 (1899).

[3] Currie *v.* White, 45 N. Y. 822 (1871); Black *v.* Homersham, L. R. 4 Exch. D. 24 (1878). Under a contract of a person to buy certain stock within a certain time if the other party desired to sell (a "put"), the first person reserving all dividends "declared during the time," a dividend declared before but payable during the time of the option belongs to the seller. Hopper *v.* Sage, 112 N. Y. 530 (1889). *Contra*, Harris *v.* Stevens, 7 N. H. 454 (1835).

[4] Bright *v.* Lord, 51 Ind. 272 (1875).

[5] Cook *v.* Monroe, 45 Neb. 349 (1895); Brewster *v.* Lathrop, 15 Cal. 21 (1860); Hyatt *v.* Allen, 56 N. Y. 553 (1874); Union Screw Co. *v.* American Screw Co., 11 R. I. 569 (1877); affirmed, 13 R. I. 673 (1882), in which it was held that where performance of a contract between two corporations for the purchase of the stock of one of them on a certain day was by agreement postponed to a later day, a dividend declared in the interval belonged to the purchaser. Where the vendor of stock reserves "one-half of whatever price the same should be sold for, when sold, over and above that sum," he is not entitled to an account of dividends, or other income received by the vendee from or on account of the stock. Jones *v.* Kent, 80 N. Y. 585 (1880). A person who sells stock reserving a dividend that may be declared at a certain date cannot claim a stock dividend which is

contract that he should have the dividends in lieu of interest on the purchase price until such purchase price is paid.[1]

A legatee of shares takes the stock as it was at the time of the testator's death. All dividends declared previous to that event go to the administrator.[2] A gift of stock on condition that the dividends should all go to the owner and that he should vote it is a gift of a remainder with a life interest in the donor.[3]

The question of whether a dividend is apportionable is considered elsewhere.[4]

A person who claims to be the owner of stock cannot establish his rights in a court by suing the party in possession of the stock for the dividends declared and paid.[5]

declared at the specified date. He can only claim the cash dividend. Kaufman *v.* Charlottesville Woolen Mills, 93 Va. 673 (1896). A contract by which the "surplus fund" on stock in a corporation up to a certain time shall belong to a certain party was construed in Thompson *v.* Hudgins, 116 Ala. 93 (1897). Where an employee is paid according to the percentage of dividends, it is for the jury to say whether dividends on an increased capital stock are the proper gauge of such salary. Bradburn *v.* Solvay Process Co., 18 N. Y. App. Div. 542 (1897). In the case of Bigbee, etc. Co. *v.* Moore, 121 Ala. 379 (1899), the court sustained a by-law whereby stockholders in a steamboat company each put a boat into the service of the company and each was to draw dividends on his stock only so long as his boat remained fit for service, such dividend to cease upon the boat becoming unfit for service, until it was repaired by the owner. In the case of Rivers *v.* Oak, etc. Co., 52 La. Ann. 762 (1899), the court upheld an oral agreement that the vendor of stock should be entitled to his proportion of the profits of the company for the ensuing year.

1 Hancock *v.* Clark, 68 Vt. 302 (1896).

2 Brundage *v.* Brundage, 60 N. Y. 544 (1875); *Re* Kernochan, 104 N. Y. 618 (1887), where it was payable after the testator's death. *Cf.* Johnson *v.* Bridgewater Iron Mfg. Co., 80 Mass. 274 (1859); § 301, *supra.* The profits and surplus funds of a corporation, whenever they may have accrued, are, until separated from the capital by the declaring of a dividend, a part of the stock itself, and will pass under that name in a transfer or bequest. Phelps *v.* Farmers', etc. Bank, 26 Conn. 269 (1857). *Cf.* Clapp *v.* Astor, 2 Edw. Ch. 379 (1834). In regard to the rights of a life tenant of stock as against a remainderman, see ch. XXXIII, *infra.*

3 Matter of Brandreth, 169 N. Y. 437 (1902). A stockholder may transfer his certificate to his children, who at the same time may give him an irrevocable power to vote the stock during his life and to receive and keep the dividends on the stock. Such an agreement is enforcible, even though the stock is transferred into the name of the children, the certificates, however, not being actually delivered to them. Matter of Brandreth, 58 N. Y. App. Div. 575 (1901). A gift of stock, the donee to have the possession and management of the same, but the donor to have the income during his life, makes the donee trustee, until the death of the donor, and hence such gift is taxable under the New York statutes as a transfer to take effect on his death. Matter of Cornell, 170 N. Y. 423 (1902).

4 See § 558, *infra.*

5 Peckham *v.* Van Wagenen, 83 N. Y.

It seems that a stockholder may lease his stock. He may for a certain sum assign to another all dividends during the specified time and give to the lessee the right to vote the stock during that time.[1]

§ 540. *Dividends must be equal and without preferences.*— Dividends among stockholders of the same class must be always *pro rata*, equal, and without preference. If the company has issued preferred stock, the holders thereof constitute a class by themselves, and stockholders of that class will be entitled, as a class, to dividends in preference to holders of the common stock. But as between stockholders of the same class there can be no discrimination, and profits set aside, for dividends must be evenly divided among the stockholders according to the amount of stock each one owns.[2] Accordingly there can be no lawful discrimination in the division of dividends, although the subscription price of part of the stock is due and unpaid;[3] or because the contract work has not

40 (1880). Conversion lies for an unauthorized sale of stock and also for dividends received thereon. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887).

[1] Zachry *v.* Nolan, 66 Fed. Rep. 467 (1895).

[2] Luling *v.* Atlantic Mut. Ins. Co., 45 Barb. 510 (1865), where part were paid in gold; Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874), aff'g 29 Barb. 353 (1859); Morgan *v.* Great Eastern Ry., 1 Hem. & M. 560 (1863); Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851), a case of preferred stock; State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848), where some were paid in cash and others were offered part cash and part stock; Atlantic, etc. Tel. Co. *v.* Commonwealth, 3 Brewst. (Pa.) 366 (1870), where a tax was levied on the assumption of an equal dividend to all; Hale *v.* Republican River Bridge Co., 8 Kan. 466 (1871), where by mistake a stockholder got more land scrip than was his share; Jackson *v.* Newark Plank Road Co., 31 N. J. L. 277 (1865). *Cf.* Chase *v.* Vanderbilt, 62 N. Y. 307 (1875). A holder of a receipt under a reorganization, entitling him to preferred stock in the new company, is entitled to dividends declared before he obtains the certificates. Elsworth *v.* New York, etc. R. R., 19 Week. Dig. 211; aff'd, 98 N. Y. 648 (1885). See also Coey *v.* Belfast, etc. Ry., Ir. Rep. 2 C. L. 112 (1866); Harrison *v.* Mexican Ry., L. R. 19 Eq. 358 (1875), preferred stock cases. As to preferred stock, see ch. XVI, *supra*. Although dividends are guaranteed to a certain date, and are paid, the stock is entitled to participate in all subsequent dividends. Parks *v.* Automatic, etc. Co., 14 N. Y. St. Rep. 710 (1888). If a stockholder by accepting the benefits assents to a change in the privileges which pertain to his stock, he cannot afterwards object thereto. Compton *v.* The Chelsea, 59 Hun, 624 (1891); aff'd, 128 N. Y. 537.

[3] Oakbank Oil Co. *v.* Crum, L. R. 8 App. Cas. 65 (1882). Where a subscription for stock is paid up, the stockholder is entitled to his stock and past dividends, even though for thirty years he has slept upon his rights. Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889); Bedford County *v.* Nashville, etc. Ry., 14 Lea (Tenn.), 525 (1884). It has been held in Maryland that a subscriber to the increased capital stock of a company is not entitled to a certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stock-

been done;[1] nor on the ground that the stockholder has no legal right to purchase the stock;[2] nor can there be a discrimination between the large and small stockholders of a company as to the manner of payment of dividends.[3] After paying a dividend to a part of the stockholders the corporation cannot refuse to pay the rest upon the ground that by so doing the capital stock will be impaired,[4] or that all the surplus earnings have been either paid out as dividends or invested in permanent improvements.[5]

A bill in equity may be maintained by a stockholder to prevent an unequal or unfair distribution of the profits of the company,[6] and for an injunction to restrain a dividend when stock has been fraudulently overissued, until a true list of the holders of genuine stock can be obtained.[7]

§ 541. *A dividend declared and specifically set apart as a distinct fund belongs absolutely to the stockholders.*— When a dividend out of the earnings of a company has been regularly declared and is

holders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893).

[1] Although stock is issued to contractors before they are entitled to it, yet they are entitled to the dividends on such stock unless there was some agreement to the contrary. Central R. R. etc. Co. *v.* Papot, 59 Ga. 342 (1877); s. c. *sub nom.* Southwestern R. R. *v.* Papot, 67 Ga. 675, 690 (1881).

[2] Where one corporation subscribes for stock in another corporation and pays for such stock, and dividends are declared by the latter, it cannot refuse to pay the dividends to the former on the ground that the former had no power to subscribe for the stock. Bigbee, etc. Co. *v.* Moore, 121 Ala. 379 (1899).

[3] Accordingly where a dividend was declared, viz., to all stockholders owning less than fifty shares, cash, but to all of fifty shares and over, part cash and part in interest-bearing bonds of the corporation, the discrimination was held invalid and unlawful. State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874). So also where a part of the authorized capital stock remained untaken, and a resolution of the directors was carried into effect, by which the untaken portion of the stock was issued to those shareholders not in arrears upon shares previously taken, to the exclusion, as to the new shares, of those in arrears upon the original issue, it was held an invalid discrimination and an unlawful imposition of a penalty upon those in arrears. Reese *v.* Montgomery County Bank, 31 Pa. St. 78 (1855).

[4] Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868). The validity of a dividend cannot be called into question by a bank in a suit to collect taxes on such dividend. Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890).

[5] Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875).

[6] Luling *v.* Atlantic Mut. Ins. Co., 45 Barb. 510 (1865). The minority may bring the officers to an accounting for an unfair distribution of the bonds, etc., owned by a construction company. Meyers *v.* Scott, 2 N. Y. Supp. 753 (1888). Or the stockholder may sue at law for an equal dividend. See § 542, *infra.*

[7] Underwood *v.* New York, etc. R. R.,

due, it becomes immediately the individual property of the stockholder. There is at once a severance, for the use and benefit of the members of the corporation, of so much of the accumulated earnings as are declared; and the dividend thereafter exists as a separate fund, distinct from the capital stock or surplus profits. It then becomes the absolute property of the stockholders.[1]

Accordingly, whenever a dividend is regularly declared and credited to a depositor it becomes his property, to which he is entitled in preference to the creditors of the corporation.[2] If the funds to pay a dividend are placed by the corporation, on deposit at a bank or elsewhere, the deposit is made and remains at the risk of the corporation and not of the stockholders, until a reasonable time after actual notice is given to the latter.[3] But it cannot be withdrawn and reclaimed either by the corporation or a receiver of the corporation, since the stockholders acquire, by virtue of the declaration of the dividend, a lien in equity upon the deposit.[4]

But where the fact that a dividend has been voted by directors is not made public, or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded.[5]

17 How. Pr. 537 (1859), a case growing out of the Schuyler frauds in New York. See also § 297, *supra*.

[1] Van Dyck *v.* McQuade, 86 N. Y. 38 (1881); Jermain *v.* Lake Shore, etc. R. R., 91 N. Y. 483 (1883); Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357; King *v.* Paterson, etc. R. R., 29 N. J. L. 82, 504 (1860); Hill *v.* Newichawanick Co., 71 N. Y. 593 (1877), affirming s. c., 8 Hun, 459 (1876); Brundage *v.* Brundage, 60 N. Y. 544 (1875), affirming s. c., 65 Barb. 397 (1873); Spear *v.* Hart, 3 Rob. (N. Y.) 420 (1865); Manning *v.* Quicksilver Min. Co., 24 Hun, 360 (1881); Kane *v.* Bloodgood, 7 Johns. Ch. 90 (1823); Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875); Fawcett *v.* Laurie, 1 Dr. & Sm. 192 (1860); *Re* Le Blanc, 14 Hun, 8 (1878). Upon the latter point compare People *v.* Merchants', etc. Bank, 78 N. Y. 269 (1879). Dividends on life-insurance policies, when once declared, cannot be varied by the company subsequently. Heusser *v.* Continental Life Ins. Co., 20 Fed. Rep. 222 (1884). Execution or garnishee process cannot be levied on stock held by an individual as trustee, where the debt is his individual debt. Nor can it be levied on the dividend from such stock. So held where stock was owned by a city in trust for the citizens. Hitchcock *v.* Galveston Wharf Co., 50 Fed. Rep. 263 (1880).

[2] Van Dyck *v.* McQuade, 86 N. Y. 38 (1881); Peckham *v.* Van Wagenen, 83 N. Y. 40 (1880). A dividend declared and ordered deposited to the order of the stockholders and so held until the further order of the court is legal, and the amount cannot be taxed as belonging to the bank. Pollard *v.* First Nat. Bank, 47 Kan. 406 (1891).

[3] King *v.* Paterson, etc. R. R., 29 N. J. L. 82, 504 (1860).

[4] *Re* Le Blanc, 14 Hun, 8 (1878); aff'd, 75 N. Y. 598; Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875).

[5] Ford *v.* Easthampton, etc. Co., 158 Mass. 84 (1893). A stockholder who accepts a dividend which has been declared in lieu of one already declared and thus revoked, cannot claim both dividends. Albany, etc. Co. *v.* Arnold, 103 Ga. 145 (1897). Where the charter

The stockholders' right to a dividend regularly declared, and to the fund set apart by the corporation to pay the dividend, is not affected by the subsequent insolvency of the corporation.[1] But where no specific fund has been set aside, a stockholder not having claimed or received his dividend has, upon the insolvency of the corporation, merely a claim of debt against the corporation, and must come in and fare as the other creditors do.[2]

Not only must the time of payment be reasonable, but a reasonable place of payment must be designated, and the entire transaction must be in good faith.[3]

§ 542. *It is a debt which may be collected by legal proceedings.* The debt which the corporation owes its stockholders, when a dividend is declared and the day of payment arrives, is one which may be collected by the usual action at law. A suit to compel the declaration of a dividend must be in equity; but when the dividend is not paid after it has been regularly declared the stockholder's action is at law, and he may sue in *assumpsit* for the amount due him by the resolution declaring the dividend,[4] or, under certain circum-

allows the directors to pay "interim dividends," in other words. dividends to apply on the next regular dividend, an interim dividend may be revoked after it has been declared and before it has been paid. Lagunas, etc. Co. *v.* Schroeder & Co., 85 L. T. Rep. 22 (1901).

[1] Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 657 (1836).

[2] Lowne *v.* American Fire Ins. Co., 6 Paige, 482 (1837); Curry *v.* Woodward, 44 Ala. 305 (1870). Where a dividend is declared in 1894, but is not called for by one stockholder until 1897, after the company has passed into an assignee's hands, he is a general creditor to that amount, but is not entitled to be paid in full unless a specific sum was deposited for the purpose of paying this dividend. Hunt *v.* O'Sheá, 69 N. H. 600 (1899).

[3] King *v.* Paterson, etc. R. R., 29 N. J. L. 82 (1860).

[4] Jackson *v.* Newark Plank Road Co., 31 N. J. L. 277 (1865); West Chester, etc. R. R. *v.* Jackson, 77 Pa. St. 321 (1875); Coey *v.* Belfast, etc. Ry., Ir. Rep. 2 C. L. 112 (1866); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860); Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868); Hall *v.* Rose Hill, etc. Co., 70 Ill. 673 (1873); City of Ohio *v.* Cleveland, etc. R. R., 6 Ohio St. 489 (1856); Marine Bank *v.* Biays, 4 Har. & J. (Md.) 338 (1818); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848); Kane *v.* Bloodgood, 7 Johns. Ch. 90, 132 (1823); Jones *v.* Terre Haute, etc. R. R., 57 N. Y. 196 (1874); Fawcett *v.* Laurie, 1 Dr. & Sm. 192, 202 (1860); Dalton *v.* Midland Counties Ry., 13 C. B. 474 (1853); Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868). See Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875). sustaining a remedy in equity. But if a stockholder is not entitled to share in the dividend according to the terms of the resolution declaring it, he cannot have his action of *assumpsit.* State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848). In suing for a dividend the plaintiff must allege that the dividend has been declared. Hill *v.* Atoka, etc. Co., 21 S. W. Rep. 508 (Mo. 1893). Where a dividend has been paid to all stockholders except one, he may collect his by a suit. Southwestern, etc. Ry. *v.* Martin, 57 Ark. 355 (1893).

stances, he may file a bill in equity for an accounting.[1] But *mandamus* is not a proper remedy in such a case.[2]

§ 543. A demand is necessary before the action at law by the stockholder can be maintained.[3]

It has been held, however, that the commencement of the suit constitutes in itself a sufficient demand.[4] Under ordinary circumstances interest is not recoverable upon dividends which have been declared, but which the stockholder has not claimed. The right to interest arises only upon a demand and a refusal to pay.[5] A stockholder is not entitled to interest on dividends, even where he has demanded the same after they have been declared, where an attachment is pending against his stock.[6] The statute of limitations begins to run only after demand.[7]

[1] Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357. This is the usual remedy where preferred stockholders sue to have a dividend declared. See § 272, *supra.*

[2] Van Norman *v.* Central Car, etc. Co., 41 Mich. 166 (1879). But see *dicta* in King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1861), and Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. 657 (1836).

[3] Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1848); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860). A mere letter of inquiry has been held under this rule an insufficient demand. Scott *v.* Central R. R. etc. Co., 52 Barb. 45 (1868). A demand while the shares are under and subject to an attachment by the corporation is not such a demand as this rule contemplates. Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874).

[4] Robinson *v.* New Berne Nat. Bank, 95 N. Y. 637 (1884); Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868). This accords with the settled theory of the law as to demand in similar cases. See East New York, etc. R. R. *v.* Elmore, 5 Hun, 214 (1875); Delamater *v.* Miller, 1 Cow. 75 (1823); Everett *v.* Coffin, 6 Wend. 603 (1831); Walradt *v.* Maynard, 3 Barb. 584 (1848); Carroll *v.* Cone, 40 Barb. 220 (1862); Ayer *v.* Ayer, 33 Mass. 327 (1835).

[5] Keppel *v.* Petersburg R. R., Chase's Dec. 167 (1868); s. c., 14 Fed. Cas. 357; Boardman *v.* Lake Shore, etc. R. R., 84 N. Y. 157, 187 (1881); State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363, 387 (1848); Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); Bank of Louisville *v.* Gray, 84 Ky. 565 (1886); Cochran *v.* McGee, 53 S. W. Rep. 519 (Ky. 1899). As to interest on preferred dividends, see ch. XVI, *supra.*

[6] Mustard *v.* Union Nat. Bank, 86 Me. 177 (1893).

[7] The statute of limitations begins to run against a stockholder's suit to collect dividends only after a demand and refusal, or notice to a shareholder that his right to dividends is denied. Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); Bank of Louisville *v.* Gray, 84 Ky. 565 (1886); Kobogum *v.* Jackson Iron Co., 76 Mich. 498 (1889); Bedford County *v.* Nashville, etc. Ry., 14 Lea (Tenn.), 525 (1884). *Cf.* Winchester, etc. Co. *v.* Wickliffe, 100 Ky. 531 (1897). The statute of limitations does not begin to run against the collection of a dividend until it is demanded. A provision of a new charter into which the old company is merged, applying a three-year statute of limitations to dividends, does not affect dividends on old stock which has not come into the reorganization. Armant *v.* New Orleans, etc. R. R., 41 La. Ann. 1020 (1889). In Bills *v.* Silver King Min. Co., 106 Cal.

In England, however, it has been held that where dividends are credited up to the personal accounts of the stockholders, and for nearly twenty years certain stockholders do not claim dividends so credited to them, the statute of limitations is a bar, and, the company having been sold out by authority of a statute, the proceeds are to be divided among the stockholders without regard to such past-due and unpaid dividends. The statute of limitations began to run from the time the dividends became payable, and the company is not to be considered as a trustee in that respect.[1]

The action at law for the payment of a dividend which has been declared should be against the corporation, and not against the corporate officers.[2] But where the treasurer of an incorporated company withheld a dividend belonging to one of the stockholders on the ground that he himself owned the stock, an action of *assumpsit* against him individually was sustained.[3] In a case where a stockholder had been unjustly deprived of his stock, it was held that he could not sue an individual stockholder to recover a dividend which should have been paid to him, but that his action was properly against the corporation.[4] In actions on the part of stockholders to enforce the payment of dividends, the validity or legality of the dividend cannot be questioned by the corporation.[5] When a corporation is sued for a dividend by two claimants therefor, it may support a bill of interpleader between them.[6]

9 (1895), it is held that the statute of limitations begins to run against the right of a stockholder to sue for his dividends from the time when his administrator inquires at the corporate office as to whether all dividends had been paid to decedent, even though a false answer in the affirmative was made by the corporation. Even though a person subscribes for stock in a turnpike company in 1857 and he does not claim the stock or dividends, and after seven years does not attend meetings or pay any attention to his interest, and dies in 1868, nevertheless his representatives may collect the dividends due on the stock and may claim the stock. The statute of limitations is no bar if the company has never notified him that his right to the stock is disputed. Owingsville, etc. Co. *v.* Bondurant's Adm'r, 54 S. W. Rep. 718 (Ky. 1900). Where the charter of a railroad company provides that after the stockholders had received dividends equal to ten per cent. per annum on the sums invested, and such dividends had equaled the amount invested, the surplus thereafter over and above fifteen per cent. dividends should be paid to the common school fund, the state may collect such surplus, and the twenty-year statute of limitations is the only statute applicable. A subsequent statute authorizing the attorney-general to institute suit is constitutional, but not so far as such statute increases the obligation. Terre Haute, etc. R. R. *v.* State, 65 N. E. Rep. 401 (Ind. 1902).

[1] *Re* Severn, etc. Ry., [1896] 1 Ch. 559.

[2] French *v.* Fuller, 40 Mass. 108 (1839); Smith *v.* Poor, 40 Me. 415 (1855); s. c., 3 Ware, 148 (1858); s. c., 22 Fed. Cas. 627.

[3] Williams *v.* Fullerton, 20 Vt. 346 (1848).

[4] Peckham *v.* Van Wagenen, 83 N. Y. 40 (1880).

[5] Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542 (1868).

[6] Salisbury Mills *v.* Townsend, 109

§ 544. *Right of the corporation to apply dividends to the payment of debts due to it by the stockholder — Dividends in payment of subscription price of stock.*— It is well settled that if, at the time a dividend becomes payable, the stockholder owes the corporation any debt, the dividend due that stockholder may be applied in liquidation of the indebtedness; and if the corporation is sued for the dividend it may set up the debt by way of set-off or counter-claim.[1] This, however, is not upheld where the registered stockholder has sold and transferred his certificate of stock before the dividend is payable.[2] The company cannot retain the dividend to secure a debt for which the stockholder is only surety or guarantor, the debt not yet being due,[3] nor can it set off a claim which it has against the plaintiff and another person jointly.[4]

Where a corporation has made profits it may declare a dividend

Mass. 115 (1871). See also §§ 387, 538, *supra.* In England the rule was formerly otherwise. Dalton *v.* Midland Ry., 12 C. B. 458 (1852).

[1] Hagar *v.* Union Nat. Bank, 63 Me. 509 (1874); Philadelphia, etc. R. R. *v.* Cowell, 28 Pa. St. 329 (1857); King *v.* Paterson, etc. R. R., 29 N. J. L. 504 (1860); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Bates *v.* New York Ins. Co., 3 Johns. Cas. 238 (1802); Donnally *v.* Hearndon, 41 W. Va. 519 (1895). See also § 526, *supra.* But a contrary rule prevails as to a deceased stockholder, upon a winding up of the company and a distribution of its assets. See Merchants' Bank, etc. *v.* Shouse, 102 Pa. St. 488 (1883); Brent *v.* Bank of Washington, 2 Cranch, C. C. 517 (1824); s. c., 4 Fed. Cas. 61. See also, *contra,* in general, *Ex parte* Windsor, 3 Story, C. C. 411 (1844); s. c., 30 Fed. Cas. 312. By agreement a dividend may be applied to an unpaid call. Kenton, etc. Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). For a contract of a corporation to sell to its superintendent shares of its stock at his option, and to allow him to pay for the stock by the dividends, see Goodwin, etc. Co.'s Appeal, 117 Pa. St. 514 (1888). The only right that a corporation has to retain a dividend from a stockholder who owes it money is based on set-off. Gemmell *v.* Davis, 75 Md. 546 (1892).

[2] Where a stockholder of record pledges his certificates of stock, and no transfer is made on the books, and subsequently a dividend is declared, and after such dividend is payable, but before it is actually paid, the pledgee presents to the company the stock for transfer with a written request of the pledgor to the same effect, together with an assignment by the pledgor to the pledgee of the dividend, it is no defense to the company that it has a claim against the pledgor for a personal debt or for a debt of a firm in which he is interested. American Nat. Bank *v.* Nashville, etc. Co., 36 S. W. Rep. 960 (Tenn. 1896). This set-off is not good on a debt against the transferrer where the certificates were sold, although not transferred on the books, before the dividend was declared. A pledgee of stock, even though not recorded as a stockholder, is entitled to dividends declared after the pledge was made, as against a claim of the corporation against the pledgor as an offset. Gemmell *v.* Davis, 75 Md. 546 (1892).

[3] Solomon *v.* First Nat. Bank, 72 Miss. 854 (1895); First Nat. Bank *v.* De Morse, 26 S. W. Rep. 417 (Tex. 1894).

[4] Rumney *v.* Detroit, etc. Co., 89 N. W. Rep. 573 (Mich. 1902).

thereof, and apply such dividend to the unpaid subscription price of subscribers to its capital stock.[1] But a payment of the subscription price by what purports to be a dividend or distribution of profits is invalid as against creditors, where such profits did not exist.[2] Even though subscribers claim that their stock was to be paid for by dividends, yet such an agreement is no defense as against creditors.[3] An agreement of the corporation with a stockholder to pay to him in dividends the amount he pays for the stock cannot be enforced as an obligation of the corporation.[4] A bonus paid by citizens may be used by subscribers for stock in partial payment for their stock, unless the bonus was made directly to the corporation.[5]

§ 545. *The courts very rarely compel the directors to declare a dividend.*— The board of directors declare the dividends, and it is for the directors, and not the stockholders, to determine whether or not a dividend shall be declared.[6]

When, therefore, the directors have exercised this discretion and refused to declare a dividend, there will be no interference by the courts with their decision, unless they are guilty of a wilful abuse of their discretionary powers, or of bad faith or of a neglect of duty. It requires a very strong case to induce a court of equity to order the directors to declare a dividend, inasmuch as equity has no jurisdiction, unless fraud or a breach of trust is involved. There

[1] Where the corporation has an accumulated profit, and that profit is by agreement with the stockholders applied to unpaid subscriptions, such stock is then paid up. Kenton, etc. Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). See also § 168, *supra.* It is a question for the jury whether fraud exists in the sale of stock, represented to be paid up, when part of the payments had been by dividends from the corporation. Kryger *v.* Andrews, 65 Mich. 405 (1887).

[2] Gager *v.* Paul, 111 Wis. 638 (1901).

[3] Hawkins *v.* Citizens', etc. Co., 38 Oreg. 544 (1901), holding also that the cancellation of such portion of subscriptions as is in excess of a certain dividend declared is illegal as against creditors existing at the time of such cancellation. See also § 170, *supra.*

[4] Smith *v.* Alabama, etc. Assoc., 123 Ala. 538 (1899).

[5] McDermott *v.* Squier, 83 N. W. Rep. 287 (Mich. 1900).

[6] "The directors of a corporation, and they alone, have the power to declare a dividend of the earnings of the corporation and to determine its amount." Hunter *v.* Roberts, etc. Co., 83 Mich. 63 (1890). The board of directors and not the stockholders declare dividends. Grant *v.* Ross, 100 Ky. 44 (1896). See also the various cases in this and succeeding sections. Under the New Jersey statutes dividends must be paid in January, unless the charter or by-laws fix some other date therefor. Marquand *v.* Federal Steel Co., 95 Fed. Rep. 725 (1899), holding also that where the charter provides that dividends on the common stock shall be declared after the close of any fiscal year, the corporation has no power to pay any dividends on the common stock prior to the close of the fiscal year, and hence cannot pay quarterly dividends on the common stock.

have been many attempts to sustain such a suit, yet, although the courts do not disclaim jurisdiction, they have quite uniformly refused to interfere.[1] The discretion of the directors will not be

[1] New York, etc. R. R. *v.* Nickals, 119 U. S. 296 (1886), rev'g 15 Fed. Rep. 575; Ely *v.* Sprague, Clarke, Ch. 351 (1840); Williams *v.* Western Union Tel. Co., 93 N. Y. 162 (1883); Reynolds *v.* Bank of Mt. Vernon, 6 N. Y. App. Div. 62 (1896); aff'd, 158 N. Y. 740; Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885); Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863); Chaffee *v.* Rutland R. R., 55 Vt. 110, 133 (1882); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Rex *v.* Bank of England, 2 B. & Ald. 620 (1819), where the court refused to grant a *mandamus* for an examination of the accounts with a view to compelling a dividend. In the case of Burden *v.* Burden, 159 N. Y. 287, 308 (1899), the court held that so long as the directors are acting honestly and within their discretionary powers in accumulating a surplus in an iron manufacturing corporation, a stockholder must submit, but "if it can be shown that trustees of a corporation are guilty of fraud and bad faith in accumulating a large surplus to the injury of the stockholders, a court of equity would doubtless interfere." The court in this case refused to interfere, although the capital was $2,000,000 and the surplus $1,100,000, $500,000 of which was in the bank and $600,000 invested in stocks which were not in a legal sense a surplus, but were capital whose income alone would go to swell the regular dividends of the corporation, and it appearing also that the corporation had paid very large dividends. Where the profits are properly used to pay debts, a guarantor of dividends cannot question the propriety of such use of the profits. Pratte *v.* Enslow, 46 W. Va. 527 (1899). The directors are bound to distribute as profits only such part of the net income as they think proper; and their judgment of what is proper is conclusive upon the stockholders. State *v.* Baltimore, etc. R. R., 6 Gill (Md.), 363 (1847). *Cf.* Dent *v.* London Tramways Co., L. R. 16 Ch. D. 344 (1880). See also § 272, *supra.* In Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885), the court said: "In cases where the power of the directors of a corporation is without limitation and free from restraint, they are at liberty to exercise a very liberal discretion as to what disposition shall be made of the gains of the business of the corporation. Their power over them is absolute so long as they act in the exercise of an honest judgment. They may reserve of them whatever their judgment approves as necessary or judicious for repairs and improvements, and to meet contingencies, both present and prospective."

In State *v.* Bank of Louisiana, 6 La. 745 (1834), the court refused to order a bank to declare a dividend although it had profits on hand of about one-tenth of its capital. The court said: "If the board honestly err in these matters, we are not ready to say the courts possess the power to rectify its mistakes." The remedy is in the elections. Courts will not order a dividend to be declared unless the directors "refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud, or breach of that good faith which they are bound to exercise towards the stockholders." A dividend will not be ordered when the profits are invested in the plant and in long-time notes. Hunter *v.* Roberts, etc. Co., 83 Mich. 63 (1890). In Smith *v.* Prattville, etc. Co., 29 Ala. 503 (1857), the court refused to order a dividend, inasmuch as the charter expressly

interfered with by the courts, unless there has been bad faith, wilful neglect, or abuse of discretion.[1]

vested discretion as to that matter in the board of directors. A stockholder cannot have a receiver appointed merely because the directors reserved the profits for a surplus instead of distributing them by way of dividends. Marcuse *v.* Gullett, etc. Co., 52 La. Ann. 1383 (1900).

[1] Greeff *v.* Equitable, etc. Soc., 160 N. Y. 19, 32 (1899).

Where large dividends are made by a manufacturing company, it is entirely within the fair and honest discretion of the directors whether the remaining profits shall be passed to surplus or used for dividends. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891); aff'd, 133 N. Y. 687, the court holding also that the fact that a manufacturing company extended its business so as to include iron pipe as well as brass, and loaned money, which loans, however, the president was willing to take up, and had owned government bonds, is not sufficient to entitle a stockholder who has acquiesced therein to demand that all profits be paid out in dividends. Although the road was leased and the floating debt was only $1,000, and the bonded debt, $70,000, was due in seventeen years, and the other expenses only $6,000, while the company had $36,000 on hand and the regular rental for its road coming in, yet the court refused to order a dividend, in Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867), the court holding also that a demand must first be made, and that the directors, instead of the company, are the proper parties defendant. In Barnard *v.* Vermont, etc. R. R., 89 Mass. 512 (1863), there was a contract to pay dividends, and it was upon this contract that the court based its right to pass upon the ability of the company to declare a dividend. The court refused to order a dividend. In Richardson *v.* Vermont, etc. R. R., 44 Vt. 613 (1872), the court decreed the payment of what was substantially a dividend to the stockholders, but stated that an accounting must first be had to ascertain whether there was available for that purpose "a fund adequate not only for the payment of the claims of the plaintiffs in the cause, but for the payment of all other stockholders having like claims;" and there "must be a surplus fund over and above what is requisite for the payment of the current expenses of the business, for discharging its duties to creditors, and over and above what reasonable prudence would require to be kept in the treasury to meet the accidents, risks, and contingencies incident to the business of operating the railroad." In Dent *v.* London Tramways Co., L. R. 16 Ch. D. 344 (1880), the court compelled the company to pay a dividend on the preferred stock, where there were profits available, and the common stockholders proposed to use all the profits for long-neglected repairs, the real reason being that there were profits sufficient for a dividend on the preferred, but not on both the common and preferred. The court said that profits meant the "surplus in receipts, after paying expenses and restoring the capital to the position it was in on the first of January in that year." Where a bill in equity, filed for the purpose of obtaining an accounting and the declaration of a dividend, does not clearly make out the existence of a surplus which the directors ought to distribute, the suit will fail. A discovery will not be granted where there is no allegation that information is refused, or that the party cannot examine the books, or that a *mandamus* was inadequate. Wolfe *v.* Underwood, 96 Ala. 329 (1892). Where the licensor of a patent is to have from a corporation as licensee a certain payment from the net profits,

Accordingly the directors may, in the fair exercise of their discretion, invest profits to extend and develop the business, and a reasonable use of the profits to provide additional facilities for the business cannot be objected to or enjoined by the stockholders.[1]

Profits may also be set aside for the payment of indebtedness, though it is not yet due.[2] Where stock is pledged and the pledgee is in control of the company, and, instead of declaring dividends, he honestly and intelligently applies the profits to improvements, the pledgor cannot hold him liable for not declaring dividends, and for not thus decreasing the debt for which the stock was given in pledge.[3] The free exercise of the director's discretion cannot be interfered with by the contracts of promoters or original incorporators as to the disposition of corporate profits.[4] A court will not compel a foreign corporation to declare a dividend.[5] Under the New Jersey statute a stockholder may file a bill to compel the declaration of a dividend out of accumulated profits not reserved for working capital by vote of the stockholders, as provided in the statute.[6] A stockholder's bill to compel the directors to declare a dividend under the new Jersey statute must allege that the accu-

such payment not to be cumulative and to be subject to provision for a reserve fund, it is legal for the company to pass a sum to the reserve fund, and also a further sum for depreciation and the cost of licenses. Bagot, etc. Co. *v.* Clipper, etc. Co., [1902] 1 Ch. 146.

[1] Where a corporation having a large surplus proposed, with the concurrence of a majority of the stockholders, to employ the surplus in extending the business, although such extension was opposed by a minority of the stockholders, it appearing that the proposed enlargement of the corporate enterprise was clearly *intra vires*, it was held on a bill brought by the dissenting minority for an injunction against the proposed use of the surplus, and praying a distribution of it among the stockholders, that the facts were not such as to require the interposition of the court on behalf of the minority. Pratt *v.* Pratt, 33 Conn. 446 (1866), the court saying: "On a question of this sort much must necessarily be left to the discretion of the managing directors; and so long as they keep within the objects contemplated by the articles of association, and the expediture is not unreasonable in reference to the amount of their capital, a court of equity ought very seldom to interfere with them."

[2] Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867).

[3] Zellerbach *v.* Allenberg, 99 Cal. 57 (1893).

[4] The agreement of the promoters and preliminary subscribers to the stock of the proposed company as to the division and disposition of the net profits does not bind the company unless it has expressly acquiesced in such agreement. Coyote, etc. Co. *v.* Ruble, 8 Oreg. 284 (1880). But if expressly ratified by the company it is binding. Richardson *v.* Vermont, etc. R. R., 44 Vt. 613 (1872), where an agreement to pay annual interest to the stockholders out of the net profits was considered.

[5] Berford *v.* New York Iron Mine, 4 N. Y. Supp. 836 (1888). See also § 734, *infra*.

[6] Griffing *v.* A. A. Griffing, etc. Co., 61 N. J. Eq. 269 (1901).

mulated profits are larger than the reserve as fixed by the stockholders.[1] Where, by a by-law, the board of directors has power to set aside from the profits such sum as they think proper as a reserve fund to meet contingencies, they have power, after paying dividends on the preferred stock, to carry the balance to a reserve fund, although the common stock is thereby deprived of any dividend.[2] A surplus of a company may be invested in such securities as the board of directors may deem best, and the board is not confined to securities in which a trustee may invest.[3]

Nevertheless the discretion of the directors in the matter of declaring or refusing to declare a dividend is not absolute; and where there is a clear abuse of power in refusing to declare the dividend, a court of equity will, at the instance of any stockholder, compel the proper authorities to declare and pay the dividend.[4] Laches

[1] Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901).

[2] Fisher *v.* Black, etc. Co., [1901] 1 Ch. 174. In the important case of Burland, etc. *v.* Earle, etc., [1902] A. C. 83, the Privy Council, passing on a by-law authorizing the directors, subject to the approval of a meeting of the stockholders, to set apart any portion of the profits for a reserve fund of a corporation that had paid on an average dividends of forty per cent. per annum, the capital stock being $200,000, and had accumulated, as undivided profits, $264,000, which was carried in profit and loss account, held that a stockholder could not maintain a suit to declare the accumulation to be *ultra vires* and to obtain a distribution thereof among the stockholders.

[3] Burland, etc. *v.* Earle, etc., [1902] A. C. 83. In this case the surplus was invested in bank shares and mortgages, and such investment was made in the name of a director. The court further stated that such investments should not be in speculative securities.

[4] In the case of Matter of Rogers, 161 N. Y. 108, 112 (1899), the court of appeals said: "An argument is made, which has the sanction of some of the authorities, to the effect that all of the assets of a corporation are deemed capital until a dividend is declared. We may concede that assets are ordinarily so treated in going concerns, but the rule has its limitations. The directors must act in good faith. If they fail to do so, and it clearly appears that they have accumulated earnings not required in the prosecution of the business, which they withhold from the stockholders for illegitimate purposes, a court of equity may interfere and compel a distribution of such earnings." Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare dividends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyances and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756 (1893), rev'g Fougeray *v.* Cord, 50 N. J. Eq. 185. Where for seven years a stockholder who owned a majority of the stock elected himself and two of his

on the part of the stockholders in failing to commence their suit to compel the payment of a dividend until the corporation becomes insolvent is fatal.[1] And the court will also consider that the aggrieved stockholders may, if a majority, refuse to re-elect the directors at the next election, or may sell their shares.[2]

§ 546. *Dividends can usually be made only from profits — Exceptions to this rule — What are profits which may be used for dividends.* — As against the dissent of stockholders or creditors, a dividend can lawfully be made only out of profits. The payment of it must leave the capital stock of the company intact and unimpaired, or the dividend itself will be held illegal.[3] A contract of directors to pay a dividend as a debt at fixed intervals, being in reality a preferred dividend, cannot be enforced either at law or in equity, except out of net profits, like other dividends.[4] An agreement of the corporation with a stockholder to pay to him in dividends the amount he pays for the stock cannot be enforced as an

dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal and void; and inasmuch as the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. The court ordered a repayment of the dividends and a distribution thereof among the stockholders. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892); Brown *v.* Buffalo, etc. R. R., 27 Hun, 342 (1882). See also Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885). In this case there was a contract that the net profits should be divided annually. Scott *v.* Eagle Fire Co., 7 Paige, 198 (1838); Pratt *v.* Pratt, 33 Conn. 446 (1866); Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875). Upon a sale of all the property of the corporation the directors may be compelled to declare a dividend. Cramer *v.* Bird, L. R. 6 Eq. 143 (1868). A stockholder cannot sue for profits until a dividend is declared. Beveridge *v.* New York, etc. R. R., 112 N. Y. 1 (1889). Where an employee gives his note in payment for subscription for stock, such note to be paid out of future dividends, the court will hold that the note has been paid when the dividends were earned, but, for the purpose of defrauding the subscriber, were not declared. Morey *v.* Fish, etc. Co., 84 N. W. Rep. 862 (Wis. 1901). A lawyer having a contract with a corporation that he should receive five per cent. of its net earnings may enforce the agreement by a suit in equity where net earnings exist and the directors ignore the contract. Dupignac *v.* Bernstrom, 37 N. Y. Misc. Rep. 678 (1902); aff'd, 76 N. Y. App. Div. 105.

[1] Scott *v.* Eagle Fire Co., 7 Paige, 198 (1838).

[2] Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844).

[3] Lockhart *v.* Van Alstyne, 31 Mich. 76 (1875); Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207, 210 (1878). See also § 272, *supra*, and cases in notes to this section. As to what constitutes a payment of dividends out of capital, see 3 Ry. & Corp. L. J. 409, reviewing English decisions.

[4] Painesville, etc. R. R. *v.* King, 17 Ohio St. 534 (1867). See also ch. XVI, *supra*.

obligation of the corporation.[1] A company may, however, legally pay interest on such part of the subscription as is paid in before required by calls. Such interest may be paid although there are no profits.[2] An agreement by which some of the directors of a company sell their stock to the remaining stockholders, who take pay therefor from the assets of the corporation, is not illegal if all the stockholders assent and the corporation is not injured.[3] Where

[1] Smith v. Alabama, etc. Assoc., 123 Ala. 538 (1899). See also § 544, *supra.*

[2] Lock v. Queensland, etc. Co., [1896] A. C. 461.

[3] Raymond v. Colton, 104 Fed. Rep. 219 (1900), holding also that the assent of a few minor stockholders whose stock was given to them may be presumed, in case they have not objected to an agreement whereby some of the stockholders sell their stock to the others and take their pay from the corporation itself and resign their offices and substitute new parties as directors. See also §§ 548, 671, *infra,* and § 535, *supra.* In New York, however, the Penal Code prohibits such a dividend. Penal Code, § 594. In the case of First National Bank, etc. v. Winchester, 119 Ala. 168 (1898), where a private corporation had but four stockholders and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation and secured by mortgage on the corporate property, the court held that the note was not enforcible against the corporation, but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with notice of the facts. Approving Swift v. Smith, 65 Md. 428 (1886); 121 Fed. Rep. 956.

Where three persons have formed a corporation and transferred a patent to it for all its capital stock, and are the sole stockholders, there being no creditors, they may purchase the patent back and give the corporation their note for the par value of the whole capital stock. Although the corporation subsequently becomes insolvent the transaction cannot be impeached. Skinner v. Smith, 56 Hun, 437 (1890); aff'd, 134 N. Y. 240 (1892). It is legal for a coal corporation, with the assent of all its stockholders, to sell all its property to its president, and for him to pay therefor in cash and by a mortgage on the property so purchased, he also agreeing to pay all the debts of the company. Payment was made directly to the stockholders, and they transferred their stock to him in addition to the transfer of the property. A subsequent creditor of the company who knew all the facts cannot complain. Parke, etc. Co. v. Terre Haute, etc. Co., 129 Ind. 73 (1891); 93 N. W. Rep. 1024.

Practically there was a division of the corporate assets among the stockholders in Boston, etc. Co. v. Bankers', etc. Co., 36 Fed. Rep. 288; aff'd *sub nom.* United, etc. Co. v. Boston, etc. Co., 147 U. S. 431 (1893). In this case the usual and simple process of one company selling all its property to the other company and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation.

Although a corporation sells all its property to an individual for purchase-money mortgage bonds, and distributes these bonds among its stockholders,

the sole owner of the stock of a corporation executes the note of the corporation for his individual indebtedness, no one but the creditors of the corporation can complain.[1] Where a few persons own all the stock of a company, and use the profits for personal expenses and miscellaneous purposes, irrespective of the corporation, all the stockholders knowing thereof and assenting thereto, a policy of insurance issued to one of them is his, even though the premiums were paid out of the corporate profits, it being shown that all this was done while the corporation was solvent, and that no rights of creditors then intervened, and that all the debts represented by the receiver arose subsequently.[2] Even though a bond dividend results in the impairing of the capital stock, the court will not interfere if no harm can come from it.[3] A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability.[4]

In view of the rule that dividends can be made only from prof-

without paying the creditors, nevertheless a *bona fide* purchaser of such bonds is protected as against the corporate creditors. A former decree in a court of equity against the trustee of the mortgage in regard to the matter does not bind the bondholders, although a suit at law against the trustee would have bound them. Lebeck *v.* Ft. Payne Bank, 115 Ala. 447 (1897). Where a corporation distributes all its assets among its stockholders without paying the debts, a corporate creditor may hold them liable, but he must first obtain a judgment against the corporation, and execution must be returned unsatisfied. Lamar *v.* Allison, 101 Ga. 270 (1897). See 72 S. W. Rep. 669.

Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. Saranac, etc. R. R. *v.* Arnold, 167 N. Y. 368 (1901).

Where the directors, with the consent and knowledge of all the stockholders, there being no creditors, pay a part of the capital stock to the stockholders by way of dividends, and afterwards the directors are compelled to pay back such sums in order to liquidate subsequent debts, the directors may recover from the stockholders the sums so paid to the latter. Moxham *v.* Grant, [1899] 1 Q. B. 480; aff'd, [1900] 1 Q. B. 88.

Under the New Hampshire statute of 1844 to the effect that the state should be entitled to the net profits of railroads in excess of ten per cent. per annum on the money invested by the stockholders, the state must do more than prove that more than ten per cent. dividends have been paid to the stockholders. The state must prove that the excess came from the earnings of the road and was not a division of the capital or derived from some source other than tolls paid by the public. State *v.* Manchester, etc. R. R., 70 N. H. 421 (1901).

[1] Millsaps *v.* Merchants', etc. Bank, 71 Miss. 361 (1893).

[2] Little *v.* Garabrant, 90 Hun, 404 (1895); aff'd, 153 N. Y. 661.

[3] Chaffee *v.* Rutland R. R., 55 Vt. 110 (1882).

[4] People *v.* Barker, 141 N. Y. 251 (1894).

its, it becomes important to ascertain what part of the income of a corporation constitutes "profits" which may be used for a dividend. This question has caused the courts considerable difficulty. There have been various definitions, explanations, and different states of facts involved in the cases which have come before the courts. The supreme court of the United States has said that "the term 'profits,' out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans."[1] An English court says that profits are "the excess of the current gains over the working expenses as shown by revenue accounts as distinguished from capital accounts."[2] A clear idea of what constitutes profits available for dividends can be obtained only by a study of the cases themselves.[3]

[1] Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486 (1894).

[2] *Re* London & Gen. Bank, 72 L. T. Rep. 227, 229 (1894); aff'd, [1895] 2 Ch. 166, 673. The House of Lords in Dovey, etc. *v.* Cory, [1901] A. C. 477, said: "Even the distinction between fixed and floating capital which in an abstract treatise like Adam Smith's Wealth of Nations is appropriate enough, may, with reference to a concrete case, be quite inappropriate. It is easy to lay down as an abstract proposition that you must not pay dividends out of capital, but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion, but as an illustration of what difficulties may arise, the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnership, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve their ruin. On the other hand, companies cannot at their will and without the precautions enforced by the statute reduce their capital; but what are profits and what is capital may be difficult and sometimes an almost impossible problem to solve." "There is no hard-and-fast rule by which the company can determine what is capital and what profit. It may be safely said that what losses can be properly charged to capital and what to income is a matter for business men to determine, and it is often a matter on which the opinion of honest and competent men will differ. . . . There is no single definition of the word 'profits' which will fit all cases." Bond *v.* Barrow, etc. Co., 86 L. T. Rep. 10 (1902).

[3] "Net earnings are, properly, the gross receipts, less the expenses of operating the road to earn such receipts. Interest on debts is paid out of what thus remains; that is, out of the net earnings. Many other liabilities are paid out of the net earnings. When all liabilities are paid, either out of the gross receipts or out of the net earnings, the remainder is the profit of the shareholders to go towards dividends, which in that way are paid out of the net earnings." St. John *v.* Erie Ry., 10 Blatchf. 271, 279 (1872); s. c., 21 Fed. Cas. 167; s. c., aff'd, 22 Wall. 136 (1874);

There are some general principles connected with this subject which have been established by the adjudications. It is not necessary for a railroad or other corporation to use its profits to pay its funded or bonded debt instead of using those profits for a dividend.[1] But it is necessary to pay the interest on such bonded debt before any dividend is declared.[2]

Warren *v.* King, 108 U. S. 389 (1883); Van Dyck *v.* McQuade, 86 N. Y. 38, 47 (1881). "Popularly speaking, the net receipts of a business are its profits." Eyster *v.* Centennial Board, 94 U. S. 500 (1876). "Surplus earnings" are said to be the moneys available for dividends. Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 191 (1883). "Net earnings" is a term synonymous with "net income," and also "net income" as used in the statute under consideration. Phillips *v.* Eastern R. R., 138 Mass. 122 (1884). In Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885), it is said that the term "net earnings" does not imply that the company is wholly out of debt. In Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114 (1885), it is said that profits mean "the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution;" and further, that bills receivable constitute a part of the assets or net profits, but are not to be considered as the basis of a dividend, unless they can be sold without material loss. In the following cases the term "net profits," or an equivalent phrase, is defined: Coltness Iron Co. *v.* Black, L. R. 6 App. Cas. 315 (1881); New York, etc. R. R. *v.* Nickals, 119 U. S. 296 (1886). In Richardson *v.* Buhl, 77 Mich. 632 (1889), the court approved of the following statement: "That the first thing to be done by any manufacturer who would ascertain his net earnings during the preceding year is to take a careful inventory of

[1] A company has power to and does raise its capital both by stock and by borrowing. "They expend that money in executing the works, and, the works having been executed, the capital of the company remains in the shape of the station-houses, the permanent way, the warehouses, and everything else which requires expenditure of capital. The shareholders . . . are not to be told that all these things are to be paid for before they are to have any dividends out of the income." Mills *v.* Northern Ry., L. R. 5 Ch. 621, 631 (1870). For a learned and very satisfactory discussion of when net earnings are to be retained for the purpose of accumulating a fund to pay a corporate debt not yet due, see Hazeltine *v.* Belfast, etc. R. R., 79 Me. 411 (1887). In Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 188 (1843), the court said that all interest must be paid out of profits, and should not be charged to construction account; also that a sinking fund should be provided and an annual contribution made to it out of the profits.

[2] Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486, 498 (1894); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 188 (1843). A dividend cannot properly be based on a statement which includes accrued interest with no allowance for interest on liabilities; outstanding accounts with no allowance for bad debts; and expense for perfecting a machine, it not being a success. Hubbard *v.* Weare, 79 Iowa, 678 (1890). Whether the interest on debentures can be legally charged upon the capital account of the company, the revenue available for dividend being thereby increased, was not decided in Bloxam *v.* Metropolitan Ry., L. R. 3 Ch. 337, 344, 350 (1868), but a preliminary injunction against the dividend was granted.

The floating debt should be paid or funded before a dividend is declared.[1] A corporation often owes large debts and still has its

what he has left, including his plant and machinery, and then make just and full allowances for all losses and shrinkages of every kind that he has suffered in his property during the year, and for all expenses of every kind, ordinary or extraordinary, that have occurred during the year; and, having made such inventory, and deducted such losses and shrinkage of every kind, his net earnings will be the difference between all his investments in his business and all his expenses of every kind on the one hand, and this new inventory, with the reductions properly made, and all that he has received of every kind, on the other hand; and if his books are properly kept and proper deductions made, these net earnings will finally appear on the balance sheet to the credit of the profit-and-loss account." In Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 187 (1843), it is held that capital paid in on stock which is afterwards forfeited does not thereby become profits and liable to be distributed as a dividend, also that money paid in as capital must remain and be treated and expended as capital, whether the stock that represents it is forfeited or not. To distribute such money as profits is to squander and dissipate the capital stock. "Gross earnings" include earnings of the railroad through a transfer company operated by it. Dardanelle, etc. Ry. *v.* Shinn, 52 Ark. 93 (1889). "The assets, resources, and funds of the corporation must consist of cash on hand and other property, and, if such assets exceed the liabilities, a dividend can be lawfully declared; in other words, a profit exists." Hubbard *v.* Weare, 79 Iowa, 678 (1890); Miller *v.* Bradish, 69 Iowa, 278 (1886). See also McDougall *v.* Jersey, etc. Co., 2 Hem. & M. 528 (1864).

[1] The funded debt need not be paid before dividends are declared, but "any debts which have been incurred and which are due from the directors or the company, either for steam-engines, for rails, for completing stations, or the like, which ought to have been and would have been paid at the time, had the defendants possessed the necessary funds for that purpose, those are so many deductions from the profits, which, in my opinion, are not ascertained till the whole of them are paid." Corry *v.* Londonderry, etc. Ry., 29 Beav. 263, 273 (1860). However, in Stevens *v.* South Devon Ry., 9 Hare, 313, 326 (1851), a stockholder failed in his suit to enjoin dividends until the floating debt was paid. The court said: "I am of opinion that the court ought not, upon this ground, to interfere by injunction. . . . I think also that the question upon this third point is one of internal management, with which the court cannot interfere." In Belfast, etc. R. R. *v.* Belfast, 77 Me. 445 (1885), the court said: "Net earnings are the gross receipts less the expenses of operating the road to earn such receipts; also less the interest on the bonded, funded, permanent, or standing debt; also floating debts 'which it is not wise and prudent to place in the form of a funded debt or to postpone for later payment;' also an annual contribution to a sinking fund to pay the funded debt, when the condition of the company renders it expedient, as where the company will at some future time earn only its operating expenses. The court also said that whether the floating debt should be paid and a contribution be made to a sinking fund 'depends upon the financial resources and abilities of the corporation and the prospects of its road,' and further, that the cost of construction may be charged to the capital-stock account."

capital stock intact. So also outstanding and disputed claims need not be first paid.[1]

A proper sum must first be expended or set aside for repairs and reconstruction to replace depreciation due to wear and tear.[2] In other words, the fund available for dividends is ascertained by taking into account the cost of repairs and a reasonable allowance for depreciation, giving credit for all actual permanent improvements.[3]

[1] The court will not enjoin a dividend where the company shows that it has the necessary profits, even though there are outstanding claims on illegally issued stock. Carpenter *v.* New York, etc. R. R., 5 Abb. Pr. 277 (1857). Where the company denies that the complainant is a stockholder, a preliminary injunction falls. Blatchford *v.* New York, etc. R. R., 5 Abb. Pr. 276 (1857). Directors are not liable to replace dividends declared (by reason of a statute making them so liable if the dividends are not "from the surplus profits"), although dividends were declared while the company, being engaged in mining, assumed a mortgage debt in buying additional property, a sinking fund being begun to meet that liability gradually, and although the money to pay the dividend was borrowed, money to that amount having been put into improvements, and although losses due to an injunction against using a stream of water were not at once charged up to operating expense. Excelsior, etc. Co. *v.* Pierce, 90 Cal. 131 (1891).

[2] In Davison *v.* Gillies, L. R. 16 Ch. D. 347, note (1879), the court, at the instance of a stockholder, enjoined the declaration of a dividend on the ground that the street-railway tracks of the company had become worn out, and needed very expensive repairs, for which no provision had been made by the company, and that this capital so used up must be restored before a dividend was declared. The by-laws prohibited dividends except from profits. The court said: "A tramway company lay down a new tramway. Of course the ordinary wear and tear of the rails and sleepers, and so on, causes a sum of money to be required from year to year in repairs. It may or may not be desirable to do the repairs all at once; but if at the end of the first year the line of tramway is still in so good a state of repair that it requires nothing to be laid out on it for repairs in that year, still, before you can ascertain the net profits, a sum of money ought to be set aside as representing the amount in which the wear and tear of the line has, I may say, so far depreciated it in value as that that sum will be required for the next year or next two years. . . . I should think no commercial man would doubt that this is the right course — that he must not calculate net profits until he has provided for all the ordinary repairs and wear and tear occasioned by his business. . . . That being so, it appears to me that you can have no net profits unless this sum has been set aside. When you come to the next year, or the third or fourth year, what happens is this: as the line gets older the amount required for repairs increases. If you had done what you ought to have done, that is, set aside every year the sum necessary to make good the wear and tear in that year, then in the following years you would have a fund sufficient to meet the extra cost." See also, as to construction account, Mackintosh *v.* Flint, etc. R. R., 34 Fed. Rep. 583 (1888).

[3] Depreciation at the rate of two per cent. a year was charged in one case, but the directors were held liable under the New Jersey statute for illegally declaring dividends. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894).

But in the case of a company owning patent rights, or of a mining company whose product when once used can never be replaced, it

"The following quotation from Greene on "Corporation Finance" (1897, pp. 83, 114) will show how an auditor would treat depreciation. He says:

"One of the perplexing things in the financial management of a large manufacturing or trading company is the treatment of the expenditures for the care of the plant. A depreciation account in some shape must be kept by every company or firm in business. The real estate may decline in value, and in any case, in any progressing concern, money will be required to be spent each year to adjust the buildings more perfectly to the requirements of the business, and yet these adjustments may not add anything to the salable value of the property, and should not, therefore, be added in the accounts to the company's investment in real estate. In like manner, machinery will wear out, and is always subject to the danger of new inventions, which may render the old machinery practically worthless. It is not easy to foresee when a new outfit will be in part or in whole required, though experience soon places a limit to the number of years in which a given set of machinery may be useful. The proper course in these cases is always the conservative one. The corporation should estimate the probabilities of depreciation always against itself, and set aside yearly such sums from its profits as will suffice to renew so much of the plant as may be expected to wear out or to become useless in a given time. Unless this depreciation fund is carefully thought out and its separation from profits rigidly insisted upon, the shareholders of the corporation and perhaps the bondholders may in the course of years find that their securities cover a property of little or no business value. If certain sums are not set aside to meet this depreciation, and if for this reason dividends are paid larger than would otherwise be the case, to the extent to which this is carried, the returns received by the shareholders are not dividends, but their capital returned to them in piece-meal. These depreciation sums should be real and not merely bookkeeping liabilities of the company to itself.

"Modern corporation accounting requires that in theory a sharp line of distinction should be drawn between outlays which may be considered a part of the regular working expenses, and those which are chargeable to an increased investment in the business. In theory the former should be deducted from the gross earnings before the net revenue is determined, while the latter may be met by an increased issue of bonds or shares. There is no doubt of the correctness of this principle in general, but in its practical application it is subject to great modification. English shareholders in American corporations usually insist upon such a system of accounting as divides the expenditures strictly according to this rule; and such indeed is the general practice in Great Britain. By charging to capital every item small and large which could by any possibility be construed to be a betterment, the British railways have increased their capitalization until they are dependent for a continuance of interest payments on good traffics year by year. Thus far no harm has come to these railways from this policy, because the fluctuations in the volume of their traffics have been comparatively slight.

"But in the United States more caution must be observed in this matter. From the very nature of the case, business of all kinds in a developing country must be more subject to changes in profitableness than in older countries. The very character of the American people, energetic and progressive, makes business all the more liable to such fluctuations. Bad years follow good years in every line of American industry, although differences are less violent in those trades which are the longest established, and among those companies which have been in operation long enough to render their business comparatively stable. The principle, therefore, of charging all so-called betterments to capital and meeting the cost from the sale of bonds or shares, requires modification according to the circumstances of each particular company. The more fluctuating the volume of business has been or is likely to be, the more important is it that in one form or another a part of the profits in prosperous years should be withheld from the shareholders and put into the property or set aside for its renewal. To those who wish a working principle to distinguish the proper items to be charged to capital account in the actual management of American corporations, railway and other, the following definition is suggested: No additions to the property, either to the real estate or to the machinery (if a manufacturing company), or to the road-bed and track (if a railway company), should be considered betterments and charged to capital, unless they increase the productivity or earning capacity of the plant. Under this rule the purchase of additional equipment for a railway would be an expenditure which could conservatively be met by the issue of bonds or equipment notes, because such purchases would enable a larger volume of traffic to be handled; on the other hand, the replacement of a wooden bridge by an iron one would not be a proper charge to capital, under our definition, unless it was one of a series of expenditures deliberately resolved upon in order that heavier trains could be run and a

is not necessary to set aside funds for the purpose of purchasing new patents or a new mine.[1]

larger volume of traffic handled, thus increasing the revenues of the company—an increase which our theory demands should be clearly seen to be possible after the various amounts of capital set aside for this purpose had been spent. The same rule might be applied to corporations other than railways; the safe course is to charge against revenues (possibly through the profit and loss account) the cost of all additions to the property which do not increase the output or decrease the cost of production. Yet any rule or any principle in so delicate a matter can properly be applied in each case only after a careful study of all the circumstances, including the business of past years and the prospect for the future. . . .

"Every active concern must in some shape keep a depreciation account, to which shall be charged certain sums for renewal of machinery, etc., before profits are divided. If this is not done, the company will at the end find itself without plant and without money."

[1] A mining or patent-right company may make dividends without setting aside sinking funds to meet the gradual consumption of capital stock. The argument to the contrary "leads to the conclusion that the most prosperous mining corporation, doing the heaviest business and paying the largest dividends, is suffering from the greatest impairment of capital and has drifted furthest towards final and hopeless insolvency." People, etc. *v.* Roberts, 156 N. Y. 585 (1898). In the case of Bond *v.* Barrow, etc. Co., 86 L. T. Rep. 10 (1902), the court said that it had not been decided that every company owning wasting property need create a depreciation fund, but it had been decided only that some companies with wasting assets need not have a depreciation fund.

A company owning a mine, lease, or patent may declare dividends out of its net proceeds, although the necessary result is that that much is permanently taken away from the substance of the estate. Excelsior, etc. Co. *v.* Pierce, 90 Cal. 131 (1891). Judge Lindley, in Verner *v.* General, etc. Trust, [1894] 2 Ch. 239, 266, said: "But the word 'profits' is by no means free from ambiguity. The law is much more accurately expressed by saying that dividends cannot be paid out of capital than by saying that they can only be paid out of profits. The last expression leads to the inference that the capital must always be kept up and be represented by assets which, if sold, would produce it; and this is more than is required by law. Perhaps the shortest way of expressing the distinction which I am endeavoring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but that floating or circulating capital must be kept up, as otherwise it will enter into, and form part of, such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law." In Lambert *v.* Neuchatel Asphalte Co., 51 L. J. (Ch.) 882 (1882), a stockholder sought to enjoin a dividend on the ground that the beds of asphalt belonging to the company were being consumed by the company, and that funds sufficient to replace this consumption should be set aside before any dividend was declared. Otherwise the capital would gradually be entirely used up. The court refused the injunction, inasmuch as the by-laws of the company gave absolute discretion to the stockholders to determine the net profits. No creditor's rights were involved in the case.

A very full and careful discussion of the right to declare dividends out of a mining property is to be found in Lee *v.* Neuchatel Asphalte Co., L. R. 41 Ch. D. 1, 20, 22, 24 (1889). In that case, however, the mines were at the time of the litigation more valuable than at the time when the company was formed, and it is to be noticed that the rules laid down expressly assumed that enough property existed to pay all cred-

In estimating the profits for a year for the purpose of declaring a dividend, it is not necessary to take into account the decrease in the value of the assets and the impairment of the capital stock of the company prior to that year. The fact that in a year prior to the declaration of the dividend some portion of the capital has been lost and has not since been made good affords no ground for restraining the payment of a dividend out of profits subsequently earned.[1] A corporation "which has lost part of its capital can law-

itors after declaring the dividend. The court said, per Lindley, J.:

"It is obvious with respect to such property, as with respect to various other properties of a like kind, mines and quarries and so on, every ton of stuff which you get out of that which you have bought with your capital may, from one point of view, be considered as embodying and containing a small portion of your capital, and that if you sell it and divide the proceeds you divide some portion of that which you have spent your capital in acquiring. It may be represented that that is a return of capital. All I can say is, if that is a return of capital, it appears to me not to be such a return of capital as is prohibited by law. . . .

"As I pointed out in the course of the argument, and I repeat now, suppose a company is formed to start a daily newspaper; supposing it sinks £250,000 before the receipts from sales and advertisements equal the current expenses, and supposing it then goes on, is it to be said that the company must come to a stop, or that it cannot divide profits until it has replaced its £250,000, which has been sunk in building up a property which if put up for sale would perhaps not yield £10,000? That is a business matter left to business men. If they think their prospects of success are considerable, so long as they pay their creditors there is no reason why they should not go on and divide profits, so far as I can see, although every shilling of the capital may be lost. It may be a perfectly flourishing concern, and the contrary view, I think, is to be traced to this that there is a sort of notion that the company is debtor to capital. In an accountant's point of view it is quite right, in order to see how you stand, to put down company debtor to capital. But the company do not owe the capital. What it means is simply this: that if you want to find out how you stand, whether you have lost your money or not, you must bring your capital into account somehow or other. . . .

"If a company is formed to acquire and work a property of a wasting nature, for example, a mine, a quarry, or a patent, the capital expended in acquiring the property may be regarded as sunk and gone, and if the company retains assets sufficient to pay its debts, it appears to me that there is nothing whatever in the act to prevent any excess of money obtained by working the property over the cost of working it from being divided amongst the shareholders; and this, in my opinion, is true although some portion of the property itself is sold, and in some sense the capital is thereby diminished. . . .

"But it is, I think, a misapprehension to say that dividing the surplus after payment of expenses of the produce of your wasting property is a return of capital in any such sense as is forbidden by the act."

The court held consequently that the stockholder's suit to enjoin the dividend must fail.

[1] Hence where, in 1882, £72,000 was charged off for bad debts, but this was offset by credit for £69,000 for increase

fully declare or pay a dividend without first making good the capital which has been lost."[1] Thus, although a mining company for several years is obliged to pay the interest on its debts out of the capital stock, nevertheless in subsequent years, when large profits are earned, it may use such profits for dividends in any year after

in the value of land owned by the company, this transaction was not to be considered in 1885 in ascertaining the profits of 1885. It is immaterial whether the alleged increase in the value of the land was correct or not. Bolton *v.* Natal Land, etc. Co., [1892] 2 Ch. 124. Though the capital stock has been impaired in time past, it has been held that dividends may be declared out of profits subsequently earned without setting them aside to restore the lost capital. Healey, Company Law & Pr. (3d ed. 1894), 138. Where a bank sells its business for a certain sum, and subsequently buys back a portion of it for another sum, it may declare a dividend of the surplus that remains after deducting from the first-mentioned sum the second-mentioned sum, and also the capital stock. Lubbock *v.* British Bank, etc., [1892] 2 Ch. 198. At common law a company may pay a dividend, even though its capital stock has been impaired in past years. Where losses incurred by a banking company during the year are written off, and the balance of the receipts in each year over the outgoings in the same year, after making some allowance for bad debts and deductions for sums carried over to a reserve fund, is treated as the profit of that year, and is divided as dividends without making any further provision for the losses of previous years, the directors are not liable on the ground that the dividends were paid out of capital, although this method of procedure would ultimately exhaust the paid-up capital of the company. The discretion of the managers in fixing the losses to be charged to capital and those to be charged to income is not inquired into by the courts, unless obviously improper charges to capital have been made, in order to increase apparent profits. The directors are not personally liable unless they were culpably or grossly negligent in the matter. Even though a director knew his name was signed to a report to the stockholders after he has resigned, yet he is not liable, where he took no part in drawing the report or in recommending the dividend based thereon. It seems that an improper dividend may be recovered from the directors, even though the creditors have all been paid and the stockholders will have the benefit of the recovery, they having been ignorant of the fact that the dividends were paid from capital stock. *Re* National Bank of Wales, [1899] 2 Ch. 629, rev'g 79 L. T. Rep. 667. The House of Lords in Dovey, etc. *v.* Cory, [1901] A. C. 477, declined to discuss the question as to whether the losses in one year must be made up out of the following year's profits, that question not being directly involved in the case.

[1] Verner *v.* General, etc. Trust, [1894] 2 Ch. 239. Where the value of the assets of a solvent company has fallen below the nominal amount of the capital stock, the company, in the absence of any special provisions in its articles or of a contract binding the company, is under no obligation to make good such depreciation in the value of the assets before declaring a dividend out of the profits. Depreciation in the value of the lease and good-will of a company is a loss of "fixed" as distinguished from "floating" capital. The balance sheet of a company cannot therefore be impeached on the ground that it does not charge anything against revenue in respect of depreciation of good-will. Wilmer *v.* McNamara & Co., [1895] 2 Ch. 245.

paying the interest on the debt for that year. The company need not first restore the capital stock.[1]

In Connecticut it is held that dividends may be declared on preferred stock where the net earnings since the issue of the stock are sufficient, even though prior to such issue the capital stock had been impaired,[2] but that ordinarily, in declaring dividends, the directors are not justified in assuming that the value of property which was originally received in payment for stock is still worth that value, and if such property at the time of the dividend was not actually worth the par value of the stock which was issued for it, the dividend is illegal, and a director receiving such dividend as a stockholder may be compelled to pay it back at the instance of a receiver of the corporation.[3] This rule is of course subject to statutory restrictions, as, for instance, in New York state, where dividends can be made only from "surplus profits."[4] A dividend may be declared although the company has not yet completed its works.[5] In the case of railroads, the cost of additional rolling-stock and improvements may be charged to capital account, and need not be paid before a dividend is declared.[6] Where one company buys out another and agrees to pay a certain salary to an officer of the latter, or a lump sum in lieu thereof, such lump sum, if paid, is a part of the capital stock, and need not be considered as expenses.[7]

Insurance companies cannot declare dividends out of unearned

[1] Bosanquet *v.* St. John, etc., Ltd., 77 L. T. Rep. 206 (1897).

[2] Cotting *v.* New York, etc. R. R., 54 Conn. 156 (1886).

[3] Davenport *v.* Lines, 72 Conn. 118 (1899).

[4] See L. 1892, ch. 688, § 23, and Penal Code, § 594.

[5] In Browne *v.* Monmouthshire Ry., 13 Beav. 32 (1851), the court refused to enjoin a company from declaring a dividend, the only ground of complaint being that the company had not yet completed its works. Penalties due by reason of a contractor not completing his contract within a specified time may be used for dividends. Such penalties, however, may be released. Alcoy, etc. Co. *v.* Greenhill, 79 L. T. Rep. 257 (1898).

[6] Rolling-stock may be carried to capital account instead of being charged to operating expense. Mills *v.* Northern Ry., L. R. 5 Ch. App. 621 (1870). For a definition of "net earnings" as used in the federal statutes in regard to the government's claims on the Pacific railroads, see Union Pacific R. R. *v.* U. S., 99 U. S. 402 (1878); U. S. *v.* Central Pac. R. R., 99 U. S. 449 (1878); U. S. *v.* Kansas Pac. Ry., 99 U. S. 455 (1878); U. S. *v.* Sioux City, etc. R. R., 99 U. S. 491 (1878). Although ordinarily from the gross earnings there should be deducted "a reasonable amount for betterments and improvements, rendered necessary by the gradual increase of traffic, the better discharge of business, and the public accommodation," in arriving at the net earnings under the Thurman act relative to the Pacific railroads, no such deductions are to be made. U. S. *v.* Central Pac. R. R., 138 U. S. 84 (1891).

[7] Royal Ins. Co. *v.* Watson, [1897] A. C. 1.

premiums.[1] Banks cannot declare dividends out of interest not yet received.[2] The question of what constitutes profits applicable to dividends arises often in connection with preferred stock.[3]

Profits earned and invested in times of prosperity may properly be paid out as dividends subsequently and at a time when no dividends have been earned.[4] When the company has used profits for improvements, it may lawfully borrow an equivalent sum of money for the purpose of a dividend.[5] And it may properly borrow money to pay a dividend if, upon a fair estimate of its assets and liabilities, it has assets in excess of its liabilities and capital stock equal to the amount of the proposed dividend.[6] The subsequent insolvency of the corporation does not invalidate a dividend declared when there were net profits.[7] The English authorities go

[1] Unearned premiums received by an insurance company, on which the risks are still running, are not surplus profits out of which dividends can legally be made, there not being a sufficient surplus on hand in excess of the capital stock to meet the probable losses on risks not yet terminated. De Peyster *v.* American Fire Ins. Co., 6 Paige, 486 (1837). See also Scott *v.* Eagle Fire Co., 7 Paige, 198 (1838); Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412 (1856).

[2] "Money earned as interest, however well secured, or certain to be eventually paid, cannot in fact be distributed as dividends to stockholders, and does not constitute surplus profits." People *v.* San Francisco Sav. Union, 72 Cal. 199 (1887). In Iowa it has been held that where a bank with a capital of $106,860; assets of $156,904; liabilities of $56,065, declares and pays a dividend of ten per cent., *i. e.*, $10,686, the corporate creditors could not compel the stockholders to return the dividend. Miller *v.* Bradish, 69 Iowa, 278 (1886). In *Re* London & Gen. Bank, 72 L. T. Rep. 227, 230 (1894); aff'd, [1895] 2 Ch. 166, 673, the court intimates "that nothing ought to be included as annual profit which could not be realized as a profit if need should be," the court having before it the question of interest earned but not collected. Where the directors in declaring dividends include as good assets renewed notes, it may be for the jury to decide whether such renewed notes were in the due course of business or were taken merely to cover defaulted and bad debts. Dykman *v.* Keeney, 34 N. Y. App. Div. 45, (1898).

[3] See ch. XVI, *supra.*

[4] Mills *v.* Northern Ry. etc. Co., L. R. 5 Ch. 621 (1870); Hoole *v.* Great Western Ry., L. R. 3 Ch. 262 (1867); Beers *v.* Bridgeport Spring Co., 42 Conn. 17 (1875); *Re* Mercantile Trading Co., L. R. 4 Ch. 475 (1869).

[5] Mills *v.* Northern Ry. etc. Co., L. R. 5 Ch. 621 (1870); *Re* Mercantile Trading Co., L. R. 4 Ch. 475, 492 (1869). A dividend may be declared if the revenue account shows profits, even though such profits are not on hand in the way of cash. *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673.

[6] *Re* Mercantile Trading Co., L. R. 4 Ch. 475 (1869). "A company is quite as competent to declare dividends out of property which is invested for the time being in buildings, or anything else, as it is out of cash in hand, and it is not at all necessary that a company, any more than an individual, should have cash at the bank on which he can draw in order to declare dividends." Municipal, etc. Land Co. *v.* Pollington, 63 L. T. Rep. 238 (1890).

[7] Reid *v.* Eatonton Mfg. Co., 40 Ga. 98 (1869); Le Roy *v.* Globe Ins. Co., 2

further and hold that where profits have been earned and properly entered as profits on the corporation books they belong to the stockholders, even though thereafter the corporation becomes insolvent and is wound up before such profits are declared to be and set apart as dividends.[1] And even though the business is a hazardous one, money need not be set aside for possible disasters.[2]

Upon a reduction of the capital stock the surplus funds over and above the full amount of the capital stock as reduced may be divided among the stockholders, the only restriction being that such a distribution must leave the reduced capital stock entire and unimpaired. A stockholder may insist upon a division of such a surplus.[3] The question of dividends where one road is consolidated with another is considered elsewhere.[4]

§ 547. *A stockholder may enjoin an illegal dividend.*— A court of equity will, upon the application of a stockholder, enjoin an attempt to distribute in dividends any part of the capital stock.[5] But the

Edw. Ch. 637 (1836). In deciding whether a dividend was rightfully made, the transaction must be viewed from the standpoint of that time, and not in the light of subsequent events. Notes or overdrafts by persons then considered abundantly good, included among the corporate assets when the dividend was declared and paid, should not be regarded as losses sustained by the corporation because they afterwards proved to be unavailable. Main *v.* Mills, 6 Biss. 98 (1874); s. c., 16 Fed. Cas. 506. *Cf.* Flitcroft's Case, L. R. 21 Ch. D. 519 (1882), where the directors figured in what they knew were bad debts.

1 The creditors of the corporation are entitled to the corpus of the estate, but not to any profits. If there is preferred stock, such profits go to that stock. Bishop *v.* Smyrna, etc. Ry., [1895] 2 Ch. 265.

2 A balance sheet sustaining a dividend is upheld where the business is extra-hazardous, such as blockade-running, and such dividend need not be refunded, even though the blockade runners are lost and other assets turn out to be worthless. *Re* Mercantile Trading Co., L. R. 4 Ch. App. 475 (1869).

3 Seeley *v.* New York, etc. Bank, 8 Daly, 400 (1878); s. c., Thompson Nat. Bank Cas., 804; aff'd, 78 N. Y. 608 (1879); Strong *v.* Brooklyn Cross-Town R. R., 93 N. Y. 426, 435 (1883). See also § 548, *infra;* Eyster *v.* Centennial Board, 94 U. S. 500 (1876); Parker *v.* Mason, 8 R. I. 427 (1867). Where the capital stock is reduced, and the corporate property over and above the reduced capital stock is distributed among the stockholders, this is not a dividend within the meaning of the New York tax statute. People, etc. *v.* Roberts, 41 N. Y. App. Div. 21 (1899).

4 See § 270, *supra.*

5 Macdougall *v.* Jersey Imperial Hotel Co., 2 Hem. & M. 528 (1864); Bloxam *v.* Metropolitan Ry., L. R. 3 Ch. 337 (1868); Salisbury *v.* Metropolitan Ry., 38 L. J. (Ch.) 249 (1869); Carlisle *v.* Southeastern Ry., 1 Macn. & G. 689 (1850); Ward *v.* Sittingbourne, etc. Ry., L. R. 9 Ch. 488 (1874); Davison *v.* Gillies, L. R. 16 Ch. D. 347, n. (1879). "Dividends can be rightfully paid only out of profits. Corporations are liable to be enjoined by shareholders or creditors from making a distribution in dividends of capital." Mobile, etc. R. R. *v.* Tennessee, 153 U. S. 486 (1894), a dictum. A stockholder has the right to enjoin the payment of a dividend from the capital stock, but the bill for that purpose must be explicit in

courts will not lightly review the decision of the board of directors in regard to whether the necessary profits actually exist.[1] If the dividend has been declared, but not paid, it has been held that all the stockholders must be joined as parties,[2] but this can hardly be held to be sound law.[3] The court will not interfere if neither the stockholders nor the corporate creditors can be injured by the dividend.[4] The courts of one state will not enjoin a corporation created by another state from declaring a dividend, unless a fraud is being perpetrated on citizens of the first-mentioned state,[5] but

its allegations. Coquard *v.* National, etc. Co., 171 Ill. 480 (1898). See also cases in preceding section. By its certificate of incorporation a New Jersey corporation may have power to purchase and retire part or all of its preferred stock, and to issue in payment therefor its bonds or to sell its bonds and use the proceeds to retire such preferred stock, or it may purchase and hold such stock for reissue. The offer to purchase must be made *pro rata* to all the preferred stockholders. Under the reserved rights to amend, alter, or repeal charters, the rights of stockholders among themselves cannot be impaired, except as required by public interest, but, while it is true that the charter constitutes a contract between the stockholders, yet under this reserved power the legislature may authorize existing corporations to purchase and retire preferred stock and issue in lieu thereof mortgage bonds, such amendment being construed to be in behalf of the public interest. Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on the corporation. Berger *v.* United States Steel Corp., 53 Atl. Rep. 68 (N. J. 1902).

1 Where the directors declare a dividend after a proper investigation of the financial position of the company, the court will not lightly interfere with the payment thereof: but where they declare it without proper investigation or professional assistance, and it is called in question, the burden of proof is upon them to show that it is to be fairly paid out of net profits. *Re* County Marine Ins. Co., L. R. 6 Ch. App. 104 (1870). See also Hoole *v.* Great Western Ry., L. R. 3 Ch. App. 262 (1867).

2 A stockholder may file a bill in behalf of himself and other stockholders to enjoin the declaration of dividends where there are no net profits; but where he has not joined all the stockholders as parties, he cannot enjoin the payment of a dividend already declared, even though the time of payment has not yet arrived. Fawcett *v.* Laurie, 1 Dr. & Sm. 192 (1860). To same effect, Carlisle *v.* Southeastern Ry., 1 Macn. & G. 689 (1850). See Browne *v.* Monmouthshire Ry., 13 Beav. 32 (1851); Coates *v.* Nottingham Water-works Co., 30 Beav. 86 (1861).

3 Even though a dividend has been declared, the payment of it may be enjoined at the instance of stockholders, and all the stockholders need not be joined as parties defendant. Marquand *v.* Federal, etc. Co., 95 Fed. Rep. 725 (1899).

4 "Equity would not interfere with a dividend unless it appeared that somebody in particular was hurt or liable to be injured. It would not interfere after all danger had passed, and for the sake of vindicating general principles." Chaffee *v.* Rutland R. R., 55 Vt. 110, 133 (1882); 93 N. W. Rep. 1024.

5 Howell *v.* Chicago, etc. R. R., 51 Barb. 378 (1868). In Massachusetts no equitable relief can be granted against

the United States court sitting in the New York district has power to enjoin the payment of a dividend by a New Jersey corporation where such dividend is illegal.[1] A corporate creditor has no standing in court to enjoin a dividend, even though it will impair the capital stock.[2] But, in certain cases, owners of claims, even though not yet due, may prevent a distribution of capital stock upon a reduction thereof, unless security is given.[3]

§ 548. ***Dividends which impair the capital stock may be illegal, and may be recovered back from the stockholders — Dividends on dissolution.***— As already shown, as against dissenting stockholders and as against corporate creditors a dividend can be lawfully declared only when sufficient net profits have been earned to pay that dividend. Accordingly, a dividend paid wholly or partly from the capital stock may be illegal, and may subject the corporation and the stockholders to serious liability. Hence the rule has been firmly established that, where dividends are paid in whole or in part out of the capital stock, corporate creditors, being such when the dividend was declared, or becoming such at any subsequent time, may, to the extent of their claims, if such claims are not otherwise paid, compel the stockholders to whom the dividend has been paid to refund whatever portion of the dividend was taken out of the capital stock.[4] The supreme court of the United States,

a foreign corporation, which has neither officers nor place of business in that state, to compel the company to declare and pay dividends according to the stipulations of their certificates of preferred stock. Williston *v.* Michigan Southern, etc. R. R., 95 Mass. 400 (1866). See also Berford *v.* New York Iron Mine, 4 N. Y. Supp. 836 (1889).

[1] Marquand *v.* Federal, etc. Co., 95 Fed. Rep. 725 (1899). See also § 734, *infra.*

[2] Mills *v.* Northern Ry. etc. Co., L. R. 5 Ch. App. 621 (1870). See also § 735, *infra.*

[3] *Re* Telegraph Const. Co., L. R. 10 Eq. 384 (1870).

[4] Curran *v.* Arkansas, 15 How. (U. S.) 304 (1853); Railroad Co. *v.* Howard, 7 Wall. 392 (1868); Osgood *v.* Laytin, 48 Barb. 463 (1867); aff'd, 3 Keyes, 521; Johnson *v.* Laflin, 5 Dill. 65, 86, note (1878); aff'd, 103 U. S. 800 (1880); Hastings *v.* Drew, 76 N. Y. 9, 19 (1879); Sagory *v.* Dubois, 3 Sandf. Ch. 466 (1846); Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435; Gratz *v.* Redd, 4 B. Mon. (Ky.) 178 (1843); Bank of St. Mary's *v.* St. John, 25 Ala. 566 (1854); Bartlett *v.* Drew, 57 N. Y. 587 (1874); Heman *v.* Britton, 88 Mo. 549 (1885); Story, Eq. Jur. (13th ed., 1886), § 1252. A stockholder who receives an illegal dividend is liable for it, even though he has paid it over to another person to whom the stock belonged. Finn *v.* Brown, 142 U. S. 56 (1891). Where the stockholders distribute the assets among themselves, a creditor may follow the assets. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498 (1890). The stockholders of a corporation have, in Louisiana, no right to appropriate any part of its assets to pay large salaries to themselves as officers of the company, until all creditors who are not stockholders have been paid. Cochran *v.* Ocean Dry Dock Co., 30 La. Ann. 1365 (1878). In Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412 (1856), it is held that the action to recover the

however, has held that the receiver of a national bank cannot recover a dividend paid to a stockholder, even though it was paid entirely out of capital, where the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and where the bank, at the time such dividend was declared and paid, was not insolvent.[1] But a receiver of a national bank may recover back dividends paid at a time when the bank was insolvent, even though the stockholders did not know of such insolvency, and it seems that a suit in equity lies for that purpose.[2]

A stockholder may by bill in equity compel a return of a dividend paid out of the capital stock.[3] A stockholder, however, who receives dividends wrongfully declared cannot then, as a corporate creditor, hold other stockholders liable on a statutory liability for wrongfully declaring dividends.[4] And a corporate creditor may by his acts be estopped from attacking the dividend.[5] Notes given

dividend in such a case may be maintained by the company or its assigns where the dividend had been paid by mistake. See also, in general, Skrainka *v.* Allen, 7 Mo. App. 434 (1879); Ward *v.* Sittingbourne, etc. Ry., L. R. 9 Ch. App. 488 (1874); Clapp *v.* Peterson, 104 Ill. 26 (1882), holding that the property so withdrawn was liable for the creditor's whole debt and not merely for a *pro rata* share thereof. If a fixed per cent. is drawn out by stockholders instead of a dividend, and this per cent. exceeds the profits, a stockholder, upon the insolvency of the corporation, must pay back the excess received by him. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1890). Creditors may reach shares of stock that the corporation which becomes insolvent has distributed without a dividend. McKusick *v.* Seymour, etc. Co., 48 Minn. 158 (1892).

A payment of the subscription price by what purports to be a dividend or distribution of profits is invalid as against creditors, where such profits did not exist. Gager *v.* Paul, 111 Wis. 638 (1901). A preferred stockholder is liable to corporate creditors for illegal dividends paid on his stock the same as a common stockholder is. American, etc. Co. *v.* Eddy, 89 N. W. Rep. 952 (Mich. 1902).

[1] McDonald *v.* Williams, 174 U. S. 397 (1899). The court held also that "the theory of a trust fund has no application to a case of this kind."

[2] Hayden *v.* Williams, 96 Fed. Rep. 279 (1899). In the case of Hayden *v.* Brown, 94 Fed. Rep. 15 (1899), in a suit by a receiver, judgment was rendered against various Vermont stockholders in a national bank in Nebraska for dividends paid from the capital stock, except so far as recovery was barred by the statute of limitations. See also Fort Payne Bank *v.* Alabama Sanitarium, 103 Ala. 358 (1894); Bingham *v.* Marion T. Co., 61 N. E. Rep. 29 (Ind. 1901); *Re* Denham, L. R. 25 Ch. D. 752 (1883). It has been held in England, however, that where the by-laws provide that the directors, for salary, shall have ten per cent. of the surplus profits over a certain dividend, they may recover it, although they sue for it many years afterwards, when it turns out that the assets were overestimated, but in good faith. *Re* Peruvian Guano Co., [1894] 3 Ch. 690.

[3] Holmes *v.* Newcastle, etc. Co., L. R. 1 Ch. D. 682 (1875).

[4] Thompson *v.* Bemis Paper Co., 127 Mass. 595 (1879).

[5] "A corporate creditor may by his acts estop himself from his right to attack a dividend." Lawrence *v.* Greenup,

by an insolvent corporation for unearned dividends are not legal except in *bona fide* hands.[1]

A corporate creditor may compel stockholders to refund the amount received by them on a distribution of the corporate assets upon dissolution or a sale of all the assets of the company, to the extent that his claim has not been paid, after he has exhausted his remedy against the corporation itself.[2] So also the stockholders are not allowed to defraud creditors by bringing about a foreclosure and purchase of the property by themselves at a low price which will not pay the corporate debts.[3] But this is the extent to

97 Fed. Rep. 906 (1899). Thus, where a company is insolvent, and bondholders have agreed to sell their bonds to a certain party at seventy-five cents on the dollar, and that party then agrees with the corporation to acquire and cancel the bonds and take the property from the corporation for a nominal consideration, and after he has made such agreement the bondholders decline to and proceed to foreclose their mortgage and realize ninety cents on the dollar, the court will not compel the stockholders to pay to the bondholders the corporate assets which the stockholders have distributed among themselves. Brooks *v.* Brooks, 174 Pa. St. 519 (1896).

[1] Alabama, etc. Co. *v.* Chattanooga, etc. Co., 37 S. W. Rep. 1004 (Tenn. 1896).

[2] See §§ 549, 672, *infra.* A solvent corporation does not hold its property in trust for its creditors, even though it is in process of liquidation, and hence a partial distribution of the assets of a bank to the stockholders during liquidation, when the bank was solvent and retained what seemed to be sufficient assets to pay its liabilities, cannot be recovered back subsequently by the receiver in an action at law, although it turned out that the remaining assets were not sufficient to pay all liabilities, no bad faith being involved. Lawrence *v.* Greenup, 97 Fed. Rep. 906 (1899). Where a construction company distributes its assets among its stockholders without paying its creditors, the stockholders may be compelled to disgorge to the extent of the debts so remaining unpaid. Grant *v.* Southern Contract Co. etc., 104 Ky. 781 (1898). A debt of a stockholder to be paid from "dividends" must be paid from the dividends of assets, if the company dissolves. Cozad *v.* McKee, 130 Pa. St. 406 (1889). Distribution of funds of incorporated association. Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). Upon the winding up of a building association distribution is made on the basis of fictitious dividends being first charged against each member and dues paid being credited to them. Boice *v.* Rabb, 24 Ind. App. 368 (1900).

[3] A foreclosure which is brought about by the stockholders for the purpose of buying in the property and reorganizing the property so as to protect the mortgage bondholders and also the stockholders, but to cut off the claims of unsecured creditors, and particularly to cut off a guaranty on the bonds of another corporation, is illegal, and if such facts are proved the foreclosure sale will be set aside. Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 674 (1899), the court saying (p. 683), "no such proceedings can be rightfully carried to consummation which recognize and preserve an interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so; but a foreclosure which

which the common law goes. So long as corporate creditors are paid, no one is injured by the stockholders distributing among themselves the assets.[1]

The distribution of the assets among the stockholders upon dissolution is made upon equitable principles.[2]

§ 549. *Proceedings to recover back such a dividend.*— It is in general the practice, where dividends have been paid out of the capital stock in prejudice of the rights of corporate creditors, for a judgment creditor, upon the return of his common-law execution against the corporation wholly or partly unsatisfied, to commence an action in equity on behalf of himself and all other creditors who may come in, in the nature of a creditors' bill, against the stockholders to whom the dividend was unlawfully paid, to recover back so much thereof as was paid out of the capital stock.[3]

It is a necessary condition precedent to the right to bring this action that a valid judgment shall have been obtained against the corporation, and that execution thereon shall have been returned wholly or partly unsatisfied, and this judgment is conclusive as to the merits of the creditor's claim.[4] If the treasurer is sued by a

attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based upon the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation." *Cf.* § 886, *infra.*

[1] See §§ 3 and 546, *supra,* and §§ 671, 766, *infra.*

[2] See § 641, *infra.*

[3] Hastings *v.* Drew, 76 N. Y. 9 (1879); Bartlett *v.* Drew, 57 N. Y. 587 (1874); McLean *v.* Eastman, 21 Hun, 312 (1880); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178 (1843); Curran *v.* Arkansas, 15 How. 304 (1853); Grant *v.* Ross, 100 Ky. 44 (1896). See also U. S. *v.* Globe Works, 7 Fed. Rep. 530 (1881); Brewer *v.* Michigan Salt Assoc., 58 Mich. 351 (1885). See also § 548, *supra.* And see Vose *v.* Grant, 15 Mass. 505 (1819), where it was held that an action as for tort could not be maintained by a creditor against an individual stockholder who had received dividends. Spear *v.* Grant, 16 Mass. 9, 15 (1819), holding that an action at law will not lie. An action on the case for fraud lies for a conspiracy, the stock having been sold back to the corporation bank and the bank then closed. Bartholomew *v.* Bentley, 15 Ohio, 659 (1846). Where all the property of a telegraph company is sold and the proceeds distributed among the stockholders, a creditor of the company may by a bill in equity compel the stockholders to pay the claim against the corporation, the proceeds being a trust fund. Baltimore, etc. Co. *v.* Interstate Co., 54 Fed. Rep. 50 (1893), 121 id. 956.

[4] In a judgment creditor's suit to reach assets of an insolvent corporation which have been turned over to the stockholders in fraud of creditors, the judgment of the creditor against the corporation cannot be impeached except by fraud and jurisdiction. All of the stockholders need not be joined, but if any stockholder wishes the equi-

corporate creditor to reach assets of the corporation which he holds, he cannot interplead.[1] A receiver may be authorized by the court to institute the suit.[2] He may file a bill in equity to compel stockholders to refund dividends illegally paid by them.[3] He represents the creditors as well as the corporation and stockholders. As an officer of the court he may sue, and is not estopped by the acts of the corporation.

In a suit by a receiver of a national bank to recover back dividends illegally paid, the books of the bank are competent evidence to prove the acts of the corporation and its financial condition, except as to dealings between the corporation and the defendant.[4] It has been held that even though a receiver is in charge, yet a judgment creditor may file a bill to compel a stockholder to pay back an illegal dividend and also to account for property trans-

ties adjusted as between the various stockholders, he can file a cross-bill. Singer *v.* Hutchinson, 183 Ill. 606 (1900); Sturges *v.* Vanderbilt, 73 N. Y. 384 (1878). In this case there was no recovery against a director who had sold his stock and ceased to participate in the company's affairs five years before the dissolution. Dudley *v.* Price, 10 B. Mon. (Ky.) 84 (1849); Andrew *v.* Vanderbilt, 37 Hun, 468 (1885); Hastings *v.* Drew, 76 N. Y. 9 (1879), where this liability was enforced against one who had become a purchaser of stock after the cause of action arose upon which the judgment was secured, the stock being by the terms of the transfer subject to all claims against it.

[1] A treasurer cannot interplead between the stockholders and a corporate creditor who is seeking to reach bonds received by the corporation in payment for its property. Stone *v.* Reed, 152 Mass. 179 (1890).

[2] A receiver of the corporation is the proper party to sue to recover back any dividends which were paid from the capital stock. Corporate creditors cannot sue for these after the receiver goes in. It is doubtful whether the corporation itself could complain of such dividends. A sale of the assets by the receiver does not carry this cause of action. Minnesota, etc. Co. *v.* Langdon, 44 Minn. 37 (1890). In New York the receiver of an insolvent corporation may maintain an action for the benefit of the creditors against the stockholders to recover the sums received by them as dividends at the time the company was insolvent; and in such an action the creditors of the corporation are proper parties defendant for the purpose of restraining them from proceeding individually against the stockholders separately to recover the unlawful dividends. Osgood *v.* Laytin, 3 Keyes, 521 (1867). See also Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412 (1856), holding that an assignee of the company for the benefit of the company might sue. But a receiver's suit cannot in such a case be brought for the benefit of the stockholders. Butterworth *v.* O'Brien, 39 Barb. 193 (1863). *Cf.* McLean *v.* Eastman, 21 Hun, 312 (1880). An order of the court directing a receiver to recover dividends illegally paid is not an adjudication binding on the stockholders to the effect that such dividends were illegally paid. Stewart *v.* Marion, etc. Co., 155 Ind. 174 (1900).

[3] Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895), rev'g 67 Fed. Rep. 273.

[4] Hayden *v.* Williams, 96 Fed. Rep. 279 (1899).

ferred to him by the corporation for a portion of his stock, the receiver being made a party defendant.[1]

In the creditor's suit all the stockholders who can be reached should be made parties defendant, and as to those unknown or insolvent or beyond the jurisdiction there should be a proper averment in the bill.[2] The corporation also should be made a party defendant to the bill.[3]

The stockholder who is compelled to pay more than his equitable proportion of any unpaid corporate debt may, in a proper proceeding, resort to his associates for contribution.[4] A transferee of stock against which creditors have this claim at the time of transfer is not liable to respond in a creditor's suit therefor.[5] The statute of limitations runs in favor of stockholders, who receive such dividends in good faith and without actual notice, from the time they are paid.[6]

§ 550. *The liability herein of the corporate officers.*—The liability of the corporate officers as to dividends paid out of the capital stock is not definitely determined. They of course are liable for the

[1] Bowker *v.* Hill, 115 Fed. Rep. 528 (1879).

[2] Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435; Bartlett *v.* Drew, 57 N. Y. 587 (1874). In the case last cited it is held that the creditor is not required to bring his suit on behalf of other creditors who may choose to come in, but may sue alone and for his own benefit exclusively, and that he need not make all the stockholders parties, but may pursue one, any, or all, as he may elect, upon the theory that with the equities between the stockholders themselves he has nothing to do, unless he choose to intervene to settle them. See also Brewer *v.* Michigan Salt Assoc., 58 Mich. 351 (1885); Pacific Ry. *v.* Cutting, 27 Fed. Rep. 638 (1886); Williams *v.* Boice, 38 N. J. Eq. 364 (1884). Many stockholders may be joined as defendants in a suit in equity to recover back illegal dividends, even though some received a greater number of dividends than others. Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895).

[3] First Nat. Bank *v.* Smith, 6 Fed. Rep. 215 (1879), followed in Dormitzer *v.* Illinois, etc. Co., 6 Fed. Rep. 217 (1881). Where all the assets have been distributed, an action against the stockholders to recover back damages for a tort committed by the corporation must include the corporation as a co-defendant. Swan, etc. Co. *v.* Frank, 39 Fed. Rep. 456 (1889). In a suit to compel stockholders of a foreign corporation to discover and account for corporate property illegally divided among them, the property must be definitely described. Service on the corporation by publication is insufficient. King *v.* Sullivan, 93 Ga. 621 (1894).

[4] Bartlett *v.* Drew, 57 N. Y. 587 (1874).

[5] Hurlbut *v.* Tayler, 62 Wis. 607 (1885).

[6] The statute of limitations runs against an action to recover back illegal dividends from stockholders. It begins to run from the time when the dividend is paid, provided the stockholder did not know or have reason to know the condition of the company. Hayden *v.* Thompson, 71 Fed. Rep. 60 (1895); Lexington, etc. Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412, 446 (1856). See also *Re* Mammoth Copperopolis, 50 L. J. (Ch.) 11 (1880); Dudley *v.* Price, 10 B. Mon. (Ky.) 84 (1849).

amount of any such dividend that they themselves receive as stockholders.[1]

Some cases goes to the full extent of holding the directors liable absolutely for all dividends paid out of capital stock. But the better rule is that, when the directors declare a dividend in good faith and without negligence, they are not to be held liable merely because the dividend turns out to have impaired the capital stock.[1] Direct-

[1] A receiver may recover back a dividend paid to a director when the corporation was insolvent. Davenport *v.* Lines, 72 Conn. 118 (1899); Main *v.* Mills, 6 Biss. 98, and note (1874); s. c., 16 Fed. Cas. 506, where a dividend paid to the president, but not legitimately earned, was recovered from the president of a bank by the assignee in bankruptcy; *Re* County Marine Ins. Co., L. R. 6 Ch. App. 104 (1870), which was the case of a marine insurance company, where the directors declared a bonus on the shares of stock without making out a profit and loss account, and it was held that a director who had received such bonus on a balance sheet thus carelessly drawn up should, in consequence of his neglect of duty, repay the amount to the liquidator. It was the gross neglect of the directors which militated so strongly against them, and both the lord justices declared the court would not have so held had there been *bona fides* and regularity in the declaration of the bonus. *Re* Denham, L. R. 25 Ch. D. 752 (1883). Here it was held that an innocent director was not personally responsible for the fraudulent reports and balance sheets and the dividends paid under them, and that — having regard to the extraordinary powers vested by the articles in the chairman, and to the fact that the books had been kept and audited by duly authorized officers, and that the director sought to be charged had no reason to suspect any misconduct — he was not liable to repay any of the dividends so received by him, although they were in fact paid out of the capital. Where the directors pay a dividend to themselves only, without there being any profits, they must refund the same. Latimer *v.* Equitable, etc. Assoc., 78 Mo. App. 463 (1898).

[2] Excelsior Petroleum Co. *v.* Lacey, 63 N. Y. 422 (1875). Directors are not liable to corporate creditors, either at common law or under a statute, for paying dividends when they supposed, and the books showed, that the company was prosperous and had profits for distribution, but it subsequently turned out that the president had embezzled the funds and substituted fictitious notes of customers and had falsified the books in omitting debts for material, there being no proof that the directors, even in the exercise of ordinary diligence, would have discovered that the company was insolvent. Chick *v.* Fuller, 114 Fed. Rep. 22 (1902). Where losses incurred by a banking company during the year are written off, and the balance of the receipts in each year over the outgoings in the same year, after making some allowance for bad debts and deductions for sums carried over to a reserve fund, is treated as the profit of that year, and is divided as dividends without making any further provision for the losses of previous years, the directors are not liable on the ground that the dividends were paid out of capital, although this method of procedure would ultimately exhaust the paid-up capital of the company. The discretion of the managers in fixing the losses to be charged to the capital and those to be charged to income is not inquired into by the courts, unless obviously improper charges to capital have been made, in order to increase

ors are not personally liable for dividends improperly paid, where they honestly believe in a state of facts which would justify the payment and rely upon the general manager's certificate as to the assets.[1]

The House of Lords in England has recently held that even though dividends have been declared and paid illegally, by reason of the fact that bad debts have not been charged off, yet a director who acted in good faith and relied upon the statements of the officers of the company in voting for such dividends is not liable to repay the same for the benefit of the stockholders.[2] But where the di-

apparent profits. The directors are not personally liable unless they were culpably or grossly negligent in the matter. Even though a director knew his name was signed to a report to the stockholders after he has resigned, yet he is not liable, where he took no part in drawing the report or in recommending the dividend based thereon. It seems that an improper dividend may be recovered from the directors, even though the creditors have all been paid and the stockholders will have the benefit of the recovery, they having been ignorant of the fact that the dividends were paid from capital stock. *Re* National Bank of Wales, [1899] 2 Ch. 629, rev'g 79 L. T. Rep. 667. In *Re* Mercantile Trading Co., L. R. 4 Ch. App. 475 (1869), it was held, in accordance with this view, that where the action of a board of directors in making a dividend was *bona fide*, they are not liable for errors of judgment in preparing a balance sheet showing the assets of the concern. In this case it appears that the directors included among the corporate assets a debt due the company by the government of the Confederate States; some cotton owned by the company but stored within the limits of the Confederacy; and certain merchant ships engaged in running the blockade, all which were estimated at their full value. These assets being subsequently destroyed and lost to the company, its bankruptcy followed. Osgood *v.* Laytin, 3 Keyes (N. Y.), 521 (1867), was an action by a receiver to recover dividends improperly declared. The court said: "Ignorance of facts that it was the duty of the managers to know — not to know which was gross ignorance — cannot excuse the managers and impart any virtue or validity to acts otherwise clearly illegal, and which were a palpable fraud upon the creditors." But the directors of a bank are not liable for dividends declared in good faith, even though it subsequently turns out that debts to the bank which they considered good were found to be bad. Witters *v.* Sowles, 31 Fed. Rep. 1 (1887). However, the court in *Re* Oxford Building, etc. Soc., 55 L. T. Rep. 598 (1886), say it is settled that "directors who improperly pay dividends out of capital are liable to repay such dividends personally upon the company being wound up; "that the company, or a creditor, or a liquidator may enforce it; that the acquiescence of the stockholders does not affect creditors; that the statute of liquidations does not apply; and that the innocent intent of the directors is no defense. The directors are not personally liable for dividends declared, even though, in estimating the assets, claims are included which ultimately prove to be bad, the result thereby being that the dividend was paid out of the capital. *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673.

[1] *Re* Kingston Cotton Mill Co., [1896] 1 Ch. 331.

[2] Dovey, etc. *v.* Cory (H. of L.), [1901] A. C. 477.

rectors negligently or wilfully and knowingly declare and pay a dividend out of the capital stock, they are personally liable to refund that dividend.[1] Where the directors of a national bank place a fictitious value on the assets of the bank in order to declare a stock dividend, such directors are liable for the par value of the

[1] In order to ascertain profits the directors should have a careful valuation. If they employ persons whom they reasonably believe to be competent and adopt their conclusions, they are not liable for mistakes. Where, however, the directors take no active, intelligent, guiding part in the affairs of the company, and really do nothing except as suggested by the secretary, and do not examine the accounts at all, and cause the stockholders to declare dividends on a statement which omits large liabilities, so that dividends are really paid out of the capital stock, such directors are personally liable to corporate creditors for such dividends. The secretary also is liable, he being the active manager of the company. The six-years statute of limitations, however, applies, and only those dividends which have been declared within six years must be repaid. Interest, however, will be allowed. Municipal, etc. Land Co. *v.* Pollington, 63 L. T. Rep. 238 (1890). See also *Re* National Funds, etc. Co., L. R. 10 Ch. D. 118 (1878); Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 194 (1843); Hill *v.* Frazier, 22 Pa. St. 320 (1853); *Re* Alexandra Palace Co., L. R. 21 Ch. D. 149 (1882); Salisbury *v.* Metropolitan Ry., 22 L. T. Rep. 839 (1870), where the suit was by a non-participating stockholder; Flitcroft's Case, L. R. 21 Ch. D. 519 (1882); Evans *v.* Coventry, 8 De G., M. & G. 835 (1857); Turquand *v.* Marshall, L. R. 4 Ch. App. 376 (1869), denying this remedy to the stockholders as a body. In Burnes *v.* Pennell, 2 H. L. Cas. 497, 531 (1849), Lord Brougham said: "I beg to be understood as going with those who view with the greatest severity the conduct of railway directors in declaring dividends which can only be paid out of capital, because I consider that that is of itself a most vicious and fraudulent course of conduct. It is telling the world that their profits are large when it may be that their profits are *nil*, or that their losses are large with no profits. It is a false and fraudulent representation by act and deed, much to be reprobated; and I go the full length of what my noble and learned friend has laid down, that it would be a just ground, if a course of conduct of this sort were pursued, coupled with such circumstances as clearly to show a fraudulent intent, for proceedings of a graver nature against these parties." The payment of a dividend out of the capital stock is *ultra vires*. Accordingly, where the directors mislead the stockholders by representing in the reports and balance sheets, as good, debts which they know to be bad, and thus knowingly pay dividends which in fact impair the capital stock, it is not a defense that the stockholders, relying in good faith upon the representations and reports of the directors, pass resolutions declaring the dividends at regular meetings of the corporation; and an action will lie on behalf of creditors to compel the directors to refund. In such an action the directors cannot set off any money due from the company to them, nor have they recourse to the stockholders who took the dividends *bona fide*. Flitcroft's Case, L. R. 21 Ch. D. 519 (1882); *Re* County Marine Ins. Co., L. R. 6 Ch. 104 (1870). See also Scott *v.* Eagle Fire Co., 7 Paige, 198 (1838). In Kentucky it is doubted whether directors are liable to creditors, the courts of that state seeming to incline to hold them liable only to the corporation or the stockholders. Lexington, etc. R. R. *v.* Bridges, 7 B. Mon. (Ky.) 556, 559 (1847).

stock to the receiver of the bank for the benefit of its creditors, unless the directors show that the stock could not have been otherwise issued or sold.[1] Where the directors make even grave errors in the exercise of judgment they are not liable; but where they surrender their judgment to others, either the manager or auditors, they are liable for dividends illegally paid, especially where they include, as good, loans which they had not looked into, and where they do not take into consideration overdrafts. They will be held liable from the date when a prudent man would not have included in the profits unpaid interest. Each director is liable only for dividends declared or recommended at meetings when he was present.[2] Frequently, when a dividend is paid out of the capital stock, the directors are made liable therefor by statute without reference to any fraud or fraudulent intent on their part.[3] A court of equity has power to entertain a suit to enforce the statutory liability of directors for paying dividends in violation of such statute, where there is no other remedy in any other court, even though the money is not needed to pay the company's debts. A stockholder may maintain such a suit in behalf of himself and other stockholders, for the benefit of the corporation, under such circumstances, especially where he was induced to purchase his stock by reason of such dividends. Investors as well as stockholders have a right to rely on dividends as having been earned.[4] Under the New Jersey statutes, if the directors upon the dissolution of a corporation distribute the assets among the stockholders without paying the debts, they are personally

[1] Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

[2] *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673. See Stroud *v.* Lawson, [1898] 2 Q. B. 44.

[3] In Massachusetts, officers of a corporation can be charged, under the statute in force upon the subject in that state (Stat. 1862, ch. 218, § 3; Stat. 1870, ch. 224, §§ 40, 42), with corporate debts after a judgment against the corporation and after a demand and return upon the execution. Chamberlin *v.* Huguenot Mfg. Co., 118 Mass. 532, 536 (1875); Priest *v.* Essex, etc. Co., 115 Mass. 380 (1874). In that state the liability of the directors has been held to be enforceable by corporate creditors only. Smith *v.* Hurd, 53 Mass. 371 (1847). Under the New York statute making directors liable for declaring dividends from the capital stock, they are liable to the extent to which the capital stock is reduced by the dividend, and in the case of bank directors they may show that notes which it is claimed they should have charged off were actually paid later. Dykman *v.* Keeney, 10 N. Y. App. Div. 610 (1896). Under the New York statute the directors are liable to repay only such part of an illegal dividend as will recoup the corporation or its creditors for the actual loss sustained thereby. Dykman *v.* Keeney, 16 N. Y. App. Div. 131 (1897); aff'd, 160 N. Y. 677. Dividing the property is equivalent to a declaration of a dividend so far as the directors are concerned. Rorke *v.* Thomas, 56 N. Y. 559 (1874).

[4] Appleton *v.* American Malting Co., 54 Atl. Rep. 454 (N. J. 1903). *Cf.* Siegman *v.* Maloney, 51 Atl. Rep. 1003.

liable for such debts.[1] In England, the auditors of a company are officials, and are liable for dividends improperly paid, based on balance sheets improperly made up by the auditors, especially where the auditors included as regular investments loans for which there was no proper security.[2] The manager of a corporation who makes up the accounts may also be liable for dividends illegally declared.[3] After dissolution has been decreed it is too late for a corporate creditor to bring an action to hold the directors liable for declaring dividends out of the capital stock, no fraud in obtaining the dissolution being alleged.[4]

Under certain circumstances, in the absence of actual fraud, the directors who have been compelled to pay the claims of corporate creditors may in turn recover what they have paid in an action against the stockholders.[5] And claims against directors who are made liable by statute in these cases may, in the absence of actual fraud on their part, be barred by laches or the statute of limitations.[6] A statutory liability in reference to illegal dividends may not survive the death of a director who is liable.[7]

[1] Keen *v.* Maple, etc. Co., 50 Atl. Rep. 467 (N. J. 1901); N. J. Rev. (1877), p. 178; Williams *v.* Boice, 38 N. J. Eq. 364 (1884). The New Jersey statute imposing a liability on directors for illegally declared dividends was applied in Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894).

[2] *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673. Auditors are not officers in the true sense of the word. *Re* Western, etc. Co., [1897] 1 Ch. 617, rev'g 75 L. T. Rep. 648.

[3] *Re* London & Gen. Bank, 72 L. T. Rep. 227 (1894); aff'd, [1895] 2 Ch. 166, 673.

[4] Coxon *v.* Gorst, [1891] 2 Ch. 73.

[5] Salisbury *v*, Metropolitan Ry., 22 L. T. Rep. 839 (1870); *Re* Alexandra Palace

[6] *Re* Mammoth Copperopolis, 50 L. J. (Ch.) 11 (1880). The acquiescence of stockholders does not bind creditors, and the statute of limitations does not apply. *Re* Oxford, etc. Soc., 55 L. T. Rep. 598 (1886). That the statute of limitations does not apply, see also Flitcroft's Case, L. R. 21 Ch. D. 519 (1882). The statute of limitations does not commence to run against an officer of the corporation who has paid dividends to himself out of the capital stock until the fraud is discovered. Main *v.* Mills, 6 Biss. 98 (1874); s. c., 16 Fed. Cas. 506. Where the directors paid out dividends from the organization of the company in 1868 until 1878, and were then stopped at the instance of the board of trade, and the company was wound up in 1886, and in 1889 the receiver brought suit to hold the directors liable, it was held that there was no such delay as to bar the remedy, since the defendants had not been prejudiced by the delay. Masonic, etc. Ass. Co. *v.* Sharpe, [1892] 1 Ch. 154.

[7] Boston, etc. R. R. *v.* Graves, 80 Fed. Rep. 588 (1897). A statutory liability of directors for illegal payment of dividends is penal and does not survive the death of a director and is not assignable. Killen *v.* State Bank, 106 Wis. 546 (1900). The statutory liability of directors in an Oregon corporation for declaring dividends out of the capital stock is a penal liability. Patterson *v.* Wade, 115 Fed. Rep. 770 (1902).

An action on the case is not the proper remedy of the creditor of an insolvent corporation to hold a director liable for dividends paid out of the capital stock. The remedy is in equity.[1] A suit to hold the directors liable for declaring a dividend out of the capital stock and thereby inducing the plaintiff to purchase the stock cannot at the same time seek to hold the directors liable to the corporation for the dividend so declared.[2]

§ 551. *Guaranty of dividends by contract.*—A guaranty of dividends is often made by the corporation itself that issues the stock. The stock is then called guaranteed or preferred stock. This class of stock is fully considered elsewhere.[3]

A guaranty of dividends frequently is made by a third person. Such a guaranty is often made when one person sells stock to another and guarantees that the corporation will pay certain dividends thereon. It often arises, also, where one company buys out another or leases the property of another corporation and guarantees dividends on the stock or the interest on the bonds of the latter. This subject, also, is considered elsewhere.[4] A foreclosure brought about for the purpose of cutting off a guaranty of the bonds of another corporation is illegal, the real purpose being to allow other creditors of the corporation and the stockholders to obtain the property free from such guaranty.[5]

Co., L. R. 21 Ch. D. 149 (1882). *Cf.* § 548, *supra.* Where a part of the capital stock is paid by the directors to the stockholders with the knowledge and consent of all, but without the capital stock being regularly reduced, the directors may be required, on the dissolution of the corporation, to repay such sum so distributed, but the directors are then entitled to recover from the stockholders the amount so paid to the stockholders. Noxham *v.* Grant, [1900] 1 Q. B. 88, aff'g [1899] 1 Q. B. 480; aff'd, [1900] 1 Q. B. 88. A director who, with knowledge of the insolvency of the company, loans money to the corporation for the purpose of declaring a dividend, is not entitled, upon an assignment of the corporate effects, to repayment of any part of the loan so made until the claims of stockholders are satisfied. Kisterbock's Appeal, 51 Pa. St. 483 (1866). But a director from whom a recovery is had under the Pennsylvania statute (Act of April 7, 1849, § 9), as a wrong-doer, has no right of subrogation as against the corporation. Hill *v.* Frazier, 22 Pa. St. 320 (1853). In this case it was held that, in the creditor's suit against the director, the corporation itself is not a necessary co-defendant.

[1] John A. Roebling's, etc. Co. *v.* Mode, 1 Pennewill, 515 (Del. 1899).

[2] Stroud *v.* Lawson, [1898] 2 Q. B. 44.

[3] See ch. XVI, *supra.*

[4] See ch. XLVI, § 775, *infra.*

[5] Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 674 (1899).

CHAPTER XXXIII.

LIFE ESTATES AND REMAINDERS IN SHARES OF STOCK.

§ 552. *The subject.*— Where shares of stock are held by an estate, and the income of the estate is to go to a life tenant for life, and the remainder to another party, the question of whether the life tenant or the remainderman is entitled to a stock dividend or extraordinary cash dividend is a perplexing one. The stock dividend or extraordinary cash dividend may represent profits which were earned or accumulated before the life tenancy began. In that case it is clear that in justice the remainderman should receive it. If, however, it was earned after the life tenancy began, it is clear that the life tenant should have it. If it was earned partly before and partly after the life tenancy began, then it is apparent that in justice some apportionment should be made if possible.

The courts, however, differ widely in laying down rules on this subject. These differences form the subject of this chapter.

§ 553. *The three rules in regard to stock or extraordinary cash dividends.*— When a stock or extraordinary cash dividend is declared upon shares held in trust, or owned in such a way that one person has an estate therein for life and another person the remainder over, there at once arises a contest between life tenant and remainderman. Their interests necessarily conflict, because, if such dividend is held to be income, it belongs to the tenant for life; whereas if it is held to be a part of the *corpus*, or principal, it inures to the benefit of the remainderman's estate. There are three well-defined rules upon this subject, which may be denominated respectively the American or Pennsylvania, the Massachusetts, and the English rule. They lead to essentially contrary conclusions, and will be considered in order.

§ 554. *The American or Pennsylvania rule.*— This rule, inasmuch as it obtains in nearly every state in the Union, may well be called the American rule. It proceeds upon the theory that the court, in disposing of stock or property dividends, as between life

tenant and remainderman, may properly inquire as to the time when the fund out of which the extraordinary dividend is to be paid was earned or accumulated, and also as to the method of accumulation. If it is found to have accrued or been earned before the life estate arose, it may be held to be principal, and, without reference to the time when it is declared or made payable, to belong to the *corpus* of the estate, and not to go to the life tenant. But when it is found that the fund, out of which the dividend is paid, accrued or was earned, not before but after the life estate arose, then it may be held that the dividend is income, and belongs to the tenant for life.[1] The court will also take into consideration the custom and regularity of the corporation in accumulating its surplus, inasmuch as the testator may be presumed to have expected the corporation to continue its accumulation of a surplus or to provide for improvements out of profits. This equitable rule prevails not only in Pennsylvania, where it seems to have been first clearly declared, but also in many other jurisdictions.[2]

[1] Earp's Appeal, 28 Pa. St. 368 (1857); Wiltbank's Appeal, 64 Pa. St. 256 (1870). See also the following later Pennsylvania cases in point: Moss's Appeal, 83 Pa. St. 264 (1877); Biddle's Appeal, 99 Pa. St. 278 (1882); Vinton's Appeal, 99 Pa. St. 434 (1882); *Re* Thompson's Estate, 11 W. N. Cas. 482 (1882). *Cf.* Roberts's Appeal, 92 Pa. St. 407 (1880); Thomson's Appeal, 89 Pa. St. 36 (1879). A scrip dividend converted into stock may belong to the life tenant. Philadelphia Trust, etc. Co.'s Appeal, 16 Atl. Rep. 734 (Pa. 1889). A large dividend in cash, owing to a sale of part of the property of an unincorporated association, may be income, and go to the life tenant. Oliver's Estate, 136 Pa. St. 43 (1890). Money received by the corporation from new stock issued to obtain funds to replace profits which had been used for improvements is capital and not income, and does not go to the life tenant. Smith's Estate, 140 Pa. St. 344 (1891). Where the company in which the trustee holds stock gives to its stockholders the option to subscribe to the stock of another company, the premium at which the trustee sells this option is principal and not income. Thomson's Estate, 153 Pa. St. 332 (1893).

[2] *Connecticut:* A stock dividend based upon the profits actually invested in the business is not income or dividends such as pass to the life tenant. Spooner *v.* Phillips, 62 Conn. 62 (1892). Where an estate is merged into a corporation, the life tenant of the real estate cannot claim that a part of the capital stock represents past increase of value and that she is entitled absolutely to that part of the stock. Hotchkiss *v.* Brainerd Quarry Co., 58 Conn. 120 (1889). Where it is impossible for the company to pay arrears of dividends on cumulative preferred stock, and a compromise is made by which the dividend is to be reduced one-half, and double the amount of stock is to be given to each stockholder, this new stock goes to the remainderman. Mills *v.* Britton, 64 Conn. 4 (1894). A large surplus gradually accumulated by a coal company is a part of the "floating capital" and upon distribution does not go to the life tenant. Society, etc. *v.* Colegrove, 49 Atl. Rep. 902 (Conn. 1901), being a case involving the distribution of a large surplus by the Pennsylvania Coal Company, upon the sale of its assets.

Kentucky: As between a life beneficiary in corporate stock and the re-

Where a *cestui que trust* is to receive the income until he reaches a certain age and then is to receive the principal, he is considered a life tenant until he arrives at that age. The life tenant takes the entire interest on bonds, although the premium on the bonds

mainderman, a stock dividend will be treated as income if it in fact represents a profit. Hite *v.* Hite, 93 Ky. 257 (1892); s. c. below, 2 Ry. & Corp. L. J. 568.

Maine: For the rule in Maine, see Richardson *v.* Richardson, 75 Me. 570 (1884). A dividend consisting of stock purchased by an issue of bonds by the company belongs, not to the life estate, but to the body of the estate. Gilkey *v.* Paine, 80 Me. 319 (1888).

Maryland: Dividends coming from a fund accumulated during the testator's life to pay a mortgage, but which are not used for that purpose, belong to the life tenant and not to the remainderman. Quinn *v.* Safe-Deposit, etc. Co., 93 Md. 285 (1901). See Thomas *v.* Gregg, 78 Md. 545 (1894).

New Hampshire: Lord *v.* Brooks, 52 N. H. 72 (1872); Wheeler *v.* Perry, 18 N. H. 307 (1846); Peirce *v.* Burroughs, 58 N. H. 302 (1878). An increase of stock upon consolidation and a stock dividend thereon are principal. Law *v.* Alley, 29 Atl. Rep. 636 (N. H. 1892). A fifty per cent. cash dividend is presumed to be from the profits and to belong to the life tenant. Walker *v.* Walker, 68 N. H. 407 (1896).

New Jersey: Van Doren *v.* Olden, 19 N. J. Eq. 176 (1868); Ashhurst *v.* Field, 26 N. J. Eq. 1 (1875). Where a few months after the testator's death a large cash dividend is declared, the court will consider the profits earned during such months of the year as were prior to his death, and also such part as was earned subsequent to his death, and will apportion the dividend on such basis. Lang *v.* Lang's Executor, 57 N. J. Eq. 325 (1898).

New York: McLouth *v.* Hunt, 154 N. Y. 179 (1897); Riggs *v.* Cragg, 89 N. Y. 479 (1882); *Re* Kernochan, 104 N. Y. 618 (1887); Riggs *v.* Cragg, 26 Hun, 89 (1881); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Simpson *v.* Moore, 30 Barb. 637 (1859); Woodruff's Estate, Tucker, 58 (1865), and Goldsmith *v.* Swift, 25 Hun, 201 (1881). *Cf.* Cragg *v.* Riggs, 5 Redf. 82 (1880); Scovel *v.* Roosevelt, 5 Redf. 121 (1881). A stock dividend goes to the life tenant and not to the remaindermen, where the words in the will clearly indicate that such was the intent of the testator, it being clear that the stock dividend represents accumulated profits and not a diminution of the capital stock. Lowry *v.* Farmers', etc. Co., 172 N. Y. 137 (1902). Profits upon the sale of stock are principal and not income in New York. Whitney *v.* Phœnix, 4 Redf. 180 (1880). In Hyatt *v.* Allen, 56 N. Y. 553, 557 (1874), the court of appeals intimated plainly its disapproval of the rule prevailing in England upon this subject. Farwell *v.* Tweddle, 10 Abb. N. Cas. 94 (1881); Prime's Estate, N. Y. L. J., March 6, 1891, reviewing the authorities. A dividend arising from the sale of a part of the assets of a company belongs to the remainderman. *Re* Curtis, N. Y. L. J., Jan. 24, 1890. Money received from stock upon the winding up of the corporation belongs to the remainderman. *Re* Skillman's Estate, 9 N. Y. Supp. 469 (1890). Where the capital is reduced and returned to the stockholders with a surplus, the surplus goes to the life tenant. *Re* Warren's Estate, 11 N. Y. Supp. 787 (1890). Though the dividends are necessarily from the capital stock, as in mining or other similar corporations, the life tenant is entitled to them. *Re* James, 78 Hun, 121 (1894); aff'd, 146 N. Y. 78 (1895). Where a manufacturing corporation had a capital stock of $300,000, and in course of time it sold its plant and part

gradually disappears as they come nearer to being due. A stock dividend representing accumulated profits goes to the life tenant, the court stating that the question is always to be decided according to the actual facts of the transaction. The New York court of appeals says: "For all corporate purposes the corporation may doubtless convert earnings into capital, when such power is conferred by its charter; but when a question arises between life tenants and remaindermen concerning the ownership of the earnings thus converted, the action of the corporation will not conclude the courts."[1]

of its working capital for $2,750,000 of the capital stock of a new corporation, and retained certain cash, bonds, stocks and surplus lands which it proceeded to distribute among its stockholders, the court held that the plant and working capital were practically capital stock, but that the cash, bonds, stocks, and surplus lands were income that went to the life tenant. Matter of Rogers, 161 N. Y. 108 (1899). The words "capital" and "profits," as used in connection with life estates and remainders in stocks, have a different meaning from what they have in determining the right of a corporation to declare dividends. In passing upon the relative interests of a remainderman and life tenant in shares of stock and the dividends therefrom, the courts will sometimes include in capital stock, extensions, improvements, plant, and working capital which have been obtained from past profits and not from subscriptions to the capital stock. Matter of Rogers, 161 N. Y. 108 (1899), the court saying: "What, then, is capital and what is profits? In a manufacturing business a plant is of first importance, and as the business increases an enlargement thereof, with the necessary tools, fixtures, and machinery, is one of the things to which the earnings of the company may properly be devoted. This must be deemed to be fairly within the contemplation of the testator in creating the trusts with the capital stock of this company. After the plant there arises a necessity for raw material and labor to manufacture it. This requires what is usually termed a working capital, and it, of necessity, varies in amount, depending upon the magnitude of the business. It must, therefore, also have been within the contemplation of the testator that a reasonable amount would be retained by the directors for this purpose." In the case of Chester *v.* Buffalo, etc. Co., 70 N. Y. App. Div. 443 (1902), where a surplus had been accumulated, partly before the testator's death and partly after it, and a stock dividend was then declared, the court refused to give to the life tenant such part of the stock dividend as would correspond to the surplus accumulated after the testator's death, inasmuch as the same regular dividends had been paid after the testator's death as before, and the testator evidently expected that similar dividends should go to the life tenant.

South Carolina: Profits and income existing when the trust is created are *corpus*, but subsequent profits and income are income. Cobb *v.* Fant, 36 S. C. 1 (1892).

Tennessee: Stock dividends declared from net earnings made after the death of testator, who bequeathed the stock on which the dividends were declared, for life, belong to the life tenant as income, not to the remaindermen as part of the *corpus*. Pritchitt *v.* Nashville Trust Co., 96 Tenn. 472 (1896). For articles on "Right to dividends as between life tenant and remainderman," see 26 Am. L. Rev. 1, and 24 Am. Rep. 169.

[1] McLouth *v.* Hunt, 154 N. Y. 179 (1897).

In New Jersey the reasonable and logical rule is laid down that a cash dividend from earnings is apportioned between the *corpus* of the estate and the life tenant, in the proportion of the lapse of time since the last dividend, unless proof is given that such dividend was earned not day by day but at irregular times. The trustee is justified in distributing the dividend on this basis unless notice by an interested party is given him not to do so.[1]

§ 555. *The Massachusetts rule.*— This rule, which prevails in Massachusetts, Georgia, and Rhode Island, is sometimes called "the rule in Minot's Case." It regards cash dividends, whether large or small, as income, and stock dividends, whenever earned and however declared, as capital, and the rule, accordingly, is a simple one. Cash dividends belong to the tenant for life and stock dividends to the *corpus*.[2] There is little doubt, however, that this rule works great hardship and injustice in many cases. Hence the rule is not rigidly adhered to, but the court, in deciding whether the distribution is a stock or a cash dividend, may consider the actual and substantial character of the transaction, and not its nominal character merely.[3]

[1] Lang *v.* Lang's Ex'r, 57 N. J. Eq. 325 (1898), rev'g 56 N. J. Eq. 603 (1898). The court held that there was no difference between ordinary and extraordinary dividends so far as this right of apportionment is concerned. The court said: "We think that when a dividend is declared out of earnings, the reasonable presumption is that those earnings have been made uniformly, day by day, since the last similar dividend was declared, leaving the parties in interest at liberty to show that the earnings were really made differently. This will afford a practical rule for trustees who receive such a dividend, and if they act on the presumption, without notice to the contrary, either from the parties or by the circumstances, they will be protected. So, also, they should be allowed to presume that dividends are out of earnings, unless like notice shall charge them to the contrary."

[2] Minot *v.* Paine, 99 Mass. 101 (1868). In this case the principle is thus stated: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." In subsequent cases this rule has been affirmed and elaborated. Daland *v.* Williams, 101 Mass. 571 (1869); Leland *v.* Hayden, 102 Mass. 542 (1869); Heard *v.* Eldredge, 109 Mass. 258 (1872); Rand *v.* Hubbell, 115 Mass. 461 (1874); Gifford *v.* Thompson, 115 Mass. 478 (1874); Hemenway *v.* Hemenway, 134 Mass. 446 (1883); New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886). See also Harvard College *v.* Amory, 26 Mass. 446 (1830); Balch *v.* Hallet, 76 Mass. 402 (1858); Atkins *v.* Albree, 94 Mass. 359 (1866). Where all the stock of a corporation is sold, and it is a part of the sale that a large accumulated surplus shall be distributed among the old stockholders by way of a dividend, this dividend belongs to the life tenant. Hemenway *v.* Hemenway, 63 N. E. Rep. 919 (Mass. 1902); 66 N. E. Rep. 423.

[3] Where a joint-stock association having $12,000,000 surplus invested in securities issues its bonds to the amount of $12,000,000 to its stockholders as a dividend in place of distributing such securities or the proceeds

The supreme court of the United States has held that a life tenant of stock does not take a stock dividend declared during the life tenancy.[1]

thereof, the interest on the bonds to be paid only from the income from the securities after paying the debts, such bonds do not belong to a life tenant, but belong to the remaindermen. D'Ooge *v.* Leeds, 176 Mass. 558 (1900), the court saying: "In considering the distribution to determine its character, substance, and not form, is regarded. The simple question in every case is whether the distribution made by the corporation is of money to be spent as income, or capital to be held as an investment in the corporation. While this arbitrary rule may sometimes defeat the intention of the testator, in most cases it accomplishes the result intended, and there were practical considerations, as well as principles, which required the adoption of it." Also, "Our court does not inquire further than to ascertain whether the distribution is of money to be used as income, or as of capital, to be continued in the business." The court said also that this was substantially the rule in England, and the rule laid down by the supreme court of the United States. In Daland *v.* Williams, 101 Mass. 571 (1869), where the directors, having voted to increase the capital stock by three thousand shares, declared a cash dividend of forty per cent., and authorized the treasurer to receive that dividend in payment for two thousand eight hundred of the shares, the remaining two hundred shares to be sold, the court held that the transaction was virtually a stock dividend, and that the shares must go to the remainderman's fund. *Cf.* Rand *v.* Hubbell, 115 Mass. 461 (1874). In Leland *v.* Hayden, 102 Mass. 542 (1869), where it appeared that the company had invested its surplus earnings in its own stock, and subsequently declared a dividend of that stock, the life tenant was held absolutely entitled to it. The life tenant takes the dividend where it is in cash, although the cash is derived from increased stock which is offered to the old stockholders for subscription, the profits having been used for improvements. This is not a stock dividend. Davis *v.* Jackson, 152 Mass. 58 (1890). See also Balch *v.* Hallet, 76 Mass. 402 (1858); Reed *v.* Head, 88 Mass. 174 (1863); Harvard College *v.* Amory, 26 Mass. 446 (1830); Gifford *v.* Thompson, 115 Mass. 478 (1874); Hemenway *v.* Hemenway, 134 Mass. 446 (1883). In New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886), it was held, in an elaborate opinion by Devens, J., that the gain or loss arising from the sale of stock held in trust is the gain or loss of the *corpus*, and that the sum received constitutes a new principal. Accordingly, a trustee who has invested in bonds at a premium may retain annually from the income payable to the life tenant such sums as will restore to the fund at its maturity what was taken therefrom at the time of the investment. See also the dissenting opinion of Mr. Justice Holmes in this case; and *cf.* Bowker *v.* Pierce, 130 Mass. 262 (1881); Dodd *v.* Winship, 133 Mass. 359 (1882); Wright *v.* White, 136 Mass. 470 (1884); Parsons *v.* Winslow, 16 Mass. 361 (1820); Lovell *v.* Minot, 37 Mass. 116 (1838). The court will take into consideration, in determining the question as between life tenant and remainderman, the whole character of the transaction, and the nature and source of the property distributed, with due regard to all the facts preceding, attending, and resulting from the declaration of the dividend. In Heard *v.* Eldridge, 109 Mass. 258 (1872), it is said: "The suggestion that the intention of the directors should determine the

[1] Gibbons *v.* Mahon, 136 U. S. 549 (1890).

In Rhode Island the courts have adopted a rule somewhat like "the rule in Minot's Case," without the modification engrafted upon it by the subsequent decisions of the Massachusetts courts. It is a rule which in general prefers the remainderman to the life tenant.[1]

§§ 556, 557. *The English rule.*— In England an ordinary, regular, usual cash or stock or property dividend belongs to the life tenant, while an extraordinary cash or stock or property dividend belongs to the *corpus* of the trust.[2] This rule was established in England in 1799.

question whether the dividend is capital or income cannot be correct. . . . It is more safe to look at the character of the property and the transaction." See three interesting and valuable little pamphlets by "A Layman," wherein the merits of the question are fully and learnedly discussed, and entitled respectively "Common Sense *versus* Judicial Legislation;" "Stock Dividends; the Rule in Minot's Case Again Restated with Variations by the Supreme Judicial Court of Massachusetts," and "A Third Chapter on the Rule in Minot's Case." (N. Y.: G. P. Putnam's Sons.) See 5 Am. L. Rev. 720; Perry, Trusts (3d ed.), §§ 544, 545, and notes. In Georgia the code is construed so as to follow the Massachusetts rule. Millen *v.* Guerrard, 67 Ga. 284 (1881); Ga. Code, § 2256.

1 Parker *v.* Mason, 8 R. I. 427 (1867); Bushee *v.* Freeborn, 11 R. I. 149 (1875); Brown's Petition, 14 R. I. 371 (1884). A stock dividend is capital and not income. Greene *v.* Smith, 17 R. I. 28 (1890).

2 The courts, perhaps uniformly, insist upon this distinction. Extraordinary dividends may be either of cash or stock, and appear under a variety of names, such as "participations," "distributions," or, more commonly, "bonuses." See Witts *v.* Steere, 13 Ves. Jr. 363 (1807); Norris *v.* Harrison, 2 Madd. 268 (1817); Hooper *v.* Rossiter, McClel. (Exch.) 527 (1824). To the point that regular dividends, though increased in amount, go as income to the owner of the life estate, see Barclay *v.* Wainewright, 14 Ves. Jr. 66 (1807); Price *v.* Anderson, 15 Sim. 473 (1847); Bates *v.* Mackinley, 31 Beav. 280 (1862), a cash dividend; to the point that "extra" or unusual dividends, whether of cash or shares, go to augment the principal of the trust fund, see Irving *v.* Houstoun, 4 Pat. H. L. Cas. 521 (1803), a stock dividend; Hooper *v.* Rossiter, McClel. (Exch.) 527 (1824), a stock dividend; *Re* Barton's Trust, L. R. 5 Eq. 238 (1868), a stock dividend; Paris *v.* Paris, 10 Ves. Jr. 185 (1804), a cash dividend; Clayton *v.* Gresham, 10 Ves. Jr. 288 (1804), a cash dividend; Witts *v.* Steere, 13 Ves. Jr. 363 (1807), a cash dividend. *Cf.* Gilly *v.* Burley, 22 Beav. 619 (1856); Straker *v.* Wilson, L. R. 6 Ch. App. 503 (1871); Brander *v.* Brander, 4 Ves. Jr. 800 (1799); Preston *v.* Melville, 16 Sim. 163 (1848); Murray *v.* Glasse, 17 Jur. 816 (1853); Johnson *v.* Johnson, 15 Jur. 714 (1850); Plumbe *v.* Neild, 6 Jur. (N. S.) 529 (1860); Hollis *v.* Allan, 12 Jur. (N. S.) 638 (1866). See also *Re* Hopkins's Trusts, L. R. 18 Eq. 696 (1874); Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863); Hartley *v.* Allen, 4 Jur. (N. S.) 500 (1858); Lock *v.* Venables, 27 Beav. 598 (1859), holding to the effect that a specific bequest of "the dividends, interest, and proceeds" of shares will not pass a bonus on the shares. In Alcock *v.* Sloper, 2 Myl. & K. 699 (1833), the income of the testator's long annuities was given to the life tenant. Wilday *v.* Sandys, L. R. 7 Eq. 455 (1869). In Lane *v.* Loughnan, 7 Vict. L. R. Eq. 19 (1881), it

There are, however, cases in England to the effect that extraordinary cash dividends may be decreed to belong to the life tenant.[1] There of course is no question that ordinary cash dividends belong to the life tenant.[2] This rule applies even though it may be shown that the dividend in question was earned, wholly or in part, before the commencement of the life estate.[3]

Where it is shown that dividends have been fraudulently retained in prejudice of the rights of the life tenant, and subsequently a

was held that the premium on a lease of part of a trust estate belonged to the tenant for life and not to the *corpus*. An executor may plainly transfer the stock to pay the decedent's debts, although it is bequeathed for life with remainder over. Franklin *v.* Bank of England, 1 Russ. 575 (1826). In Clive *v.* Clive, Kay, 600 (1854), by the terms of the deed of settlement the net profits of the concern were to be divided ratably to such an amount as should be declared at the semi-annual meetings, and were to be paid within twenty-one days thereafter; and it was provided that a stockholder was not to receive any dividend after the period at which he ceased to be a proprietor of shares, but the dividends on such shares were to continue in suspense until some other person should become proprietor of them. When a stockholder died sixty-nine days after a half-yearly meeting at which a dividend had been declared, but before notice had been given that such dividend was payable, having by his will bequeathed the interest and annual income arising from all his shares to one for life, and then in remainder to others, it was held that this dividend belonged to the legatee for life, and not to the general personal estate of the testator. See also Title to Dividends, 19 Am. L. Rev. 571; Bostock *v.* Blakeney, 2 Bro. Ch. 653 (1789); 2 Perry, Trusts, §§ 544, 545. Mr. Moak's note, 31 Eng. Rep. 328–332; Browne *v.* Collins, L. R. 12 Eq. 586 (1871), is to the effect that profits of a partnership accrued and earned before, but not set aside *qua* profits until after the death of the testator, belong to the *corpus* of the estate, and that profits accruing after his death go to the tenant for life as income. See also the important review of the whole subject in Bouch *v.* Sproule, L. R. 12 App. Cas. 385 (1887), reversing the court below, Sproule *v.* Bouch, L. R. 29 Ch. D. 635 (1885).

[1] In Sugden *v.* Alsbury, L. R. 45 Ch. D. 237 (1890), the court held that the life tenant was entitled to an extraordinary dividend payable in cash. The dividend was called a bonus, but was nothing more or less than a large dividend, being a division of accumulated profits. In Ellis *v.* Barfield, 64 L. T. Rep. 625 (1891), the court held that a large dividend was income and belonged to the life tenant, although it was used by the trustee to pay up the stock in full, and also to purchase new shares which he immediately sold; but the excess for which he sold the stock at a profit belongs to the remainderman.

[2] A cash dividend of profits which have been earned since the last preceding dividend, such last preceding dividend having been made in a regular and reasonable time previously, belongs to a life tenant of stock, and not to the remainderman. Barclay *v.* Wainewright, 14 Ves. Jr. 66 (1807); Norris *v.* Harrison, 2 Madd. 268 (1817); Clive *v.* Clive, Kay, 600 (1854); Murray *v.* Glasse, 17 Jur. 816 (1853); Preston *v.* Melville, 16 Sim. 163 (1848); Cuming *v.* Boswell, 2 Jur. (N. S.) 1005 (1856). *Cf.* Ware *v.* McCandlish, 11 Leigh (Va.), 595 (1841); Price *v.* Anderson, 15 Sim. 473 (1847); Witts *v.* Steere, 13 Ves. Jr. 363 (1807).

[3] Bates *v.* Mackinley, 31 Beav. 280 (1862); Jones *v.* Ogle, L. R. 8 Ch. App. 192 (1872).

bonus is paid upon the shares, it belongs, as income deferred, to the tenant for life, even though it be called a bonus.[1] The life tenant does not take any part of the surplus value of shares upon distribution after dissolution, if such surplus was clearly capital.[2]

In all cases, however, the intent of the grantor or testator is the pole-star, and will be carried out by the courts.[3]

§ 558. *The apportionment of dividends.*— When a life tenant dies before the date at which a dividend is declared, the question arises whether the dividend declared next after his death ought or ought not to be apportioned between the reversioner or remainderman and the estate of the life tenant for the period of time partially covered by the life estate. It is, in general, the rule in such a case that the dividend is not apportionable, but belongs entirely to the *corpus* of the trust fund.[4] But where a tenant for life dies after the dividend is declared, but before the dividend becomes due, his estate will be entitled to the whole of that dividend.[5] In England,

[1] Maclaren *v.* Stainton, L. R. 11 Eq. 382 (1871); s. c., 3 De G., F. & J. 202 (1861), reversing s. c., 27 Beav. 460 (1859); Edmondson *v.* Crosthwaite, 34 Beav. 30 (1864); Dale *v.* Hayes, 40 L. J. (Ch.) 244 (1871). *Cf.* Lean *v.* Lean, 32 L. T. Rep. 305 (1875); Lambert *v.* Lambert, 29 L. T. (N. S.) 878 (1874); *Re* Tinkler's Estate, L. R. 20 Eq. Cas. 456 (1875).

[2] *Re* Armitage, [1893] 3 Ch. 337.

[3] Sproule *v.* Bouch, L. R. 29 Ch. D. 635 (1885); *Re* Hopkins's Trusts, L. R. 18 Eq. 696 (1874); Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863); Jones *v.* Ogle, L. R. 14 Eq. 419 (1872); *Re* Box, 1 Hem. & M. 552 (1863). *Cf.* Reed *v.* Head, 88 Mass. 174 (1863); Clarkson *v.* Clarkson, 18 Barb. 646 (1855); Millen *v.* Guerrard, 67 Ga. 284 (1881); Thomson's Appeal, 89 Pa. St. 36 (1879). The life tenant takes a dividend paid immediately after the death of the testator, where the will provides that each share bequeathed by the will should carry the dividend accruing at the time of the testator's death. Lysaght *v.* Lysaght, [1898] 1 Ch. 115 (1897).

[4] Pearly *v.* Smith, 3 Atk. 260 (1745); Sherrard *v.* Sherrard, 3 Atk. 502 (1747); Wilson *v.* Harman, 2 Ves. Sr. 672 (1755); Hartley *v.* Allen, 4 Jur. (N. S.) 500 (1858); *Re* Maxwell's Trusts, 1 Hem. & M. 610 (1863); Foote, Appellant, 39 Mass. 299 (1839); Granger *v.* Bassett, 98 Mass. 462 (1868); Clapp *v.* Astor, 2 Edw. Ch. 379 (1834). *Cf.* Hyatt *v.* Allen, 56 N. Y. 553 (1874); Brundage *v.* Brundage, 60 N. Y. 544, 551 (1875); Perry, Trusts, § 556. But in Massachusetts it has been held that sometimes dividends declared after the life tenant's death will, nevertheless, go to his estate. Thus, a life tenancy in stock for the support of the testator's widow and children was held to entitle the widow's estate to a dividend declared after her death, but for a period which expired before that event. Johnson *v.* Bridgewater Mfg. Co., 80 Mass. 274 (1859). See also Ellis *v.* Essex Merrimack Bridge, 19 Mass. 243 (1824); Gifford *v.* Thompson, 115 Mass. 478 (1874. *Cf.* King *v.* Follett, 3 Vt. 385 (1831), in which the residuary legatee claimed from the legatee of certain stock the share of dividends earned in the lifetime of his testator, but declared after his death; the court holding that a sale or gift of stock carries with it all dividends declared after it takes effect, whether earned before or not.

[5] Wright *v.* Tuckett, 1 J. & H. 266 (1860); Paton *v.* Sheppard, 10 Sim. 186 (1839).

under the statute known as the Apportionment Act of 1870, dividends are apportionable in these cases between the estate of the life tenant and the *corpus;*[1] and in this country at common law, in one or two jurisdictions, there is a tendency to hold that dividends are apportionable.[2] In Maryland a stock dividend has been apportioned.[3] At the termination of the life estate no claim can be made in behalf of the life tenant for increase in the value of the stock, no dividends having been declared.[4]

§ 559. *The right to subscribe for new shares as between life tenant and remainderman.*— The right to subscribe for new shares at par upon an increase of the capital stock, which is an incident of the ownership of the stock, does not belong as a privilege to the life tenant, but such an increment must be treated as capital, and be added to the trust fund for the benefit of the remainderman. This is equally the rule whether the trustee subscribes for the new stock for the benefit of the trust or sells the right to subscribe for a valuable consideration. In either event the increase goes to the

[1] 33 & 34 Vict., ch. 35, § 2; Pollock *v.* Pollock, L. R. 18 Eq. 329 (1874), qualifying or explaining Whitehead *v.* Whitehead, L. R. 16 Eq. 528 (1873); Beavan *v.* Beavan, 53 L. T. Rep. 245 (1885). *Cf.* Capron *v.* Capron, L. R. 17 Eq. 288 (1874); and see Banner *v.* Lowe, 13 Ves. Jr. 135 (1806); Hay *v.* Palmer, 2 P. Wms. 501 (1728). The statute applies only to dividends upon the stock of corporations, strictly speaking, and not to those upon the shares in private trading corporations. Jones *v.* Ogle, L. R. 8 Ch. App. 192 (1872). And does not apply to stock dividends. Hartley *v.* Allen, 4 Jur. (N. S.) 500 (1858). Under the Apportionment Act of England, a dividend declared after the death of the tenant for life may be apportioned between his estate and the remainderman. Bulkeley *v.* Stephens, [1896] 2 Ch. 241.

[2] In *Ex parte* Rutledge, 1 Harp. Eq. (S. C.) 65 (1824), a dividend was apportioned between life tenant and remainderman. This is regarded as a leading case in favor of apportionment. In Pennsylvania the interest on municipal bonds and on the bonds of private corporations is apportionable; but *quere* whether or not the interest on government bonds would be. Wilson's Appeal, 108 Pa. St. 344 (1885), overruling Earp's Will, 1 Pars. Eq. Cas. (Pa.) 453 (1850). But in Massachusetts the statute of apportionment is held not to apply to dividends upon the stock of corporations. Granger *v.* Bassett, 98 Mass. 462, 469 (1868), construing Mass. Gen. Stat., ch. 97, § 24. In New York an apportionment is provided for by Laws of 1875, ch. 542. See Goldsmith *v.* Swift, 25 Hun, 201 (1881). Where dividends are declared at irregular intervals, such dividends are not apportionable under the New York statute. Matter of Kane, 64 N. Y. App. Div. 566 (1901).

[3] A stock dividend declared in 1891 to represent profits which for three years had been used for improvements should be apportioned between the life tenant and remaindermen, the testator having died in 1890. Thomas *v.* Gregg, 78 Md. 545 (1894).

[4] *In re* Connolly's Estate, 198 Pa. St. 137 (1901). A dividend paid after the death of the life tenant belongs to the remaindermen and there is no apportionment unless the will provides otherwise. Mann *v.* Anderson, 106 Ga. 818 (1899).

corpus.[1] The subsequent income, however, of such increase belongs, during the continuance of the life tenancy, to the life tenant as income; the new shares are part of the *corpus*, and the life tenant, being entitled to the income from the *corpus*, takes the income from the accretions thereto.[2] Where new stock is issued and the right to subscribe therefor is sold, the proceeds of such sale belong to the remainderman, and only the income to the life tenant.[3]

§ 560. *Miscellaneous questions herein.*— An executrix is liable on stock standing in the name of the estate instead of in the name of the deceased or the executrix, it being shown that the stock formerly stood in the name of the deceased.[4] Even though executors transfer to themselves as trustees certain national bank stock and pay the dividends to a legatee of a share in the estate, yet if the will did not set aside such stock for such legatee, the estate, and

[1] Atkins *v.* Albree, 94 Mass. 359 (1866); Brinley *v.* Grou, 50 Conn. 66 (1882); Biddle's Appeal, 99 Pa. St. 278 (1882); Moss's Appeal, 83 Pa. St. 264 (1877); Goldsmith *v.* Swift, 25 Hun, 201 (1881); *Re* Bromley, 55 L. T. Rep. 145 (1886). Profit upon the sale of stock is *corpus*, and not income for the life tenant. Whitney *v.* Phœnix, 4 Redf. (Surr.) 180 (1880). *Cf.* Leitch *v.* Wells, 48 N. Y. 585 (1872); Hemenway *v.* Hemenway, 134 Mass. 446 (1883); New England Trust Co. *v.* Eaton, 140 Mass. 532 (1886). A privilege given by a corporation to its stockholders to take additional stock at par is appurtenant to the old stock, and does not belong to the life beneficiary. Hite *v.* Hite, 93 Ky. 257 (1892). Where the life tenant refuses to pay for increased capital stock which is issued at fifty cents on a dollar, the remaining fifty cents being a stock dividend, and the trustee takes the stock for himself, and ten years have elapsed since the life tenant claimed the stock, the statute of limitations is a bar to his suit to compel the trustee to account for the stock. Matter of Smith, 66 N. Y. App. Div. 340 (1901). Sometimes certificates of new stock issued to represent property acquired are not stock dividends. Chicago, etc. R. R. *v.* Page, 1 Biss. 461 (1864); s. c., 5 Fed. Cas. 600. In Londesborough *v.* Somerville, 19 Beav. 295 (1854), where consols were sold just before a dividend day and the proceeds invested in realty, a tenant for life was held entitled to be paid, as income on the consols, the difference between the price obtained and the value exclusive of the next dividend. See also notes in § 554, and, in general, § 286, *supra*.

[2] Quoted and approved in *Re* Eisner's Estate, 175 Pa. St. 143 (1896); Moss's Appeal, 83 Pa. St. 264 (1877); Biddle's Appeal, 99 Pa. St. 278 (1882), and the cases generally cited in the preceding note; *Re* Bromley, 55 L. T. Rep. 145 (1886).

[3] Walker *v.* Walker, 68 N. H. 407 (1896). A life tenant is not entitled to the price realized by the trustee from the sale of the right to subscribe for new stock, neither is the life tenant entitled to a large sum realized on the sale of the securities in excess of the inventoried value, the sale being for purposes of reinvestment, nor is he entitled to profits on securities purchased and later sold at a higher price, but the life tenant is entitled to a stock dividend representing earnings used by the company to increase its plant. Stewart *v.* Phelps, 71 N. Y. App. Div. 91 (1902).

[4] Brown *v.* Ellis, 103 Fed. Rep. 834 (1900). See also § 248, *supra*.

not the legatee's interest, is liable for an assessment on such stock.[1] The life tenant must pay calls which are made[2] and taxes levied[3] during the continuance of his estate upon shares held in trust for his benefit. Where stock to produce a fixed income is bequeathed for life, a subsequent increase in the earnings from that stock inures to the benefit of the life tenant.[4] The enhanced price for which stock sells by reason of dividends earned but not declared belongs entirely to the remainder.[5] Profits realized from the enhanced value of securities belong to the remainderman.[6] Where a trustee sells stock by decree of the court on account of the precarious nature of the stock, the life tenant is not entitled to anything from the *corpus* of the estate, where it is not shown that the income

[1] Earle *v.* Rogers, 105 Fed. Rep. 208 (1900).

[2] *Re* Box, 1 Hem. & M. 552 (1863); Day *v.* Day, 1 Dr. & Sm. 261 (1860). In case of a life estate, followed by a life estate, followed by a remainder to the nominees of the first life tenant, the estate of the first life tenant is liable for calls made after the remainder commences. Hobbs *v.* Wayet, L. R. 36 Ch. D. 256 (1887). If a call becomes due the day after the testator dies, it is the duty of the executor to pay it from the general fund. Emery *v.* Wason, 107 Mass. 507 (1871).

[3] Webb *v.* Burlington, 28 Vt. 188 (1856); Citizens' Mut. Ins. Co. *v.* Lott, 45 Ala. 185 (1871). See also § 248, *supra.*

[4] Russell *v.* Loring, 85 Mass. 121 (1861). But when a fixed income is bequeathed and the income fails or falls short, the principal must be resorted to. Bonham *v.* Bonham, 33 N. J. Eq. 476 (1881); Haydel *v.* Hurck, 72 Mo. 253 (1880). The opposite rule, however, prevails in New York. Delaney *v.* Van Aulen, 84 N. Y. 16 (1881), reversing s. c., 21 Hun, 274. *Cf.* Crawford *v.* Dox, 5 Hun, 507 (1875). See also § 304, *supra.*

[5] Where stock is sold the life tenant is not entitled to such part of the price as might represent the income since the last dividend. The court has no power to make any division. Scholefield *v.* Redfern, 2 Dr. & Sm. 173 (1863), the court refusing to follow Londesborough *v.* Somerville, 19 Beav. 295, and stating that the latter turned upon very special circumstances. See also Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850); Van Blarcom *v.* Dager, 31 N. J. Eq. 783 (1879); *Re* Stutzer, 26 Hun, 481 (1882); *Re* Gerry's Accounting, 103 N. Y. 445 (1886). Where, during the life tenancy, the corporation passes a large portion of its profits to surplus, and by reason thereof the market value of the stock increases and is sold for a higher price, the difference belongs to the life tenant. Simpson *v.* Millsaps, 31 S. Rep. 912 (Miss. 1902).

[6] Stewart *v.* Phelps, 71 N. Y. App. Div. 91 (1902). Concerning the question as to the rights of the life tenant and remainderman where trustees buy securities at a premium or sell them at a premium, see Scovel *v.* Roosevelt, 5 Redf. 121 (1881); Townsend *v.* U. S. Trust Co., 3 Redf. 220 (1877); Duclos *v.* Benner, 5 N. Y. Supp. 733 (1888); Farwell *v.* Tweddle, 10 Abb. N. Cas. 94 (1881); Whittemore *v.* Beekman, 2 Dem. 275 (1883); Cridland's Estate, 132 Pa. St. 479 (1890). See note in 18 Abb. N. Cas. 185. An increase in the value of securities in which a trust fund of $10,000 is invested belongs to the life tenant where the instrument creating the trust divides "the said principal sum of $10,000" among remaindermen upon the death of the life tenant. Claflin *v.* Dewey, 177 Mass. 166 (1900).

is decreased.[1] On the other hand, even though trust-estate funds are used to purchase securities at a higher price than par, yet the life tenant is entitled to the entire income from such securities.[2] Where, during the life tenancy, the corporation ceases business and is wound up, the life tenant is entitled to such part of the surplus value of the stock as was earned during the life tenancy.[3] Where a trustee has power to sell and reinvest, profits made in this way belong to the *corpus*.[4] A life tenant is not entitled to have the stock transferred to him on the corporate books.[5] The corporation, if it had notice of the trust, may be held liable for transferring shares in prejudice of the rights of the life tenant.[6] And an administrator who permits an irregular transfer in fraud of the life tenant's rights makes himself personally liable.[7] A dividend declared be-

[1] Lister *v.* Weeks, 47 Atl. Rep. 588 (N. J. 1900). See s. c., 60 N. J. Eq. 215 (1900).

[2] *Re* De Pothonier, [1900] 2 Ch. 529.

[3] *In re* Connolloy's Estate, 198 Pa. St. 137 (1901).

[4] *In re* Kemble's Estate, 201 Pa. St. 523 (1902). A life tenant entitled to dividends and income is not entitled to profits made in the sale and reinvestment of the fund. Smith *v.* Hooper, 51 Atl. Rep. 844 (Md. 1902). Where a trustee is authorized to sell the securities and reinvest the money, and he sells bonds at a premium, the premium does not belong to the life tenant. Whittingham *v.* Schofield's Trustee, 67 S. W. Rep. 846 (Ky. 1902).

[5] Collier *v.* Collier, 3 Ohio St. 369 (1854). *Cf.* State *v.* Robinson, 57 Md. 486 (1881). If the corporation transfers the stock to the life tenant, even by order of the court, and issues a certificate not stating the facts of life tenancy, and tells a purchaser of the certificate that it is all right, the corporation is liable to the remainderman. Caulkins *v.* Gaslight Co., 85 Tenn. 683 (1887).

[6] Stewart *v.* Fireman's Ins. Co., 53 Md. 564 (1880). Where a life tenant transfers the stock to the remainderman, the former's executor cannot hold the corporation liable for dividends paid to the latter. Kennedy *v.* First Nat. Bank, 115 N. C. 223 (1894). Where a life tenant transfers the stock into his own name, the remainderman may recover the stock upon the death of the life tenant, even though the latter was insolvent. Mercantile, etc. Co. *v.* Weld, 85 Md. 685 (1897). A bank is liable to the remainderman for allowing a transfer to the life tenant, even though the transfer to the life tenant is by the executors. Cox *v.* First Nat. Bank, 119 N. C. 302 (1896). Where stock is specifically bequeathed in trust for a certain person during her life and then for her children, and the corporation allows the executor to transfer the stock to the trustee, as trustee for the life tenant only, and afterwards allows the trustee to transfer the stock to *bona fide* hands, the corporation is liable for allowing the second transfer. In a suit by a remainderman to recover from a corporation the value of stock which the corporation had transferred to the life tenant absolutely and which had been lost, the statute of limitations does not begin to run until the death of the life tenant, even though the trust was created in 1854 and the life tenant died in 1898. Wooten *v.* Wilmington, etc. R. R., 128 N. C. 119 (1901). See also § 330, *supra.*

[7] Keeney *v.* Globe Mill Co., 39 Conn. 145 (1872). See also Amiss *v.* Williamson, 17 W. Va. 673 (1881). Where the executor, who is also the life tenant, wrongfully pledges the stock, his executor may rightfully use the funds of the estate to redeem such stock. *In re* Orne's Estate, 192 Pa. St. 626 (1899).

fore but payable after the testator's death belongs to the estate.[1] A claim of the company against the life tenant for dividends paid cannot be enforced against the remainderman's interest.[2] Where a life interest is given to one person with remainder over, and it is necessary that the stock be sold in order to preserve the estate, a decree of sale is valid if both the executor and life tenant are parties to such suit.[3] A gift of stock on condition that the dividends should all go to the owner, and that he should vote it, is a gift of a remainder, with a life interest in the donor.[4] A tenant for life, unless restrained by condition, may sell his interest.[5]

[1] De Gendre *v.* Kent, L. R. 4 Eq. 283 (1867). *Cf.* Browne *v.* Collins, L. R. 12 Eq. 586, 594 (1871); Lock *v.* Venables, 27 Beav. 598 (1859). See also Cogswell *v.* Cogswell, 2 Edw. Ch. 231 (1834); Abercrombie *v.* Riddle, 3 Md. Ch. 320 (1850); Wright *v.* Tuckett, 1 Johns. & H. 266 (1860); Furley *v.* Hyder, 42 L. J. (Ch.) 626 (1873).

[2] Where a fixed per cent. is paid annually to stockholders instead of dividends and charged to them, and the stock held in pledge for the same, such a payment to the life tenant does not create a valid lien on the stock as against the remainderman. Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282 (1891).

[3] Drovers', etc. Bank *v.* Hughes, 83 Md. 355 (1896).

[4] Matter of Brandreth, 169 N. Y. 437 1902). A gift of stock, the donee to have the possession and management of the same, but the donor to have the income during his life, makes the donee trustee until the death of the donor, and hence such gift is taxable under the New York statutes as a transfer to take effect on his death. Matter of Cornell, 170 N. Y. 423 (1902).

[5] Jackson *v.* Van Hoesen, 4 Cowen, 325 (1825); Bailey *v.* Bailey, 97 N. Y. 460, 470 (1884). An estate may be rendered inalienable by vesting it in trustees or by creating future, contingent, or expectant estates, so that there are no persons in being during the two lives who can convey a perfect title. Murphy *v.* Whitney, 140 N. Y. 546 (1894); Williams *v.* Montgomery, 148 N. Y. 519 (1896).

CHAPTER XXXIV.

TAXATION OF SHARES OF STOCK AND OF CORPORATIONS.

§ 561. *The four methods of taxing corporate interests.*— There are, in general, four methods of taxing corporate interests. These are, first, by a tax on the franchise; second, on the capital stock; third, on the real estate and personal property of the corporation; fourth, by a tax on the shares of stock in the hands of the stockholders.[1] There is another mode of taxation which is sometimes adopted — a tax on corporate dividends; but since this is generally construed to be only a method of valuing the franchise or capital stock, it can hardly be called a fifth method of taxing corporate interests.[2]

It is entirely within the discretion of the legislature to say which one of these four methods of taxation shall be adopted, where the matter is not regulated by the state constitution. Not only this, but it is also within the discretion of the legislature to tax the corporation in two or more of these ways — to levy a double tax on the corporate interests, and even to levy a treble or quadruple tax thereon.

[1] 2 Redfield, Railw. (3d ed.), p. 453; Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556 (1876); Louisville, etc. R. R. *v.* State, 8 Heisk. (Tenn.) 663, 795 (1875).

[2] See § 572*a*, *infra*.

A. TAXATION OF SHARES OF STOCK.

§ 562. *Relation of stockholders to the first three methods of taxation.*— The stockholders in a corporation have very little to do directly with any of the first three modes of taxing corporate interests. The tax is levied directly against the corporation, and is paid by the corporate officers out of the treasury of the corporation. If the tax is unauthorized or illegal, or improperly assessed, or is based on too high a valuation, it is ordinarily the duty of the corporate officers to rectify or oppose such tax. The stockholders have nothing to do with the ordinary transaction of corporate business, of which this forms a part. Where, however, the corporate officers refuse, upon request of one or more stockholders, to oppose or decline to pay an unauthorized tax levied in any one of the three methods mentioned above, the stockholder himself may bring a suit in a court of equity, in behalf of and for the protection of the corporate interests, to enjoin the payment and collection of such unauthorized tax.[1]

[1] Dodge *v.* Woolsey, 18 How. 331 (1855); Barnes *v.* Kornegay, 62 Fed. Rep. 671 (1894); State Bank *v.* Knoop, 16 How. 369 (1853); Wilmington R. R. *v.* Reed, 13 Wall. 264 (1871); Delaware R. R. Tax, 18 Wall. 206 (1873); Greenwood *v.* Freight Co., 105 U. S. 13 (1881); Paine *v.* Wright, 6 McLean, 395 (1855); s. c., 18 Fed. Cas. 1010; Foote *v.* Linck, 5 McLean, 616 (1853); s. c., 9 Fed. Cas. 366, holding also that the corporation is a necessary party, and that if the complainant is a non-resident he may bring the suit in the United States circuit court; Davenport *v.* Dows, 18 Wall. 626 (1873), also holding that the corporation is a necessary party defendant; Bailey *v.* Atlantic, etc. R. R., 3 Dill. 22 (1874); s. c., 2 Fed. Cas. 365; Parmley *v.* St. Louis, etc. R. R., 3 Dill. 13, 25 (1874); s. c., 18 Fed. Cas. 1223, 1226. But the stockholder must allege actual tender of the amount of tax conceded to be due. Allegation of readiness to pay is insufficient. Huntington *v.* Palmer, 8 Fed. Rep. 449 (1881). See also Trask *v.* Maguire, 18 Wall. 391 (1873); Wood *v.* Draper, 24 Barb. 187 (1857); London *v.* Wilmington, 78 N. C. 190 (1878). See also § 494, *supra*. The case of State *v.* Flavell, 24 N. J. L. 370 (1854), denies this right. A stockholder's injunction against a tax on corporate property fails when the property is subsequently sold under execution. Secor *v.* Singleton, 35 Fed. Rep. 376 (1888). The general character of such a suit as this comes under the principles of law set forth in ch. XLV, *infra*. A stockholder may enjoin the corporation from obeying an illegal order of railroad commissioners of a state requiring shippers to pay a war revenue stamp tax. Dinsmore *v.* Southern, etc. Co., 92 Fed. Rep. 714 (1899). A suit in equity lies in the federal court to enjoin the collection of taxes on stock held by one corporation in another on the ground that it deprives the stockholder of the equal protection of the law, where the statutes of the state forbid such tax. Louisville T. Co. *v.* Stone, 107 Fed. Rep. 305 (1901). A stockholder in a corporation cannot maintain a bill to enjoin the payment by the corporation of the tax imposed by act of congress upon such corporation for doing business in Alaska. Corbus *v.* Alaska, etc. Co., 99 Fed. Rep. 334 (1899); aff'd, 187 U. S. 455 (1903).

§ 563. *Tax on shares of stock as distinguished from the other methods.*—A tax on shares of stock is clearly different from a tax upon the franchise, the corporate property, or the capital stock. Especially is it important to distinguish a tax on shares of stock from a tax on the capital stock.[1] The latter is always taxed against the corporation, is paid by the corporation, and is based on a valution which does not necessarily depend on the value of the shares of stock. A tax on the shares of stock is generally levied directly against the stockholders themselves at their place of residence, is

[1] In Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875), the court clearly recognized this distinction, and said: "The legal property of the shareholder is quite distinct from that of the corporation, although the shares of stock have no value save that which they derive from the corporate property and franchise, and a tax levied upon the property of the one is not, in a legal sense, levied upon the property of the other." See also Bradley *v.* Bauder, 36 Ohio St. 28 (1880). *Cf.* Delaware R. R. Tax, 18 Wall. 206. 230 (1873); Farrington *v.* Tennessee, 95 U. S. 679 (1877), where the distinction is clearly drawn; Quincy Bridge Co. *v.* Adams County, 88 Ill. 615 (1878). In North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877), the court said: "The moneyed capital of a bank is an entirely different thing from its capital stock. The former is the property of the corporation. It may consist of cash or bills discounted, or be in part invested in real estate or in the securities of federal government. In whatever form it is invested, it is owned by the bank as a corporate entity and not by the stockholders. The stock or shares represent the interests of the shareholders, which entitle them to participate in the net profits of the bank in the employment of its capital, and is a distinct and independent interest or property in the shareholders, held by them like other property." The case of Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875), holds also that a tax on the "capital stock" means the property of the corporation and not the aggregate of the shares of stock. See also State *v.* Hamilton, 5 Ind. 310 (1854), where the word "stock" was construed to mean the tangible property of the corporation. But see Trask *v.* Maguire, 18 Wall. 391 (1873), and § 8, *supra*, where the word "stock" is defined. And even though the value of the capital stock is estimated by the aggregate value of the shares, it is still a tax on the capital stock. New Orleans, etc. R. R. *v.* Board of Assessors, 32 La. Ann. 19 (1880). See also State Bank *v.* Richmond, 79 Va. 113 (1884). So also where the franchise is valued in that manner for taxation. Commonwealth *v.* Hamilton Mfg. Co., 94 Mass. 298 (1866); Att'y-Gen. *v.* Bay State Min. Co., 99 Mass. 148 (1868). Hamilton Co. *v.* Massachusetts, 6 Wall. 632 (1867), holds that a tax on the excess of the market value of the stock over the value of the corporate realty and machinery is a franchise tax. In Indiana it is held that a tax on the shares of stock is the proper mode of taxation unless the statute provides otherwise. Whitney *v.* Madison, 23 Ind. 331 (1864). *Cf.* Wright *v.* Stelz, 27 Ind. 338 (1866). The mere fact that the corporation is compelled to pay the tax does not prevent its being considered a tax on the shares. National Bank *v.* Commonwealth, 9 Wall. 353, 360 (1869), per Miller, J. Stockholders are liable for taxes levied on a distillery where the statute levies the tax on "persons interested in the use of the distillery." U. S. *v.* Wolters, 46 Fed. Rep. 509 (1891).

based on the market value of the stock, and is entirely distinct from the location, interests, property, or taxes of the corporation itself. There are, however, some instances of taxation herein which are on the border-line between the two. Thus, a statute expressly laying a tax on the shares of stock, but requiring the corporation to pay that tax from the corporate funds, has been held to be a tax, not on the shares of stock, but on the capital stock. In other jurisdictions it has been held to be a tax on the shares of stock. Taxes on shares of stock in national banks are frequently so levied and collected, and are held to be upon the shares of stock and not on the capital stock.[1] A tax laid on shares owned by non-residents of the state which creates the corporation and which levies the tax is a tax on the shares of stock and not on the capital stock, even though the corporation is required to pay it and to collect the same from the owners of those shares. A state may tax the shares of stock of a corporation, even though a part of its assets consist of United States bonds.[2]

§ 564. *Tax by a state or municipality on stockholders residing in the state creating the corporation.*— The right of the state to tax resident stockholders of a resident corporation on their shares of stock is undoubted, and has been unquestioned except where double taxation would result therefrom and is prohibited; or where a constitutional provision restricts this mode of taxation.[3] Generally such a tax on resident stockholders is levied on them, not in the municipality where the corporation is, but in the cities, counties, or towns where the stockholders respectively reside. This is always the rule if the statute is silent, and is the rule unless the statute expressly provides otherwise.[4]

[1] See § 570, *infra.*

[2] Cleveland T. Co. *v.* Lander, 184 U. S. 111 (1902).

[3] In Illinois, under the act of 1872 taxing railroad corporations, resident stockholders in domestic corporations are not taxed. Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875). In Iowa stock is taxed under § 813 of the Code. See Cook *v.* Burlington, 59 Iowa, 251 (1882); Henkle *v.* Keota, 68 Iowa, 334 (1886). *Cf.* National State Bank *v.* Young, 25 Iowa, 311 (1868). In Iowa, where deductions for debts are allowed to persons taxed on their "credits," no deduction is allowed from the tax on shares of stock. They are not "credits." Bridgman *v.* Keokuk, 72 Iowa, 42 (1887). As to the valuation of the shares of stock, see St. Charles, etc. R. R. *v.* Assessors, 31 La. Ann. 852 (1879). If the corporation owns shares of its own stock it is taxable the same as though owned by another. Richmond, etc. R. R. *v.* Alamance Co., 84 N. C. 504 (1881).

[4] Evansville *v.* Hall, 14 Ind. 27 (1859). A pledgor is the proper person to be assessed on stock which has been pledged. Tucker *v.* Aiken, 7 N. H. 113 (1834). A pledgee of stock is not subject to a tax levied on the shares of stock held by him. Waltham Bank *v.* Waltham, 51 Mass. 334 (1845). In Massachusetts shares held by executors or administrators are taxed in the town of which the deceased was an inhabit-

Controversies sometimes arise as to the power of a municipality to tax stockholders living in the state, but not in the municipality which levies a tax on their shares of stock, the corporation itself being located within that municipality. The law plainly is that such a tax is unauthorized, illegal, and not collectible, unless the municipality is authorized by statute to levy the tax.[1] A mere general authority to the municipality to tax all property within its boundaries will authorize a tax by it of shares of stock owned by persons living within it.[2] But such authority does not sustain a tax on stockholders residing out of the municipality, although within the state. The location of such shares of stock, as property for purposes of taxation, is not where the corporation is located, but where the stockholder lives.[3] The statutes of the state may change this situs of the stock so as to render it taxable where the corporation is; but unless there is a statute to that effect, such a tax by a municipality is unauthorized and void.

§ 565. *Tax on resident stockholders in a non-resident or foreign corporation.*— It is undoubtedly within the constitutional power of the legislature of a state to enact a statute that persons residing in that state, who are stockholders in a corporation created by another state, shall be taxed on their shares of stock at their residence

ant at the time of his death, and shares held by trustees are taxed in the towns in which the *cestuis que trust* respectively reside. Revere *v.* Boston, 123 Mass. 375 (1877). As to the legal remedy in Massachusetts for an unjust valuation of stock for taxation, see Boston Mfg. Co. *v.* Commonwealth, 144 Mass. 598 (1887). As to taxation of stock under the Vermont law, see Willard *v.* Pike, 59 Vt. 202 (1887).

[1] A city has no inherent power to levy a tax on the capital stock of a corporation. Macon *v.* Macon Constr. Co., 94 Ga. 201 (1894); Stetson *v.* Bangor, 56 Me. 274 (1868), the court saying: "Municipalities can tax shares of stock only when authorized so to do by some law of the state. They are the creatures of state law, and derive their powers in this respect solely from state enactments;" Griffith *v.* Watson, 19 Kan. 23 (1877); Evansville *v.* Hall, 14 Ind. 27 (1859); Conwell *v.* Connersville, 15 Ind. 150 (1860). Such a tax may be levied under a general power of the municipality to tax property. Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847). *Cf.* Richmond *v.* Daniel, 14 Gratt. (Va.) 385 (1858); Augusta *v.* National Bank, 37 Ga. 620 (1868). Markoe *v.* Hartranft, 6 Am. L. Reg. (N. S.) 487 (1867), holds that in Pennsylvania such a tax is unconstitutional, and that a tax must be levied where the stockholder resides. See also Craft *v.* Tuttle, 27 Ind. 332 (1866).

[2] But a municipality can levy a tax only when specially authorized so to do, and can tax only such property as the statute permits it to tax. Cooley, Taxation (2d ed.), 678. Hence, power to a municipality to levy a tax for watchmen purposes will not authorize a tax on shares of stock. Bank of Georgia *v.* Savannah, Dudley (Ga.), 130 (1832). Under a statute authorizing it, a city may levy a tax on stock in a local bank, even though some of the stockholders are non-residents. Union Bank *v.* City, 94 Va. 316 (1897).

[3] See § 566, *infra*.

within the former state.[1] This principle of law is based on the fact that shares of stock are personal property; that they are distinct from the corporate property, franchises, and capital stock; that they follow the domicile of their owner like other personal property, and that consequently he may be taxed therefor wherever he may reside. It accordingly is a question of policy and expediency with a state whether or not it will tax its citizens who are stockholders in foreign corporations.[2] A few of the states levy such taxes.[3]

[1] Worthington *v.* Sebastian, 25 Ohio St. 1 (1874); Bradley *v.* Bauder, 36 Ohio St. 28 (1880), holding it valid, although the corporation is taxed in the state where it exists. To same effect, Seward *v.* Rising Sun, 79 Ind. 351 (1881); Dyer *v.* Osborne, 11 R. I. 321 (1876); McKeen *v.* Northampton County, 49 Pa. St. 519 (1865); Dwight *v.* Boston, 94 Mass. 316 (1866); Whitesell *v.* Northampton County, 49 Pa. St. 526 (1865); Great Barrington *v.* County Com'rs, 33 Mass. 572 (1835); Worth *v.* Com'rs, 82 N. C. 420 (1880); s. c., 90 N. C. 409 (1884).

[2] Quoted and approved in Hart *v.* Smith, 64 N. E. Rep. 661 (Ind. 1902).

[3] State *v.* Hannibal, etc. R. R., 37 Mo. 265 (1866); Ogden *v.* St. Joseph, 90 Mo. 522 (1887); Sturges *v.* Carter, 114 U. S. 511 (1884), upholding such a tax in Ohio; Newark City Bank *v.* Assessor, 30 N. J. L. 1 (1862). In Illinois, also, resident stockholders in foreign corporations are taxed on their shares of stock. Porter *v.* Rockford, etc. R. R., 76 Ill. 561 (1875). Under the Illinois statute a resident of the state is subject to taxation on stock owned by him in a Kansas corporation, all the property of the corporation being in Kansas. *In re* Greenleaf, 184 Ill. 226 (1900); Cooley, Taxation (2d ed.), 57, 221; Holton *v.* Bangor, 23 Me. 264 (1843); Smith *v.* Exeter, 37 N. H. 556 (1859). A citizen of California may be taxed on mortgage bonds held by him in an Arizona railroad company, payable in New York. Mackay *v.* San Francisco, 113 Cal. 392 (1896). Stocks and bonds of a foreign corporation owned by a resident of California are located in that state for taxation purposes, even though they are pledged for a loan in another state. Stanford *v.* City, etc., 131 Cal. 34 (1900). Bonds secured by a mortgage on a railroad in California are not taxable, under the California constitution, the railroad itself being taxed for its full value. Germania, etc. Co. *v.* City, etc. of San Francisco, 128 Cal. 589 (1900). But mortgage bonds of a foreign railroad company are taxable. *In re* Fair's Estate, 128 Cal. 607 (1900)). If such bonds are held by two trustees, one a resident and the other a non-resident, one-half in value of the bonds will be taxed in the state, even though all the bonds are outside of the state. Mackay *v.* City, etc. of San Francisco, 128 Cal. 678 (1900). See also Webb *v.* Burlington, 28 Vt. 188 (1856); Lycoming County *v.* Gamble, 47 Pa. St. 106 (1864). *Re* Short's Estate, 16 Pa. St. 63 (1851), where a decedent who died a resident of Pennsylvania left a fortune in stocks of non-resident corporations. The stocks were held subject to a collateral inheritance tax. In 1879 Pennsylvania adopted in large part the system of taxation that prevails in New York for the taxation of corporations. See Hunter's Appeal, 10 Atl. Rep. 429 (Pa. 1887). By the still later statute of 1885, manufacturing corporations are specially favored in the way of taxation. MacKellar, etc. Co. *v.* Commonwealth, 10 Atl. Rep. 780 (Pa. 1887). In ascertaining the value of stock for purposes of taxation the amount paid in on the stock may be taken as the value if there have been no sales of the stock, and if there is no other evidence as to its value. Commonwealth *v.* People, etc. Co., 183 Pa.

But New York pursues the more broad and liberal policy that shares of stock should not be taxed where the corporation is already taxed; that the state which furnishes facilities to the corporation for the earning of dividends should have the sole benefit of taxes on such corporate interests; that a tax on resident stockholders in non-resident corporations would generally result in a double taxation of stockholders not residing in the state creating the corporation; and that interstate comity, interests, and financial investments are promoted best by taxing corporations directly, and not levying a tax on either resident stockholders in non-resident corporations or resident stockholders in resident corporations where the

St. 405 (1898). In New Jersey now there is no tax on shares of stock except in banks. See Newark Banking Co. *v.* Newark, 121 U. S. 163 (1887), and in that state shares of stock owned by residents in foreign corporations are not taxable if a tax is paid by the corporation itself. State *v.* Ramsey, 54 N. J. L. 546 (1892). In Texas shares of stock are not taxed where the capital or property of the corporation is taxed. Gillespie *v.* Gaston, 67 Tex. 599 (1887). California made a wise resolution when, in 1881, it repealed § 3640 of its political code, taxing shares of stock, and added the following (§ 3608) to the code: "Shares of stock in corporations possess no intrinsic value over and above the actual value of the property of the corporation which they stand for and represent, and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed; but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." Sustained and applied in Burke *v.* Badlam, 57 Cal. 594 (1884); Spring Valley Waterworks *v.* Schottler, 62 Cal. 69, 118 (1882). But the temptation to tax stockholders in non-resident corporations was yielded to. See San Francisco *v.* Fry, 63 Cal. 470 (1883); San Francisco *v.* Flood, 64 Cal. 504 (1884). As to Ohio, see R. S. 1886, §§ 2737, 2739, 2744, construed in Jones *v.* Davis, 35 Ohio St. 474 (1880). In Ohio resident stockholders in foreign corporations may be taxed on their stock. Lee *v.* Sturges, 46 Ohio, 153 (1889). In Ohio stock of both foreign and domestic corporations is taxed unless the property of the corporation is taxed in its name in that state. Lander *v.* Burke, 63 N. E. Rep. 69 (Ohio, 1902). See also Worth *v.* Ashe County, 90 N. C. 409 (1884); Seward *v.* Rising Sun, 79 Ind. 351 (1881). As to taxation of shares of stock in foreign corporations under the Michigan statutes, see Graham *v.* St. Joseph, 67 Mich. 652 (1888). Shares of stock may be taxed although the corporation is also taxed. The corporation may be compelled to pay the tax on the shares of stock by deducting it from dividends. South Nashville Street R. R. *v.* Morrow, 87 Tenn. 406 (1889). Under the Connecticut statutes, shares of stock owned by residents in foreign express companies are taxed, even though such companies are not incorporated. Lockwood *v.* Weston, 61 Conn. 211 (1891). In Mayor, etc. of Baltimore *v.* Baltimore, etc. St. Ry., 57 Md. 31 (1881), it was held that stock in street railway companies in Maryland may be taxed, although by statute stock in steam railroad companies cannot be. In Virginia shares of stock in domestic as well as foreign corporations held by residents are taxed. Jennings *v.* Commonwealth, 98 Va. 80 (1900). Citizens of Alabama owning stock in foreign corporations may be taxed thereon in Alabama. State *v.* Kidd, 125 Ala. 413 (1900). The

corporation itself is subject to taxation.[1] The injustice of a tax on resident stockholders in foreign corporations is at once apparent when it is considered that the state creating the corporation nearly always taxes the corporation itself or all its stockholders, resident and non-resident; and that if stockholders residing elsewhere are taxed again where they reside, they are taxed both in the state of the corporation, directly or indirectly, and also directly in the state where they reside. No reduction need be allowed in the latter state for taxes levied upon the corporation in another state.[2]

§ 566. *Tax on non-resident stockholders in resident or domestic corporation.— Mode of collecting.—* When it is determined by a state that it prefers to levy a tax on shares of stock rather than on the franchises, capital stock, or tangible property of the corporation, or to levy a tax on both, there is no doubt as to its right to tax the stockholders residing within the state. But more difficulty occurs as to the right of the state to tax non-resident stockholders in corporations created by the state. This right has been strenuously denied on the ground that shares of stock are not located at the domicile of the corporation, but follow the domicile of the stockholder.

It is the well-established rule, however, that although shares of

situs of stock for the purpose of taxation may be where the owner of the stock resides. Stanford *v.* City, etc., 131 Cal. 34 (1900). Stock held by residents in foreign corporations may be taxed. Bacon *v.* Board, etc. Com'rs, 126 Mich. 22 (1901).

[1] The statute is as follows: "The owner or holder of stock in any incorporated company liable to taxation on its capital shall not be taxed as an individual for such stock." Laws 1896, ch. 908, § 4, (16). See also People *v.* Com. of Taxes, 4 Hun, 595 (1875); aff'd, 62 N. Y. 630, holding that residents of this state, owning shares of stock in a corporation created under and by the laws of this state or of any foreign state, are not subject to be personally assessed and taxed thereon under the laws of this state. Also People *v.* Com'rs, 5 Hun, 200 (1875); *Re* Enston's Will, 113 N. Y. 174 (1889). For the purpose, however, of making the taxation of moneyed corporations correspond to taxation of stockholders in national banks, and for the purpose of taxing the latter, stockholders in banks incorporated under the laws of New York are taxed on their shares of stock. The tax generally levied on corporations in New York is held to be a tax on their franchises. See People *v.* Home Ins. Co., 92 N. Y. 328 (1883); People *v.* McLean, 80 N. Y. 254 (1880); People *v.* Ferguson, 38 N. Y. 89 (1868); People *v.* Assessors, etc., 76 N. Y. 202 (1879). See People *v.* New York, etc., Co., 92 N. 487 (1883); People *v.* Davenport, 91 N. Y. 574 (1883); Nassau, etc. Co. *v.* Brooklyn, 89 N. Y. 409 (1882); Oswego Starch Factory *v.* Dolloway, 21 N. Y. 449 (1860); People *v.* Com'rs, 95 N. Y. 554 (1884); Valle *v.* Ziegler, 84 Mo. 214 (1884); People *v.* Bradley, 39 Ill. 130 (1866). *Cf.* Bank of Republic *v.* Hamilton County, 21 Ill. 54 (1858). See also Smith *v.* Exeter, 37 N. H. 556 (1859), and Jersey City Gas Light Co. *v.* Jersey City, 46 N. J. L. 194 (1884).

[2] See §§ 566, 567, *infra.*

stock have at common law a situs at the domicile of the stockholder, yet that a statute enacted by the state creating the corporation may give to the shares of stock a situs at the location of the corporation; that such a statute may thus determine the situs of shares of non-resident stockholders without changing the situs of shares of resident stockholders; and that consequently, under a statute expressly authorizing such a tax, non-resident stockholders in a resident corporation may be taxed thereon in the place where the corporation has its domicile.[1] The method of enforcing the payment

[1] In Ottawa Glass Co. *v.* McCaleb, 81 Ill. 556 (1876), the court said that the legislature might "require the taxes to be paid by the corporation, and collected by them of the shareholder, by deducting the amount from his dividends or otherwise;" State *v.* Mayhew, 2 Gill (Md.), 487 (1845), where the corporation was to pay the tax from dividends if declared, and from profits if no dividends were declared; St. Albans *v.* National Car Co., 57 Vt. 68 (1884), holding that the statute giving shares of stock a situs at the location of the corporation may be passed after the incorporation, and that *mandamus* lies to compel the corporation to pay the tax. In Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490, 499 (1873), the court said: "Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicile. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located." See also Whitney *v.* Ragsdale, 33 Ind. 107 (1870); Tallman *v.* Butler County, 12 Iowa, 531 (1861); Faxton *v.* McCosh, 12 Iowa, 527 (1861); Mayor, etc. of Baltimore *v.* Baltimore, etc. Ry., 57 Md. 31 (1881). *Cf.* Richmond *v.* Daniel, 14 Gratt. (Va.) 385 (1858); also the case of Oliver *v.* Washington Mills, 93 Mass. 268 (1865), which holds such a tax to be unconstitutional. The common-law rule is well expressed in Union Bank *v.* State, 9 Yerg. (Tenn.) 490 (1836), where the court said: "The power to tax non-resident stockholders is denied, and we think correctly; from its very nature it must be a tax *in personam* and not *in rem*. Stock is in the nature of a chose in action and can have no locality; it must, therefore, of necessity follow the person of the owner. . . . Bank stock is not a thing in itself capable of being taxed on account of its locality, and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner; and if he be a non-resident, he is beyond the jurisdiction of the state and not subject to her laws." See also Minot *v.* Philadelphia, etc. R. R., 18 Wall. 206 (1873); Davenport *v.* Miss. etc. R. R., 12 Iowa, 539 (1861); Howell *v.* Cassopolis, 35 Mich. 471 (1877). In Bradley *v.* Bauder, 36 Ohio St. 28 (1880), the court said: "That shares of stock may be separated from the person of the owner by statute, and given a situs of their own, was held in Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 (1873). But when not so separated, that this situs follows and adheres to the domicile of the owner, is supported by a great weight of authority." See State Tax on Foreign-held Bonds, 15 Wall. 300 (1872). See also Jenkins *v.* Charleston, 5 S. C. 393 (1874). In National Com. Bank *v.* Mobile, 62 Ala. 284 (1878), the court well said: "It may be made the duty of a bank to pay for its shareholders the tax legally assessed against their respective shares, whether the stockholders reside in the state of Alabama or not. Contestations upon these points have been made time and again, sometimes by the banks and

of this tax may be by compelling the corporation to pay it and giving it a lien therefor on the stock, or authorizing it to deduct the tax from the non-resident stockholders' dividends; or, if the statute is silent as to the mode of collection, a tax warrant or an attachment and execution therefor may be levied on the shares of stock.[1] Where the statute provides that stock shall be taxed and

sometimes by the shareholders, to avoid this liability. But it is established by repeated adjudications, and ought to be considered definitely settled." And in First Nat. Bank *v.* Smith, 65 Ill. 44 (1872), the court said: "The separation of the situs of personal property from the domicile of the owner for the purposes of taxation is familiar doctrine of the courts of this country, and has been sanctioned by this court in various cases. . . . The act of congress itself contemplates a severance of the situs of such shares from the person of their owner by providing that they should not be taxed except in the state where the bank is established. But, apart from this, it is really much more reasonable to fix the situs of shares at the place where the bank is located, and where it must continue to do its business or wind up its affairs, than to separate by legislation tangible personal property from the person of its owner." In St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); s. c., 21 Fed. Cas. 203, the following statute was sustained: "The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares: and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made." And again, in American Coal Co. *v.* County Com'rs, 59 Md. 185 (1882), the court said: "The state may give the shares of stock held by individual stockholders a special or particular situs for purposes of taxation, and may provide special modes for the collection of the tax levied thereon." But where the statute merely made the bank the agent to pay the tax and to deduct it from the dividends, the bank is not liable if there have been no dividends. Hershire *v.* First Nat. Bank, 35 Iowa, 272 (1872). Non-resident stockholders in Virginia banks are taxed. Stockholders *v.* Supervisors, 88 Va. 293 (1891). Concerning the situs of stock, see also an article in 45 Alb. L. J. 330.

[1] In Farrington *v.* Tennessee, 95 U. S. 679, 687 (1877), the court said: "The bank may be required to pay the tax out of its corporate funds or be authorized to deduct the amount paid for each stockholder out of his dividend." And, in general, under the act of congress allowing taxation of shares of stock in national banks, a situs is given by statute to the shares so as to locate them where the bank is located, even though the stockholders be non-resident. But collections cannot be enforced against the corporation unless the statute specially authorizes it. First Nat. Bank *v.* Fancher, 48 N. Y. 524 (1872). As to collection by execution, see Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847); Weld *v.* Bangor, 59 Me. 416 (1871). But a levy of execution on stock can only exist when the statute allows stock to be so taken. Barnes *v.* Hall, 55 Vt. 420 (1883). See also § 480, *supra*. A state may prescribe that resident stockholders shall pay a tax where they reside, and that the corporation shall pay a tax based upon the value of the shares of stock held by non-residents, and that the corporation shall have a lien on the stock of such stockholders for such tax so paid. State *v.* Travellers' Ins. Co., 70 Conn. 590 (1898). In this case the Connecticut statute of

that the corporation shall pay the tax and have a lien therefor on the stock, the stockholder is not personally liable to the corporation which has paid such tax.[1] Even though a statute states that stock in banks shall be listed by the banks and the tax paid by the banks with a right to recover from its stockholders, yet this does not au-

1897 imposing a tax of one and one-half per cent. on the value of stock held by non-resident stockholders in resident corporations was upheld and applied. The court held also that a state may tax shares of stock held by non-residents in domestic corporations, even though the corporation pays a tax on all its property. It also held that although resident stockholders in a domestic corporation are allowed a deduction of $183 per share from a market value of $230 a share of their holdings of stock, leaving the taxable value of the stock $47, a similar deduction may be refused to non-resident stockholders, inasmuch as the statute did not provide for such deduction for the latter, and inasmuch as there was no proof that the non-resident stockholders were citizens of the United States. As to levy under a tax warrant, see McNeal *v.* Mechanics', etc. Assoc., 40 N. J. Eq. 351 (1885). But if the stockholder pays the tax, even under protest, he cannot recover back the money paid. Sowles *v.* Soule, 59 Vt. 131 (1887). In the case of State *v.* Thomas, 26 N. J. L. 181 (1857), the court refused to compel the corporation to pay the tax on stock of non-residents, and said: "It has been decided by this court that the bonds and stocks of corporations in this state held by non-residents are not liable to taxation, though they are clearly within the letter of the act." A state may collect a non-resident stockholder's tax from the corporation and give it a lien therefor on his stock. North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877); but see Raleigh, etc. R. R. *v.* Wake County Com'rs, 87 N. C. 414 (1882). A tax collector cannot levy on and sell stock under the law relative to attachments. Kennedy *v.* Mary Lee, etc. Ry., 93 Ala. 494 (1891). The statute may provide for the sale of stock at the place where the corporation exists, in case the taxes upon such stock are not paid. A purchaser of the outstanding certificates after the assessment has been made takes subject to the tax and tax seizure. Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890). It is clear, where shares of stock are sold under a tax warrant, that the corporation is not obliged to oppose the sale. McNeal *v.* Mechanics' Building, etc. Assoc., 40 N. J. Eq. 351 (1885). Where by statute taxes levied on stock are to be paid by the corporation, such taxes must be paid by the corporation although it becomes insolvent. Boston, etc. Co. *v.* Mercantile, etc. Co., 34 Atl. Rep. 778 (Md. 1896). Cooley, Taxation (2d ed.), 433, clearly upholds the rule that the state may levy a tax on shares of stock and compel the corporation to pay it, citing Maltby *v.* Reading R. R., 52 Pa. St. 140 (1866); Haight *v.* Railroad Co., 6 Wall. 15 (1867); National Bank *v.* Commonwealth, 9 Wall. 353 (1869); U. S. *v.* Railroad Co., 17 Wall. 322 (1872); Minot *v.* Railroad Co., 18 Wall. 206 (1873); Ottawa, etc. *v.* McCaleb, 81 Ill. 556 (1876); New Orleans *v.* Saving, etc. Co., 31 La. Ann. 826 (1879); Baltimore *v.* City Passenger R. R., 57 Md. 31 (1881); St. Albans *v.* National Car Co., 57 Vt. 68 (1884); American Coal Co. *v.* Allegany County, 59 Md. 185 (1882); Barney *v.* State, 42 Md. 480 (1875); McVeagh *v.* Chicago, 49 Ill. 318 (1868); First Nat. Bank *v.* Fancher, 48 N. Y. 524 (1872); Lionberger *v.* Rowse, 43 Mo. 67 (1868); Relfe *v.* Life Ins. Co., 11 Mo. App. 374 (1882).

[1] Mercantile, etc. Co. *v.* Mellon, 196 Pa. St. 176 (1900).

thorize the assessment of the stock to the bank.[1] The Connecticut statute authorizing the taxation of stock held by non-residents in resident corporations is constitutional, even though a deduction for real estate held by the corporation is allowed the resident stockholders, but not to non-resident stockholders.[2] In New York, where neither resident nor non-resident stockholders in either foreign or domestic corporations, excepting banking corporations, are taxed on their shares of stock, these interstate complications, hardships, and jealousies do not arise. Trover and case lie against a tax collector for selling stock for an illegal tax.[3]

§ 567. *Double taxation.*—The most objectionable feature of a tax levied on shares of stock is that almost inevitably it operates to impose a double tax on a part or all of the stockholders.[4] Such a double tax exists where either the corporate realty or personalty or franchise or capital is taxed, and a tax is also levied on the shares of stock without any deduction for the former taxation.[5] There has been some controversy as to the right of a state to levy a double tax on property. Sometimes the state constitution prohibits such taxation.[6] Thus, in Michigan it is held that the constitutional requirement of uniform taxation prevents a tax being levied on stock held by residents in a foreign corporation where the property of the corporation is situated in that state and is taxed

[1] State *v.* Merchants' Bank, 160 Mo. 640 (1901).

[2] Traveller's, etc. Co. *v.* Connecticut, 185 U. S. 364 (1902).

[3] Sprague *v.* Fletcher, 69 Vt. 69 (1896).

[4] In Ohio such double taxation is advocated and recommended. In Frazer *v.* Siebern, 16 Ohio St. 614 (1866), the court said that an equitable system of taxation "is best attained in case of a corporation or joint-stock company by taxing the stockholders, the persons who own the property, upon the full value of their shares therein, including, of course, their interest in the franchise or privilege, and in all tangible property owned by the company; and by taxing the corporation also upon the value of such tangible property. The stockholder is thus taxed, as all other individuals who own tangible and intangible property are sometimes unavoidably taxed, once upon all he is worth, and a second time upon that part of his property which is tangible."

[5] This is practically the result. In the case of Farrington *v.* Tennessee, 95 U. S. 679, 687 (1877), however, the court said in a dictum: "The capital stock and the shares may both be taxed, and it is not double taxation." See also New Orleans *v.* Houston, 119 U. S. 265, 277 (1886). *Cf.* Ryan *v.* Com'rs, 30 Kan. 185 (1883). A tax on the tangible property and on the capital stock is not double taxation. Second Ward Sav. Bank *v.* Milwaukee, 94 Wis. 587 (1896).

[6] County Com'rs *v.* Farmers' Nat. Bank, 48 Md. 117 (1877), the constitution saying that each person shall pay a tax "according to his actual worth in real or personal property." See also San Francisco *v.* Mackey, 21 Fed. Rep. 539 (1884); Burke *v.* Badlam, 57 Cal. 594 (1881), relative to the California constitution, art. XII, § 1, that "all property shall be taxed in proportion to its value."

by it. Such taxation is double taxation.[1] But, aside from constitutional restrictions, it unquestionably is within the power of the state to levy, not only a double tax, but even a treble or quadruple tax, if it so chooses.[2] The injustice of such taxation, however, generally prevents its occurrence. The courts also do their utmost to prevent double taxation, and will construe a taxation statute so as to avoid such a result, and sometimes even in opposition to the plain words of the statute itself.[3]

[1] Stroh *v.* City of Detroit, 90 N. W. Rep. 1029 (Mich. 1902).

[2] Salem Iron, etc. Co. *v.* Danvers, 10 Mass. 514 (1813), where corporate realty was taxed although the shares of stock were also taxed. See also Belo *v.* Forsyth Com'rs, 82 N. C. 415 (1880). In the remarkable case of Toll Bridge Co. *v.* Osborn, 35 Conn. 7 (1868), it seems that the realty, capital stock, and shares of stock of a corporation were taxed, and that the chief stockholder, a railroad, was taxed on its capital stock and shares of stock, making four or five taxations of the same property. Evidently corporations were not popular in Connecticut in 1868, except for taxation purposes. *Cf.* Jones, etc. Co. *v.* Commonwealth, 69 Pa. St. 137 (1871). See also Cook *v.* Burlington, 59 Iowa, 251 (1882); State *v.* Branin, 23 N. J. L. 484 (1852); State *v.* Bentley, 23 N. J. L. 532 (1852); Memphis *v.* Ensley, 6 Baxt. (Tenn.) 553 (1873); Providence, etc. R. R. *v.* Wright, 2 R. I. 459, 464 (1853), holding that a tax on the stock does not raise a presumption that a municipality is thereby prevented from taxing the corporate realty. See also Hannibal, etc. R. R. *v.* Shacklett, 30 Mo. 550, 560 (1860). Although by the charter a tax is levied on the capital stock, a tax may also be levied on the shares of stock. Memphis *v.* Home Ins. Co., 91 Tenn. 558 (1892). A tax on the bonds which are issued by a corporation does not constitute double taxation although there is also a tax on the franchises of the corporation. Commonwealth *v.* New York, etc. R. R., 150 Pa. St. 234 (1892). Where the stock is not taxable if the tangible property is taxed, the stock may nevertheless be taxed for such part of its value as the capital stock exceeds in value the tangible property. Hyland *v.* Central Iron, etc. Co., 129 Ind. 68 (1891). A tax may be levied on the capital stock even though the shares of stock are also taxed. Durham County *v.* Blackwell, etc. Co., 116 N. C. 441 (1895). The franchise may be taxed although the shares of stock are also taxed, the latter tax being collected also from the corporation. U. S. Electric, etc. Co. *v.* State, 79 Md. 63 (1894). A national bank may be taxed on stock owned by it in other corporations, even though such latter corporations also pay a tax. Pacific Nat. Bank, etc. *v.* Pierce County, 20 Wash. 675 (1899).

[3] Thus, in Illinois, in cases where the capital stock is taxed by the state, the shares of stock are held to be free from taxation. Republic Life Ins. Co. *v.* Pollak, 75 Ill. 292 (1874). See also Lackawanna County *v.* First Nat. Bank, 94 Pa. St. 221 (1880), holding that under the act of March 31, 1870, releasing corporations from all other taxes if they pay one per cent. tax on the par value of the stock, the corporate realty cannot be taxed after such one per cent. has been paid; State *v.* Hannibal & St. J. R. R., 37 Mo. 265 (1866); Jersey City, etc. Co. *v.* Jersey City, 46 N. J. L. 194 (1884); Cheshire, etc. Teleph. Co. *v.* State, 63 N. H. 167 (1884); Valle *v.* Zeigler, 84 Mo. 214 (1884); Tax Cases, 12 G. & J. (Md.) 117 (1841); Provident Inst. *v.* Gardiner, 4 R. I. 484 (1857); Mechanics' Bank *v.* Thomas, 26 N. J. L. 181 (1857); American Bank *v.* Mumford, 26

§ 568. *Exemptions from taxation as affecting tax on shares of stock.*— An exemption of shares of stock is a contract protected by that provision of the constitution of the United States which prevents a state from passing a law which will impair the validity of contracts.[1] This provision has frequently been construed and applied in cases involving the taxation of the corporate franchises, capital stock, or tangible property. In the numerous decisions on this subject there appear two classes of cases of exemptions from taxation which affect the taxation of shares of stock. The first class involves the question whether an exemption of the corporate property, franchises, or capital stock from taxation exempts also the shares of stock from any tax; the second, whether an exemption of the shares of stock from taxation exempts the corporate

N. J. L. 478 (1857); State *v.* Tunis, 23 N. J. L. 546 (1852); Smith *v.* Burley, 9 N. H. 423 (1838); Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Savings Bank *v.* Nashua, 46 N. H. 389 (1866), the court saying: "It is a fundamental principle in taxation that the same property shall not be subject to a double tax, payable by the same party, either directly or indirectly; and where it is once decided that any kind or class of property is liable to be taxed under one provision of the statutes, it has been held to follow as a legal conclusion that the legislature could not have intended the same property would be subject to another tax, though there may be general errors in the law which would seem to imply that it was to be taxed a second time." In Michigan, where shares of stock in savings banks are taxed, a reduction being allowed for realty, which is taxed separately, the courts held that no other tax can be levied against the corporation. Lenawee, etc. Bank *v.* Adrian, 66 Mich. 273 (1887). The Kentucky tax statutes are so construed that a corporation need not pay a tax on its property in addition to the tax on the stock. Louisville, etc. Co. *v.* Barbour, 88 Ky. 73 (1888); Commonwealth *v.* St. Bernard Coal Co., 9 S. W. Rep. 709 (Ky. 1888). The Pennsylvania acts are construed so as to prevent double taxation. Pennsylvania Co. etc. *v.* Commonwealth, 15 Atl. Rep. 456 (Pa. 1888). Where a coal company owns all the stock of a railroad company, and taxes have been paid by the railroad on the appraised value of its capital stock, the coal company cannot be taxed on such stock again. Double taxation is legal, but will not be imposed unless the statute clearly requires it. Commonwealth *v.* Fall Brook Coal Co., 156 Pa. St. 488 (1893). In the case of Louisville, etc. R. R. *v.* Wright, 116 Fed. Rep. 669 (1902), the court held that stock could not be taxed under the Georgia statute, where the corporation paid taxes, even though the statute required taxpayers to make a return of stock owned by them. Where all the property of the corporation is taxed and then a tax is levied on the capital stock, this amounts to a double taxation and will not be upheld unless the statute clearly authorizes such double taxation. Lewiston, etc. Co. *v.* Asotin County, 24 Wash. 371 (1901).

[1] Farrington *v.* Tennessee, 95 U. S. 679 (1877). See also § 497, *supra.* An exemption of the stock of a railroad company does not exempt stock issued for constructing branch roads of that company, such construction being subsequent to a constitutional provision prohibiting exemptions. Chicago, etc. R. R. *v.* Guffey, 120 U. S. 569 (1887).

property, franchises, and capital stock. As regards the former exemption, the effect thereof depends largely on the words used in the statute or charter granting the exemption. The question has given rise to a difference of opinions. In the federal courts, New Jersey, Indiana, and Kentucky, it has been decided that an exemption of the corporation from taxation on one or more of the first three methods of taxation exempts by implication the shares of stock,[1] although the supreme court of the United States has recently held that exemption of the capital stock does not necessarily exempt the stockholders.[2] In Tennessee, North Carolina, and Maryland, and in fact generally, an exemption is strictly construed.[3]

[1] State *v.* Branin, 23 N. J. L. 484 (1852); State *v.* Bentley, 23 N. J. L. 532 (1852); Johnson *v.* Commonwealth, 7 Dana (Ky.), 338 (1838); King *v.* Madison, 17 Ind. 48 (1861), holding that an exemption of the capital stock exempts shares of stock. An exemption of the corporation on its property exempts also the shares of stock, and exemption of the shares of stock exempts the corporation. State *v.* Heppenheimer, 58 N. J. L. 633 (1896). An exemption from taxation of the capital of a corporation exempts the shares of stock. Penrose *v.* Chaffraix, 106 La. 250 (1901). An exemption of the capital and personal property of the corporation from taxation exempts the shares of stock. Richardson *v.* City of St. Albans, 72 Vt. 1 (1899). Gordon *v.* Appeal Tax Court, 3 How. 133 (1845), held that an exemption prohibiting any "further tax or burden upon them," the banks, exempted the shares of stock. Again, where the charter provided that "the capital stock of said company shall be forever exempt from taxation, the shares of stock cannot be taxed. . . . Each share is a part of the whole, and, as the whole is exempt from taxation, it follows that each part or share must also be exempt." Tennessee *v.* Whitworth, 22 Fed. Rep. 75 (1884). And the purchaser and successor of a railroad, taking by statute all its rights and privileges, is also exempt in the same manner. Tennessee *v.* Whitworth, 22 Fed. Rep. 81; aff'd, 117 U. S. 139 (1886). An exemption of the corporation exempts it from a tax upon the stock of stockholders, which the company is required to pay irrespective of any dividends or profits payable to the stockholder, since this is substantially a tax on the corporation itself. New Orleans *v.* Houston, 119 U. S. 265 (1881). *Cf.* U. S. *v.* Railroad Co., 17 Wall. 322 (1872). An exemption of shares of stock from taxation is waived by the acceptance of subsequent statutes imposing a tax. Hannibal, etc. R. R. *v.* Shacklett, 30 Mo. 550 (1860); Cooley, Taxation (2d ed.), 212.

[2] New Orleans *v.* Citizens' Bank, 167 U. S. 371 (1897).

[3] Union Bank *v.* State, 9 Yerg. (Tenn.) 490 (1836), holding that an exemption of the capital stock did not exempt shares of stock. To same effect, Memphis *v.* Farrington, 8 Baxt. (Tenn.) 539 (1876), the court saying: "The capital stock and shares of stock are two distinct properties, and an exemption of the one does not thereby necessarily exempt the other, nor the taxation of the latter operate as a tax on the former, so as to interfere with its exemption from such burdens." A tax may be levied on the shares of stock although the capital stock is exempt. State *v.* Bank of Commerce, 95 Tenn. 221 (1895); Belo *v.* Forsyth Com'rs, 82 N. C. 415 (1880), holding that an exemption of the corporate realty does not exempt the shares of stock; Appeal Tax Court *v.* Rice, 50 Md. 302 (1878);

As regards the second class of exemptions, it seems to be established by the great weight of authority that an exemption of the shares of stock from taxation exempts also, by implication, the corporate franchises, the capital stock, and tangible property from any tax.[1] Where the charter compels a corporation to pay an annual tax on each share of stock "in lieu of all other taxes," the stockholders themselves cannot be taxed on their stock.[2] Such an exemption, however, does not prevent the state from levying a tax

Tax Cases, 12 G. & J. (Md.) 117 (1841). In County Com'rs *v.* Annapolis, etc. R. R., 47 Md. 592 (1877), the court said: "To make out the claim to this exemption from the taxing power of the state, so essential to the support of its government, it is incumbent upon corporations to show that the power to tax has been clearly relinquished by the state; and if this has not been done in clear and explicit terms, or by necessary implication, the question whether or not the exemption has been granted must be resolved in favor of the state." Citing Providence Bank *v.* Billings, 4 Pet. 514 (1830); Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Philadelphia & W. R. R. *v.* State, 10 How. 376 (1850). But a clear exemption of the shares of stock is a contract which is protected by the United States constitution. State *v.* Baltimore, etc. R. R., 48 Md. 49 (1877). A charter provision, however, that a certain tax shall be paid by the corporation does not prevent a subsequent change in that tax. Delaware Railroad Tax, 18 Wall. 206 (1873). And an exemption by the state has been held not to exempt the shares from taxation by a municipality. Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847).

[1] In State *v.* Bank of Commerce, 53 Fed. Rep. 735 (1892), it is held that a provision imposing a tax on each share of stock, "which shall be in lieu of all other taxes," exempts the property of the company as well as the stock from further taxation. Scotland County *v.* Missouri, etc. Ry., 65 Mo. 123 (1877), the court saying: "It is clear that a tax on the property represented by the stock is substantially a tax on the stock." An exemption of shares of stock from "any tax or impost whatsoever" exempts the capital stock also by implication. Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289 (1898). See also County Com'rs *v.* Annapolis, etc. R. R., 47 Md. 592 (1877), where the court said: "It is settled by repeated decisions of this court, which we are not disposed to disturb, that the exemption of the shares of the capital stock operates as an exemption of the property of the corporation, or so much of it as the corporation is fairly authorized to hold for the proper exercise of its franchises; and this upon the principle that the shares of the stock in the hands of the shareholders represent the property held by the corporation;" Cape Fear Bank *v.* Edwards, 5 Ired. L. (N. C.) 516 (1845), where the charter said: "The said bank shall not be liable to any further tax;" Mayor, etc. *v.* Baltimore & O. R. R., 6 Gill (Md.) 288 (1848); Tax Cases, 12 G. & J. (Md.) 117 (1841); Gordon *v.* Mayor, etc., 5 Gill (Md.), 231 (1847). In Wilmington, etc. R. R. *v.* Reid, 64 N. C. 226 (1870), however, it was held that an exemption of shares of stock does not exempt the corporate franchise from taxation. Raleigh, etc. R. R. *v.* Reid, 64 N. C. 155 (1870). And in State *v.* Petway, 2 Jones, Eq. (N. C.) 396 (1856), it was held that a charter provision that the shares of stock should be taxed a certain amount did not prevent a tax on dividends.

[2] Bank of Commerce *v.* Tennessee, 161 U. S. 134 (1896). On a rehearing the decision in this case was modified so as to allow a recovery against holders of new

on the capital stock,[1] and such an exemption is lost by a judicial sale of the franchises of the company.[2] A statute conferring upon a new corporation "all the rights and privileges" of a former corporation does not confer such an exemption.[3] Nor does such exemption continue where the charter is so amended as to change an insurance company into a banking company.[4] Nor is such an exemption good where, after the granting of a charter, but before the first organization meeting, a new constitution is adopted by the state forbidding such exemptions.[5] An exemption of stock does not exempt the property of the corporation where the charter provides against such latter exemption.[6] Exemptions have no effect and are of no avail beyond the boundaries of the state granting them; and accordingly a non-resident stockholder, who is taxed on his stock in the state where he resides, cannot defeat that tax by reason of exemptions enjoyed within the state creating the corporation.[7]

B. TAXATION OF NATIONAL-BANK STOCK.

§ 569. *General rules.*— It is one of the established principles of constitutional law in this country that the instruments of government by the United States shall not be taxed by any state, and also that those of a state shall not be taxed by the United States. Accordingly, bonds issued by the United States government cannot be taxed by any state.[8] So, also, when the old United States Bank was in existence, it was held that neither the bank nor its capital stock could be taxed by a state. But it was also held that, inasmuch as the interest of the stockholders in the bank was different from the franchises, property, capital stock, and the United States bonds held by the bank, such interest of the stockholder could be taxed by a state, and that such taxation would be constitutional and legal.[9] The same rules apply to the present national

stock, but not as against holders of old stock. Bank of Commerce *v.* Tennessee, 163 U. S. 416 (1896).

[1] Shelby County *v.* Union, etc. Bank, 161 U. S. 149 (1896).

[2] Mercantile Bank *v.* Tennessee, 161 U. S. 161 (1896).

[3] Phœnix F. & M. Ins. Co. *v.* Tennessee, 161 U. S. 174 (1896).

[4] Memphis City Bank *v.* Tennessee, 161 U. S. 186 (1896).

[5] Planters' Ins. Co. *v.* Tennessee, 161 U. S. 193 (1896).

[6] Central R. R. etc. Co. *v.* Wright, 164 U. S. 327 (1896).

[7] Appeal Tax Court *v.* Patterson, 50 Md. 354 (1878); Appeal Tax Court *v.* Gill, 50 Md. 377 (1878). See also Railroad Co. *v.* Pennsylvania, 15 Wall. 300 (1872).

[8] Cooley, Taxation (2d ed.), 84, 85. Formerly government bonds were called stock both in England and in this country. That use of the term, however, has become practically obsolete. See Bank of Commerce *v.* New York, 2 Black, 620 (1862); Weston *v.* Charleston, 2 Peters, 449 (1829).

[9] McCulloch *v.* Maryland, 4 Wheat. 316, 436 (1819); Bulow *v.* Charleston, 1

banks. A state tax on the capital stock of the bank is illegal and void.[1] But a tax on its real estate or on its shares of stock is upheld as legal and enforceable where such tax is substantially the same as on state-bank stock.[2] This is the law, although a large part or all of the bank's capital stock is invested in United States bonds.[3] The authority of a state to tax shares of stock in national

Nott & M. (S. C.) 527 (1819). See also Berney *v.* Tax Collector, 2 Bailey (S. C.) 654 (1831); National Bank *v.* Commonwealth, 9 Wall. 353 (1869), per Miller, J.

[1] A state tax upon the franchise or intangible property of a national bank is illegal. Owensboro Nat. Bank *v.* Owensboro, 173 U. S. 664 (1899); First Nat. Bank *v.* Douglas County, 3 Dill. 298 (1873); s. c., 9 Fed. Cas. 100; Collins *v.* Chicago, 4 Biss. 472 (1867); s. c., 6 Fed. Cas. 118; Salt Lake, etc. Bank *v.* Golding, 2 Utah, 1 (1876); Mayor, etc. *v.* First Nat. Bank, 59 Ga. 648 (1877); Bradley *v.* People, 4 Wall. 459 (1866); Bank of Commerce *v.* New York City, 2 Black, 620 (1862), reversing People *v.* Com'rs of Taxes, 23 N. Y. 192 (1861); s. c., 32 Barb. 509, and declaring unconstitutional the New York statutes under which the national banks were taxed. New York has been exceedingly unfortunate in its efforts to tax national banks. After the decision in Bank of Commerce *v.* New York City, 2 Black, 620 (1862), came Bank Tax Case, 2 Wall. 200 (1864), declaring unconstitutional the New York statute of April 29, 1863, for the taxation of national banks, the tax still being on the capital stock. Next came Van Allen *v.* Assessors, 3 Wall. 573 (1865) (reversing Utica *v.* Churchill, 33 N. Y. 161 — 1865. See also First Nat. Bank *v.* Fancher, 48 N. Y. 524 — 1872), declaring unconstitutional the New York statute of March 9, 1865, taxing the stockholders in national banks, because the act did not prescribe expressly that the tax should be no greater than the tax on other shares of stock, and because taxes in New York on other corporations were not on shares of stock, but on the capital stock. New York then passed the act of April 23, 1866, which was sustained in People *v.* Com'rs, 4 Wall. 244 (1866). Still later came the case of People *v.* Weaver, 100 U. S. 539 (1879), reversing 67 N. Y. 516, overruling People *v.* Dolan, 36 N. Y. 59 (1867), and declaring void the New York tax of national-bank stock, for the reason that the New York court of appeals construed the New York taxation statute to allow persons taxed on ordinary securities a deduction for debts, while a similar deduction was not allowed to stockholders in banks, state or national. Supervisors *v.* Stanley, 105 U. S. 305 (1881) [see People *v.* Dolan, 36 N. Y. 59 — 1867], practically modified the preceding case, however, by holding that a stockholder who owed no debts could not complain, and that those who did owe debts were entitled, not to a release from the tax altogether, but only to the extent of what the state ought to have allowed as a deduction. States cannot tax national-bank currency. Horne *v.* Green, 52 Miss. 452 (1876). *Cf.* Ruffin *v.* Orange County Com'rs, 69 N. C. 498 (1873); Lilly *v.* Cumberland County Com'rs, 69 N. C. 300 (1873); Com'rs *v.* Elston, 32 Ind. 27 (1869).

[2] Austin *v.* Boston, 96 Mass. 359 (1867); First Nat. Bank *v.* Douglas County, 3 Dill. 330 (1874); s. c., 9 Fed. Cas. 84; Stetson *v.* Bangor, 56 Me. 274 (1868).

[3] Van Allen *v.* Assessors, 3 Wall. 573 (1865); People *v.* Com'rs, 4 Wall. 244 (1866). See also Home Ins. Co. *v.* New York, 119 U. S. 129 (1886). In taxing the stock no reduction is allowed for bonds held by the corporation. Home Ins. Co. *v.* Board of Assessors, 42 La.

banks is expressly conferred by the statutes of the United States which create and regulate these banks.[1]

§ 570. *Place in which shares of national-bank stock may be taxed.* The Revised Statutes of the United States expressly declare that non-resident stockholders in a national bank are to be taxed at the place where the bank is located.[2] Under this statute a non-resident of the state within which the bank is situated can be taxed on his stock only where the bank is located.[3] The state where he resides cannot also tax him on such stock. As regards residents of the state within which the bank is located, the state itself determines where the tax is to be levied.[4] If the state statute requires that

Ann. 1131 (1890); Parker *v.* Sun Ins. Co., 42 La. Ann. 1172 (1890).

[1] U. S. Rev. Stat., § 5219 (taken from act of June 3, 1864, as amended by act of Feb. 10, 1868). The case of People *v.* Weaver, 100 U. S. 539, 543 (1879), says that the effect of the act of congress, as regards the taxation of national banks, is that congress says to the states: "You may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner to the same extent you tax other moneyed capital invested in your state. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented." Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886). New shares cannot be taxed until the increase has been approved by the comptroller of the currency. Charleston *v.* People's Nat. Bank, 5 S. C. 103 (1873). A state tax on a national bank giving a lien to the bank on the stock of the stockholders for such tax is not legal where the bank is insolvent. Stapylton *v.* Thaggard, 91 Fed. Rep. 93 (1898). Taxes upon the capital stock of a national bank cannot be collected from the receiver thereof. Gray *v.* Logan County, 7 Okl. 321 (1898).

[2] Such was the effect of the amendment of 1866. Previous to that time there was controversy herein as to the meaning of the act of 1863. See Austin *v.* Boston, 96 Mass. 359 (1867).

[3] See McIver *v.* Robinson, 53 Ala. 456 (1875); Williams *v.* Weaver, 75 N. Y. 30 (1878); Kyle *v.* Fayetteville, 75 N. C. 445 (1876); National Bank *v.* Commonwealth, 9 Wall. 353 (1869); Lionberger *v.* Rouse, 9 Wall. 468 (1869).

[4] Austin *v.* Aldermen, 7 Wall. 694 (1886). The tax may be levied on resident stockholders in the city, county, or town where they reside. Austin *v.* Boston, 96 Mass. 359 (1867). And the cashier of the bank may be required by statute to send to the clerks of the various towns the names of such stockholders as reside in those towns. Waite *v.* Dowley, 94 U. S. 527 (1876). As to the taxation of national-bank stock in Iowa, see First Nat. Bank *v.* Albia, 52 N. W. Rep. 334 (1892). As to the assessment of bank stock in West Virginia, see Bank of Bramwell *v.* Mercer County Court, 36 W. Va. 341 (1892). Concerning the taxation of national-bank stock in Nevada, see First Nat. Bank *v.* Kreig, 21 Nev. 404 (1893). National-bank stock in Delaware may be taxed by the state. First Nat. Bank *v.* Herbert, 44 Fed. Rep. 158 (1890). As to the taxation of bank stock in Washington, see First Nat. Bank *v.* Hungate, 62 Fed. Rep. 548 (1894). As to the taxation of national-bank stock in Indiana, see First Nat. Bank *v.* Turner, 154 Ind. 456 (1900). The Kentucky tax on national-bank stock is legal. First Nat. Bank *v.* Stone, 88 Fed. Rep. 409 (1898).

the whole tax shall be paid in the city, county, or town where the bank is located, even though some of the stockholders reside in other counties or cities, the statute must be obeyed.[1] Generally, however, the statute requires that stockholders residing in the state shall be taxed at their place of residence on stock owned by them in a national bank within that state.[2] If the statute is silent herein, then the state statutes regulating the taxation of stockholders in other corporations are to apply to stockholders in national banks situated within the state. A state statute may require a national bank to pay a tax on the stock of non-resident as well as of resident stockholders in the bank.[3] The statute may require the bank to retain from dividends the tax on the shares of stock, such tax being determined by the amount of dividends.[4] The collection of a tax on national-bank stock may be enforced by the same procedure through which taxes on other personal property are collected.[5] A non-resident holder of national-bank stock is not personally liable for a tax thereon, under the New York statute.[6]

[1] National Bank *v.* Commonwealth, 9 Wall. 353 (1869); Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 (1873); Provident Inst. *v.* Boston, 101 Mass. 575 (1869); McLaughlin *v.* Chadwell, 7 Heisk. (Tenn.) 389 (1872). Craft *v.* Tuttle, 27 Ind. 332 (1866), holds that, if a municipality has no power to tax shares in state banks, it cannot tax national-bank shares.

[2] Clapp *v.* Burlington, 42 Vt. 579 (1870). See Trustees of Eminence *v.* Deposit Bank, 12 Bush (Ky.), 538 (1877); Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347 (1867). *Cf.* State *v.* Hart, 31 N. J. L. 434 (1866); State *v.* Haight, 31 N. J. L. 399 (1866). The decision in North Ward Nat. Bank *v.* Newark, 39 N. J. L. 380 (1877), however, placed New Jersey among the states which levy the tax in the most approved manner, residents being taxed where they reside, non-residents being taxed at the domicile of the corporation. See also Kyle v. Fayetteville, 75 N. C. 445 (1876); Buie *v.* Fayetteville Com'rs, 79 N. C. 267 (1878); Austin *v.* Boston, 96 Mass. 359 (1867); First Nat. Bank *v.* Smith, 65 Ill. 44 (1872); Baker *v.* First Nat. Bank, 67 Ill. 297 (1873); Clapp *v.* Burlington, 42 Vt. 579 (1870); Howell *v.* Cassopolis, 35 Mich. 471 (1877). *Cf.* Mintzer *v.* Montgomery County, 54 Pa. St. 139 (1867). For taxation of national-bank stock under the Alabama act, see Maguire *v.* Board of Revenue, 71 Ala. 401 (1882).

[3] Merchants', etc. Bank *v.* Pennsylvania, 167 U. S. 461 (1897).

[4] Central Nat. Bank *v.* U. S., 137 U. S. 355 (1890). *Cf.* First Nat. Bank *v.* Richmond, 39 Fed. Rep. 309 (1889). The taxation of the capital stock of a national bank against the bank *in solido* is invalid. It may be collected from the bank, but should be assessed against the stockholders. Deductions should also be allowed when allowed on other similar property. Leoti Nat. Bank *v.* Fisher, 45 Kan. 726 (1891).

[5] Palmer *v.* McMahon, 133 U. S. 660 (1890). A tax on national-bank stock, to be collected in the first instance from the bank, cannot be collected from the receiver of the bank, the bank being insolvent. Boston *v.* Beal, 51 Fed. Rep. 306 (1892).

[6] City of New York *v.* McLean, 170 N. Y. 374 (1902).

§ 571. *The tax must not be greater than that imposed on other "moneyed capital."*— The most difficult, unsettled, and litigated questions connected with the taxation of shares of stock in national banks arise from the meaning and application of that provision of the statutes of the United States requiring that the taxation of national-bank shares of stock shall not be at a higher rate than the taxation of other "moneyed capital" within the state. The term "moneyed capital" as used in the statute authorizing taxation of national-bank stock refers to capital which comes in competition with the business of national banks.[1] The words "moneyed capital" have been construed to mean "not only bonds, stocks, and money loaned, but all credits and demands of every character in favor of the taxpayer."[2] This has been the subject of much controversy, however; and the decisions go very far in upholding the tax, if substantial justice has been done.[3] Money invested in rail-

[1] First Nat. Bank, etc. *v.* Chapman, 173 U. S. 205 (1899).

[2] Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886); Boyer *v.* Boyer, 113 U. S. 689 (1884). Shares of stock in banks are other moneyed capital, but shares of stock in other corporations are not necessarily so. "Moneyed capital" means money put out by way of loan, discount, etc., or invested in stocks of banks, etc., which put out money by way of loan, discount, etc. Trust companies are different from banks herein. Mercantile Bank *v.* New York, 121 U. S. 138 (1887), affirming 28 Fed. Rep. 776. A tax on national-bank stock is legal although stock in state and savings banks is not taxed directly, but the corporation itself is taxed in another way. Richards *v.* Rock Rapids, 31 Fed. Rep. 505 (1887). See also Hepburn *v.* School Directors, 23 Wall. 480 (1874). Other moneyed capital means capital employed in banking or loaning, and not in business. Talbott *v.* Silver Bow Co., 139 U. S. 438 (1891).

[3] People *v.* Commissioners, 4 Wall. 256 (1866); Adams *v.* Nashville, 95 U. S. 19 (1877). *Re* McMahon, 102 N. Y. 176 (1886), holds that shares of stock in railroads, manufacturing, and other corporations are not "moneyed capital" in the sense in which these terms are used in the act of congress. See also First Nat. Bank *v.* Waters, 7 Fed. Rep. 152 (1881). Provident Inst. *v.* Boston, 101 Mass. 575 (1869), holds that the comparison is to be made with other moneyed capital in the same town or city where the tax is levied. See also People *v.* Moore, 1 Idaho, 504 (1873). Subject to this rule the shares of national banks may be assessed at their value even above par. Hepburn *v.* School Directors, 23 Wall. 480 (1874); People *v.* Commissioners of Taxes, 94 U. S. 415 (1876); S. C., 67 N. Y. 516 (1876), affirming 8 Hun, 536; St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); S. C., 21 Fed. Cas. 203, the court saying, also, that the assessors may ascertain that value by including "all reserve funds, profits, earnings, and other values" when the intent of the statute is to base the tax "upon an inquiry, *inter alia*, into the actual value of the property of the banks so far as this imparts or confers a value upon the shares." A stockholder cannot enjoin the tax unless he first pays such part of it as he admits is legal. Rosenberg *v.* Weekes, 67 Tex. 578 (1887). The stock is listed against the stockholder, not against the bank. Miller *v.* First Nat. Bank, 46 Ohio St. 424 (1889). The statute may authorize taxation for years past. State *v.* Simmons, 70 Miss. 485 (1893).

roads, manufacturing, mining, or mortgages is not "moneyed capital" competing with national-bank capital, and hence a tax on the latter need not be at the same rate as upon the former.[1] The fact that by statute general stocks can be taxed at only thirty cents on each hundred dollars does not prevent a higher rate on national-bank stock.[2]

The method of taxing shares of national-bank stock need not correspond to that followed in taxing other corporations in the state.[3] The material point is that national-banks must not, as a result, be taxed higher than other moneyed investments. If this rule is observed, it is of little consequence whether the tax on national-bank stock is levied and assessed in the same way as other corporations are taxed.

If the state laws allow a deduction to a person taxed on bonds,

[1] Aberdeen Bank *v.* Chehalis County, 166 U. S. 440 (1897). "Moneyed capital means money employed in a business whose object is to make profit by investing such money in securities by way of loan, discount, or otherwise, which from time to time, in the course of business, are reduced again to money and reinvested." Mercantile Nat. Bank *v.* Shields, 59 Fed. Rep. 952 (1894).

[2] National Bank *v.* Mayor, etc., 100 Fed. Rep. 24 (1900).

[3] Davenport Bank *v.* Davenport, 123 U. S. 83 (1887). "There is no reason to suppose that congress cared at all about the mode the states might adopt for the collection of their taxes. A tax imposed on the capital or property of a corporation falls as effectually on the capital of the shareholder represented by his shares as does a tax upon the shares directly; and although, in legal discrimination, a tax upon the former is not a tax upon the latter, practically and substantially taxation of the capital of the corporation is taxation of the capital of the shareholder." A tax on national-bank stock was upheld, though all other stock except bank stock was exempt, the tax being on capital stock, in Mercantile Nat. Bank *v.* New York, 28 Fed. Rep. 776 (1886); aff'd, 121 U. S. 138. The mode of collection need not be the same. The state may compel the bank to pay the tax. National Bank *v.* Commonwealth, 9 Wall. 353, 363 (1869), per Miller, J. But if the assessment is illegal, in that no notice and opportunity is given to the stockholder to appear and resist the tax, it cannot be enforced. Albany City Nat. Bank *v.* Maher, 9 Fed. Rep. 884 (1882). In general, *cf.* Van Allen *v.* Assessors, 3 Wall. 573 (1865); Bradley *v.* People, 4 Wall. 459 (1866); Hubbard *v.* Johnson County, 23 Iowa, 130 (1867); People *v.* Assessors, 29 How. Pr. 371 (1865): Wright *v.* Stelz, 27 Ind. 338 (1866), overruling Whitney *v.* Madison, 23 Ind. 331 (1864), on certain points; Cooley, Taxation (2d ed.), 390. *Contra,* People *v.* Bradley, 39 Ill. 130 (1866). See also Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Smith *v.* First Nat. Bank, 17 Mich. 479 (1869); Van Slyke *v.* State, 23 Wis. 655 (1869); Bagnall *v.* State, 25 Wis. 112 (1869). Where a state and also a local tax are levied on shares of stock in a state bank, and the local tax is declared illegal, the same local tax is illegal as regards shares in national banks. City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); S. C., 5 Fed. Cas. 755. Even though the property of other corporations is taxed instead of the stock, yet it may be legal to tax stock in national banks. Nevada Nat. Bank *v.* Dodge, 119 Fed. Rep. 57 (1902).

notes, and similar property for debts due from him to others, a similar deduction must be allowed to stockholders taxed on their shares in a national bank.[1] If the statute does not allow the same

[1] Evansville Bank *v.* Britton, 105 U. S. 322 (1881), aff'g 8 Fed. Rep. 867. But a deduction to individuals for United States bonds held by them will not invalidate a tax on the national-bank stock without a deduction for bonds held by the bank. Bressler *v.* Wayne County, 25 Neb. 468 (1889); People *v.* Commissioners, 4 Wall. 244 (1866); First Nat. Bank *v.* Ayers, 160 U. S. 669 (1896). In Wasson *v.* Indianapolis Nat. Bank, 107 Ind. 206 (1886), the court held that the deduction allowed to others is fatal to a tax on national-bank shares without that deduction only when it is "material and serious;" and that that depends on the proportion of moneyed capital which is allowed the deduction to that moneyed capital which is not allowed it. If material, the national-bank-share tax is to be allowed a similar deduction. National-bank stock cannot be taxed at a higher valuation on its actual value than other moneyed property is valued at. Deductions allowed to other moneyed capital must also be allowed on national-bank stock. Whitbeck *v.* Mercantile, etc. Bank, 127 U. S. 193 (1888). A stockholder in a national bank is entitled to the same deductions as a stockholder in a state bank. McHenry *v.* Downer, 116 Cal. 20 (1897). In Ohio the debts of a stockholder in a national bank cannot be deducted from the value at which the stock is taxed. Niles *v.* Shaw, 50 Ohio St. 370 (1893). In Ohio no deduction for the debts of the stockholder is made in the taxation of national-bank stock. Chapman *v.* First Nat. Bank, 56 Ohio St. 310 (1897). Deductions allowed general taxpayers of their debts from credits taxed against them give to national-bank stockholders the right to a similar reduction in the taxation of their stock. Non-resident stockholders are entitled to the same deductions. Mercantile Nat. Bank *v.* Shields, 59 Fed. Rep. 952 (1894).

Where a tax on stock is not illegal except in that the assessors have proceeded in a wrong manner, the court will not enjoin its collection unless the plaintiff stockholders pay in such a tax as would have been legal. Frazer *v.* Siebern, 16 Ohio St. 614 (1866); Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153 (1879); Supervisors *v.* Stanley, 105 U. S. 305 (1881); S. C. *sub nom.* Stanley *v.* Supervisors, 121 U. S. 535 (1887), holding that the stockholder cannot recover back the excess of tax where he has not attempted to have the tax remedied; Hills *v.* Exchange Bank, 105 U. S. 319 (1881), reversing National Albany Exch. Bank *v.* Wells, 5 Fed. Rep. 248. In consequence of this escape of the stockholders from taxation, a special statute was passed levying a back tax. See N. Y. Laws, 1883, ch. 341. Such a statute is constitutional. See McVeagh *v.* Chicago, 49 Ill. 318 (1868). The legislature may cure any defects in the levy of taxes in past years, provided such defects could have been so modified before the levy was made. Williams *v.* Supervisors of Albany, 122 U. S. 154 (1887), sustaining ch. 345, Laws of 1883. *Cf.* City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); S. C., 5 Fed. Cas. 755. A deduction to other moneyed corporations for their real estate must be allowed in taxing national-bank shares. Pollard *v.* State, 65 Ala. 628 (1880), overruling McIver *v.* Robinson, 53 Ala. 456 (1875), and Sumter County *v.* National Bank, 62 Ala. 464 (1878). In general, see also Ruggles *v.* Fond du Lac, 53 Wis. 436 (1881); Miller *v.* Heilbron, 58 Cal. 133 (1881); St. Louis Nat. Bank *v.* Papin, 4 Dill. 29 (1876); Covington, etc. Bank *v.* Covington, 21 Fed. Rep. 484 (1884). A deduction for debts, if allowed to persons taxed generally, must be allowed

to the latter, and the courts of the state refuse to allow the deduction, then the tax is illegal. Such was the result of a tax in New York on national-bank stock.[1]

national-bank stockholders who are taxed on their stock. McAden *v.* Mecklenburg County, 97 N. C. 355 (1887). Deductions are to be allowed the national-bank stockholder for debts due from him to others where the state statute permits its citizens to deduct their debts from the valuation of their personal property. Richards *v.* Rock Rapids, 31 Fed. Rep. 505 (1887); Peavey *v.* Greenfield, 64 N. H. 284 (1887). As regards deductions for surplus funds which are already taxed, see Strafford Nat. Bank *v.* Dover, 58 N. H. 316 (1878). *Cf.* North Ward, etc. Bank *v.* Newark, 39 N. J. L. 380 (1877); First Nat. Bank *v.* Peterborough, 56 N. H. 38 (1875). As regards its realty, see Rice County Com'rs *v.* Citizens' Nat. Bank, 23 Minn. 280 (1877). In Indiana the national-bank stockholder may recover back such part of the tax as should have been deducted by reason of his indebtedness. Indianapolis *v.* Vajen, 111 Ind. 240 (1887); Exchange Nat. Bank *v.* Miller, 19 Fed. Rep. 372 (1884).

[1] People *v.* Weaver, 100 U. S. 539 (1879). The New York court held that "the effect of the state law is to permit a citizen of New York, who has moneyed capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stock can make no such deduction." The supreme court of the United States declared the tax on the national-bank shares to be invalid. But the case of Supervisors *v.* Stanley, 105 U. S. 305, 315 (1881), holds that the tax is not void absolutely. A deduction allowed to individuals for national and state securities, but not allowed on national-bank stock, invalidates a tax on the latter. Whitney Nat. Bank *v.* Parker, 41 Fed. Rep. 402 (1890). If the stockholder owed no debts he is not injured; and even if he owes debts he cannot defeat the tax altogether, but is allowed a similar deduction. No discrimination is allowable, although the state taxes banks and nothing else. Gorgas' Appeal, 79 Pa. St. 149 (1875). No discrimination, though a deduction for debts is allowed to those whose property consists of debts due them; but no deduction otherwise. First Nat. Bank *v.* St. Joseph, 46 Mich. 526 (1881). The exemption of all capital which is wholly invested in mining is not a discrimination. Silver Bow County *v.* Davis, 6 Mont. 306 (1887). Exemption from taxation of savings banks, municipal bonds, and shares of stock in all foreign and domestic corporations other than banks does not invalidate a tax on shares of stock in national banks. Mercantile Bank *v.* New York, 121 U. S. 138 (1887); Newark, etc. Co. *v.* Newark, 121 U. S. 163 (1887); Bank of Redemption *v.* Boston, 125 U. S. 60 (1888). No discrimination exists in taxation of national-bank stock in territory where the shares of stock in corporations paying taxes on their property or capital stock are exempted from taxation. Silver Bow County *v.* Davis, 6 Mont. 306 (1887). In Nebraska the owner of national-bank stock, in listing his shares for taxation, is not entitled to deduct his *bona fide* indebtedness from the value of such shares of stock. The decision on the former hearing of the case, reported in 25 Neb. 468, is overruled. Bressler *v.* Wayne County, 32 Neb. 834 (1891). National-bank shares in Massachusetts are taxed at their actual value, and the bank may petition for a reduction of the tax. National Bank of Commerce *v.* New Bedford, 155 Mass. 313 (1892).

A refusal to allow a deduction to stockholders in national banks similar to a deduction allowed on a tax levied on other "moneyed capital" is held to be a discrimination in contravention of the statute. Special exemptions, however, of certain stocks or other forms of "moneyed capital" do not require that a similar exemption should be made on national-bank stock.[1]

Again, the national bank act cannot be evaded by an unfair assessment of the shares in national banks as compared with the assessment of other moneyed capital. It is a well-known fact and an understood matter in nearly all localities that no kinds of property are valued at their actual selling worth in making the valuation for taxation purposes. Consequently if other moneyed capital is valued in the assessment rolls at a certain proportion of the actual value, and national-bank stock at a higher proportion, the tax is illegal and cannot be collected.[2]

[1] Thus, a special contract exemption of a few state bonds from taxation will not exempt the national bonds. Lionberger *v.* Rouse, 9 Wall. 468 (1869); Hepburn *v.* School Directors, 23 Wall. 480 (1874), where an exemption of mortgages, judgments, and contracts to sell land were immaterial therein. See also Adams *v.* Nashville, 95 U. S. 19 (1877); Supervisors *v.* Stanley, 105 U. S. 305, 317 (1881); *Re* McMahon, 102 N. Y. 176 (1886); McLaughlin *v.* Chadwell, 7 Heisk. (Tenn.) 389 (1872); Boyer *v.* Boyer, 113 U. S. 689 (1885); Everitt's Appeal, 71 Pa. St. 216 (1872); Albany, etc. Bank *v.* Maher, 19 Blatchf. 175 (1882). See also Richmond *v.* Scott, 48 Ind. 568 (1874); Mercantile Nat. Bank *v.* New York, 28 Fed. Rep. 776, 785 (1886).

[2] Pelton *v.* National Bank, 101 U. S. 143 (1879), the court saying that "any system of assessment of taxes which exacts from the owner of the shares of a national bank a larger sum in proportion to their actual value than it does from the owner of other moneyed capital valued in like manner does tax them at a greater rate within the meaning of the act of congress." Where, however, the assessors assess ordinary securities at three-fifths of their actual value, and assess bank stock at its full actual value, and such method of unequal assessment is contrary to the constitution of the state, the court will relieve the stockholders only upon payment by them of such a tax as would have been legal. Cummings *v.* Merchants' Nat. Bank, 101 U. S. 153 (1879); Supervisors *v.* Stanley, 105 U.S. 305 (1881). When the national-bank stock is assessed too low, the fact that another bank is assessed still lower will not invalidate the tax against the former. People *v.* Assessors, 2 Hun, 583 (1874). In First Nat. Bank *v.* Treasurer, 25 Fed. Rep. 749 (1885), where ordinary moneyed capital was assessed at six-tenths of its actual value, while shares in national banks were assessed at a higher proportion of the real value, the collection thereof was enjoined upon the complainant paying the tax admitted to be due. As to the pleadings, see National Bank *v.* Kimball, 103 U. S. 732 (1880). Lower valuation of other property has been held to be immaterial. Wagoner *v.* Loomis, 37 Ohio St. 571 (1881). As regards taxation of national banks, a custom of assessing property at fifty per cent. of its value is not proved by a few examples. Engelke *v.* Schlenker, 75 Tex. 559 (1890). If, as a matter of fact, personal property and capital of individuals escape taxation, and little effort is made to tax such capital, then a

§ 572. *The bank may bring suit to restrain an illegal tax on its stockholders.*— There has been some doubt as to whether a national bank could bring suit to restrain an illegal tax on its stockholders. Ordinarily a corporation cannot do so. Each stockholder must protect his own interests. But where, as in the case of national banks, the tax is paid by the bank itself, and collected by it from its stockholders, if the latter refuse to pay the bank or recognize its payment as legal, many suits would result. Accordingly, in order to avoid a multiplicity of suits, it is now well established that the bank itself may file a bill in equity to prevent and enjoin the collection of an illegal tax on its stockholders.[1] A suit to declare invalid a tax levied on national-bank stock must be in equity.[2] The New York court of appeals hold, however, that a suit in equity

tax on national-bank stock cannot be enforced. If such stock is assessed at two-thirds of its actual value, and other personal property at one-half their value, the assessment is illegal. First Nat. Bank *v.* Lindsay, 45 Fed. Rep. 619 (1891).

[1] Quoted and approved in Knopf *v.* First Nat. Bank, 173 Ill. 331 (1898); City Nat. Bank *v.* Paducah, 2 Flip. 61 (1877); s. c., 5 Fed. Cas. 755, where the court said: "The bank is so far the trustee of the stockholders and the custodian of the dividends that it is entitled to maintain the bill. It might be subjected to great annoyance by stockholders who denied the legality of the tax, and gave the bank notice that it would pay at the peril of being sued by them. It is certainly no hardship to permit the whole question to be litigated in a single action." This case holds also that an injunction against the collection of the illegal tax will be granted. In general, see also Albany City Nat. Bank *v.* Maher, 20 Blatchf. 341 (1882); North Ward Nat. Bank *v.* Newark, 40 N. J. L. 558 (1878). *Cf.* Dows *v.* Chicago, 11 Wall. 108 (1870); Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490 (1873); Pelton *v.* National Bank, 101 U. S. 143 (1879); Cummings *v.* National Bank, 101 U. S. 153 (1879). *Contra*, First Nat. Bank *v.* Meredith, 44 Mo. 500 (1870). See also Union Nat. Bank *v.* Chicago, 3 Biss. 82 (1871); s. c., 24 Fed. Cas. 615. As to the rule in New York, see People *v.* Wall Street Bank, 39 Hun, 525 (1886); People *v.* Coleman, 41 Hun, 344 (1886). The same rule does not apply to a corporation which brings suit to prevent the levy upon and sale of a non-resident stockholder's stocks for non-payment of his tax. Waseca Co. Bank *v.* McKenna, 32 Minn. 468 (1884). The case of Farmers' Nat. Bank *v.* Cook, 32 N. J. L. 347 (1867), denies the right of the bank to bring the action, and says: "The corporation is not the agent of the stockholders for any such purpose." A national bank may file a bill to restrain the imposition of a tax on stock, the bank having to pay the tax. But the injunction against collection of the tax is granted only as to the excess of tax. Whitney Nat. Bank *v.* Parker, 41 Fed. Rep. 402 (1890). The bank cannot file a bill in the federal court unless the tax involved is over $2,000. Sioux Falls Nat. Bank *v.* Swenson, 48 Fed. Rep. 621 (1892). A national bank may bring suit to relieve its stockholders from an excessive tax. Citizens', etc. Bank *v.* Columbia County, 23 Wash. 441 (1900).

[2] Lindsay *v.* First Nat. Bank, 156 U. S. 485 (1895).

does not lie at the instance of a national bank to enjoin the collection of taxes on the stock of the bank, excepting in a case involving fraud or illegal discrimination or classification.[1]

C. OTHER METHODS OF TAXING CORPORATIONS.

§ 572a. *General principles.*— A state may tax corporations, and the rate of taxation may be greater or less than or equal to the rate at which individuals are taxed.[2] The method of assessing taxes upon corporations varies of course in the different states.[3] A state may legally distribute the taxes paid by a railroad on its rolling-stock and personalty among the counties traversed by the railroad.[4]

Where a company is really located in a city and does all its business there, but its articles of incorporation state its principal place of business as being in an adjacent town, the sole object being to evade taxation, the court will hold that for taxation purposes its principal place of business is in such city.[5] Where the capital stock

[1] Mercantile, etc. Bank *v.* Mayor, etc., 172 N. Y. 35 (1902). A national bank cannot maintain an injunction against the collection of taxes on its stock unless some ground of equity jurisprudence is involved, and cannot maintain such a suit where the stockholders do not, and where the bank has nothing to do with the tax unless they desire to pay it. People's, etc. Bank *v.* Marye, 107 Fed. Rep. 570 (1901).

[2] It is constitutional to tax corporations without taxing individuals. Singer Mfg. Co. *v.* Wright, 33 Fed. Rep. 121 (1887); State R. R. Tax Cases, 92 U. S. 575 (1875). *Cf.* Railroad Tax Cases, 13 Fed. Rep. 722 (1882); Santa Clara Co. *v.* Railroad, 18 Fed. Rep. 385; s. c., 118 U. S. 396 (1885). A tax on railroads may be legal, although the assessment is for eighty per cent. of the value, while on other property in the state the assessment is sixty per cent. Chamberlain *v.* Walter, 60 Fed. Rep. 788 (1894). It is legal for a state to impose a larger tax on domestic corporations having their principal places out of the state than upon those having their principal places of business within the state. Blue Jacket, etc. Co. *v.* Scherr, 40 S. E. Rep. 514 (W. Va. 1901). The Kentucky statute imposing a tax on corporations exercising any special franchise, not allowed by law to natural persons does not apply to a tobacco warehouse company. Louisville, etc. Co. *v.* Commonwealth, 49 S. W. Rep. 1069 (Ky. 1899).

[3] A tax on a gas company on gross receipts and on dividends by way of license for the right to act as a corporation is not a tax upon the property or corporate franchises, but is a license fee. Jersey City Gas-Light Co. *v.* United Gas, etc. Co., 46 Fed. Rep. 264 (1891).

[4] Columbus Southern Ry. *v.* Wright, 151 U. S. 470 (1894), the court holding that the rolling-stock, choses in action, etc., of a railroad have their situs at the domicile or place of business of the company, but the legislature may change this situs for purposes of taxation.

[5] Milwaukee Steamship Co. *v.* Milwaukee, 83 Wis. 590 (1892). Where the actual place of business of a corporation is at one place, but its nominal place of business is fixed elsewhere in order to evade taxation, the actual place of business is the place where the company will be taxed under the Michigan statutes. Detroit Transp. Co. *v.* Board of Assessors, 91 Mich. 382

is invested in patent-rights it cannot be taxed by the state.[1] A state may compel corporations to pay taxes for years past.[2]

A tax on the capital stock based upon the amount of dividend declared cannot be evaded by distributing profits without declar-

(1892), distinguishing the New York cases. See also Galveston, etc. Ry. v. Gonzales, 151 U. S. 496 (1894), relative to domicile and residence for purposes of jurisdiction of the federal courts. In regard to a corporation being taxed in another place in the state from the place where its principal office is located, see also *Re* McLean, 66 Hun, 122 (1892); aff'd, 138 N. Y. 158. It must be the principal place or places of business for the purposes of taxation and service of process; and in New York under somewhat similar statutes it is held that the certificate is conclusive as to this. Western Transp. Co. v. Scheu, 19 N. Y. 408 (1859). A domestic corporation will not be allowed to deny that it has a place of business in the state. Chapman v. Doray, 89 Cal. 52 (1891). Generally, the statutes prescribe that a corporation shall be taxed where its principal office or place of business is located. People v. McLean, 17 Hun, 204 (1879); Pelton v. Northern Transp. Co., 37 Ohio St. 450 (1882); Baltimore v. Baltimore, etc. Ry., 57 Md. 31 (1881); Western Transp. Co. v. Scheu, 19 N. Y. 408 (1859); Glaize v. South Carolina R. R., 1 Strobh. (S. C.) 70 (1846), holding that a corporation may have a special or constructive residence extending to the territorial limits of the jurisdiction which granted its charter for purposes of taxation.

[1] Commonwealth v. Westinghouse Electric, etc. Co., 151 Pa. St. 265 (1892). Where the entire capital stock is invested in patent-rights and the business of the company is granting licenses to use the same, the value of such patent-rights is not a part of the capital to be taxed in New York. People, etc. v. Knight, 67 N. Y. App. Div. 333 (1901). In Holt v. Indiana Mfg. Co., 80 Fed. Rep. 1 (1897), it appears that the corporation enjoined state officials from levying a tax on capital stock which represented patent-rights and nothing else. The capital stock of a corporation cannot be taxed by a state where it has been issued for the right to make, use, or license certain inventions covered by patents, there having been no apparatus or tangible property received for the stock. This is on the principle that a patent-right cannot be taxed by a state. Commonwealth v. Philadelphia Co., 157 Pa. St. 527 (1893). Compare People v. Campbell, 138 N. Y. 543 (1893). The New Jersey annual tax is legal, although nearly the entire capital stock of the company was issued for patents. State v. State Board, 61 N. J. L. 461 (1898). Where the stock is issued in payment for the exclusive right to use certain patented articles within certain territory, it is not invested in patent-rights so as to be exempt from taxation by reason of the acts of congress. Commonwealth v. Central, etc. Tel. Co., 145 Pa. St. 121 (1891); Commonwealth v. Brush, etc. Co., 145 Pa. St. 147 (1891). In the case of Crown, etc. Co. v. State, 87 Md. 687 (1898), the court held that patent-rights owned by the corporation might be included in an estimate of its property for the purpose of ascertaining the taxable value of its shares of stock; also in 174 N. Y. 475.

[2] McVeagh v. Chicago, 49 Ill. 318 (1868). An attempt of the state to make a railroad corporation pay $1,250,000 back taxes, not levied under an alleged mistaken view of the law by former state officials, failed in Commonwealth v. Pennsylvania Co., 145 Pa. St. 266 (1892). Where the charter provides for "a tax not exceeding twenty-five cents per annum per share on each share of the capital stock whenever the annual profits thereof shall exceed six per cent.,"

ing a dividend. But a stock dividend does not come within the tax statute.[1] The fact that a company has declared a dividend does not show that the capital stock has a value subject to taxation under the New York statute.[2] A corporation claiming that it is taxed too much cannot enjoin collection unless it offers to pay the amount it admits to be due.[3] The court will, under the New Jersey

the legislature may compel the company to pay such tax, and to pay it for twenty-five years past, during which time the company had evaded payment. State *v.* Seaboard, etc. R. R., 52 Fed. Rep. 450 (1892).

[1] Lehigh, etc. Co. *v.* Commonwealth, 55 Pa. St. 448 (1867); Commonwealth *v.* Pittsburg, etc. Ry., 74 Pa. St. 83 (1873). See State *v.* Franklin Bank, 10 Ohio, 91 (1840); People *v.* Home Ins. Co., 92 N. Y. 328 (1883). Where taxes are based upon dividends, the tax must be paid, even though a dividend is declared nearly equal to the capital stock, it being shown that the value of the stock after the declaration of the dividend was practically par, and hence that the dividend was not a distribution of the capital stock. Commonwealth *v.* Western Land, etc. Co., 156 Pa. St. 455 (1893). Where a company has in its treasury stock in another company, and distributes it among its stockholders, this is a dividend. Allegheny *v.* Pittsburgh, etc. Ry., 179 Pa. St. 414 (1897). Where a consolidation of three corporations is made by increasing the capital stock of one, and issuing the increased stock to the stockholders of all three corporations in the proportion agreed upon, this is not a stock dividend, even though the aggregate capital stock was $400,000, but by the consolidation is $1,000,000. Allegheney *v.* Federal, etc. Ry., 179 Pa. St. 424 (1897). Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. Ry., 179 Pa. St. 414 (1897). Where the dividends declared during the year were partly earned during prior years, the latter portion are not taxable under the Pennsylvania statute taxing the capital stock according to the dividends. Commonwealth *v.* Brush, etc. Co., 145 Pa. St. 147 (1891). Where all the shares are reduced in par value from $50 to $38, and the $12 difference is paid to the stockholder in cash, this is a reduction of capital stock and not a dividend, and cannot be taxed as a dividend. Commonwealth *v.* Central Transp. Co., 145 Pa. St. 89 (1891). A tax upon the receipts of a railroad is not a tax upon dividends. Com'rs, etc. *v.* Buckner, 48 Fed. Rep. 533 (1891). A dividend declared and ordered deposited to the order of the stockholders, and so held until the further order of the court, is legal, and the amount cannot be taxed as belonging to the bank. Pollard *v.* First Nat. Bank, 47 Kan. 406 (1891). Profits applied to betterments are not "dividends earned" within the meaning of a statute imposing taxation. State *v.* Comptroller, 54 N. J. L. 135 (1891). See also § 534, *supra.* Where all the stockholders are officers, and, instead of dividends, the corporation distributes its profits by large salaries, there is danger that upon the death of one of them others may continue the payment of such salaries to themselves, even though they are executors of the deceased officer's estate. Matter of Schaefer, 65 N. Y. App. Div. 378 (1901).

[2] People *v.* Barker, 141 N. Y. 251 (1894).

[3] Smith *v.* Rude, etc. Co., 131 Ind. 150 (1892). See also § 572, notes, *supra.* An injunction is not the proper remedy to attack a tax erroneously laid on the capital stock. Jones *v.* Rushville Nat. Gas Co., 135 Ind. 595 (1893).

statute, enjoin a corporation from doing business if it does not pay taxes levied upon it.[1] A purchaser of a railroad at foreclosure sale cannot revive an action begun by the mortgagor, after the giving of the mortgage, to enjoin the collection of taxes.[2] Where taxes are based on the aggregate value of all the shares of stock, unissued stock should not be considered, even though ten per cent. has been paid on the subscription to the latter.[3]

In ascertaining the actual value of capital stock for taxation, the price at which the stock is selling is not taken as the actual value where the market value is due to speculation and market influences.[4] Bonds of a domestic corporation held by non-residents are not tax-

[1] *Re* Electro-Pneumatic Transit Co., 51 N. J. Eq. 71 (1893).

[2] Keokuk, etc. R. R. *v.* Scotland County, 152 U. S. 318 (1894).

[3] Boston, etc. R. R. *v.* Commonwealth, 157 Mass. 68 (1892). Even though a gas company issues stock without the consent of a state board, as required by statute, yet this is no defense to a tax levied on the corporation based on the amount of its capital stock, including such tax. Attorney General *v.* Massachusetts, etc. Co., 179 Mass. 15 (1901). The whole capital stock may be taxed under a city charter, although only a part of it has been paid in. Shelby County, etc. Co. *v.* Shelbyville Trustees, 91 Ky. 578 (1891).

[4] Commonwealth *v.* Philadelphia, etc. R. R., 145 Pa. St. 74 (1891). The statute of 1891 in Pennsylvania for taxing corporations according to the value of their capital stock is a tax on the property, franchises, bonds, money, and assets of the corporation, all of which are considered in arriving at the tax, and the indebtedness should also be considered. Various decisions on this statute are given in Commonwealth *v.* N. Y. etc. R. R., 188 Pa. St. 169 (1898); Commonwealth *v.* Manor, etc. Co., 188 Pa. St. 195 (1898); Commonwealth *v.* Beech Creek R. R., 188 Pa. St. 203 (1898); Commonwealth *v.* Fall Brook R. R., 188 Pa. St. 199 (1898); Commonwealth *v.* Ontario, etc. Ry., 188 Pa. St. 205 (1898). In Louisiana the corporation may sue to reduce or annul taxation of the shares of stock. The value of the stock may be ascertained from various sources, including that of stock for which it has been exchanged. Planters', etc. Co. *v.* Assessor, 41 La. Ann. 1137 (1889). Where all the stockholders sell their stock at a certain time, the price received may be the basis for the taxation of the corporate property. Winnepiseogee, etc. Co. *v.* Gilford, 67 N. H. 514 (1894). In the case of Chicago, etc. Co. *v.* State Board of Equalization, 112 Fed. Rep. 607 (1901), the court, in speaking about the unreliability of quotations of stock as a basis for its intrinsic value, said (p. 612): "The court knows by experience and observation that railroad properties, when sold as an entirety, almost without exception, yield nothing to the stockholder, although the stock may have been sold in share lots upon the stock exchange for years previously at advanced figures. The court knows, also, from observation, that these stock quotations are frequently advanced by contending interests for control, or by short interests in the market, such as ran the Northern Pacific within a year to quotations almost ten-fold its real value. The court also knows from observation that the speculative public, dealing in stock sales, and making its quotations, are governed largely by the prospect of present dividends, and not by any general conception of permanent earning capacity. These, and other considerations that could be mentioned, make

able by the state creating the corporation.[1] A statute by which Pennsylvania requires a New York railroad corporation doing business in Pennsylvania to pay to the latter a part of coupons due to residents of Pennsylvania, such coupons being by their terms payable in New York, is void.[2] In Kentucky a railroad cannot be taxed to aid in paying a municipal subscription to its construction.[3] The franchise to build and operate a street railway is subject to taxation. A license fee may be imposed on the railway, although, under its franchise, it is also bound to pay other taxes annually.[4] The taxation of unincorporated associations is considered elsewhere.[5] Where a railroad company of one state is consolidated with companies of other states, the consolidated company is considered, for the purposes of taxation, to be a corporation of each state to the extent that its property is in that state. It is taxed in the state on the capital stock of the company which it absorbed.[6] The

stock quotations an *indicia*, but an unstable *indicia*, of the real value of the capital stock as an entirety."

[1] Railroad Co. *v.* Jackson, 7 Wall. 262 (1868); State Tax on Foreign-held Bonds, 15 Wall. 300 (1872); Davenport *v.* Mississippi, etc. R. R., 12 Iowa, 539 (1861); Commonwealth *v.* Chesapeake, etc. R. R., 27 Gratt. 344 (1876); People *v.* Eastman, 25 Cal. 603 (1864), where the same principle was applied between counties in the same state. *Contra*, Maltby *v.* Reading, etc. R. R., 52 Pa. St. 140 (1866). As to the rule where part of the capital stock is used out of the state, see Commonwealth *v.* Standard Oil Co., 101 Pa. St. 119 (1882); State Treasurer *v.* Auditor-General, 46 Mich. 224 (1881); People *v.* Equitable, etc. Co., 96 N. Y. 387 (1884). The Pennsylvania system of taxing against corporations all bonds issued by them and owned by citizens of the state, and compelling the corporation to pay the tax and deduct it from the interest on the bonds, is constitutional. Bell's Gap R. R. *v.* Pennsylvania, 134 U. S. 232 (1890).

[2] New York, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894), rev'g 150 Pa. St. 245. Where a state, by charter granted to a railroad company, limits the taxation to a certain amount, it cannot afterwards compel the company to deduct from coupons due on bonds owned by residents a part of such coupons, and pay that part to the state. New York, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894).

[3] Louisville, etc. R. R. *v.* Commonwealth, 89 Ky. 531 (1890).

[4] New Orleans, etc. Co. *v.* New Orleans, 143 U. S. 192 (1892).

[5] See ch. XXIX, *supra*.

[6] Ohio, etc. R. R. *v.* Weber, 96 Ill. 443 (1880); Chicago, etc. Ry. *v.* Auditor-General, 53 Mich. 79 (1884); Railroad Co. *v.* Vance, 96 U. S. 450 (1877). In this case a railroad corporation of Indiana which had been recognized by an act of the Illinois legislature as a corporation of that state was held for taxes upon the capital and franchises of a road leased by it in Illinois and assessed to the lessor company, but charged to the lessee company and to be collected from it. Quincy R. R. Bridge Co. *v.* Adams County, 88 Ill. 615 (1878), where a bridge company originally incorporated by two states, and consolidated by articles which were confirmed by the legislature of one of them (Illinois), was held to be a corporation of that state for purposes of taxation. An incorporating fee is not imposed on the whole consolidated capital under the New York statute. People *v.* New York,

word "franchise" has been construed to mean the entire property, tangible and intangible, when so intended in a taxation statute.[1]

§ 572*b*. *Exemptions from taxation.*— A state, if not restricted by its constitution, may exempt the property of a corporation from taxation. Such an exemption constitutes a contract between the state and the corporation, which cannot be repealed or changed by subsequent legislation, unless the right to alter or repeal it has been reserved by the state.[2] Exemptions from taxation, however,

etc. R. R., 129 N. Y. 474 (1892). The state may constitutionally charge a large fee as a condition of granting a charter. Edwards *v.* Denver, etc. R. R., 13 Colo. 59 (1889).

[1] Adams Express Co. *v.* Kentucky, 166 U. S. 171 (1897). A clause that a lessee shall pay all taxes was construed to cover a franchise tax in the case of Thomas *v.* Cincinnati, etc. Ry., 93 Fed. Rep. 587 (1899).

[2] See § 568, *supra*. An exemption of a railroad from taxation, except when the dividends exceed eight per cent., is a contract protected by the federal constitution. Mobile & Ohio R. R. *v.* Tennessee, 153 U. S. 486 (1894). An exemption from state taxation is a contract between the state and the corporation which cannot be impaired by a subsequent statute. Such exemption, however, will not be extended to branch lines thereafter constructed. Wilmington, etc. R. R. *v.* Alsbrook, 146 U. S. 279 (1892). See, in general, Tomlinson *v.* Branch, 15 Wall. 460 (1872); Home of the Friendless *v.* Rowse, 8 Wall. 430 (1869); Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871); Mobile, etc. R. R. *v.* Moseley, 52 Miss. 127 (1876); Jefferson Bank *v.* Skelley, 1 Black, 436 (1861), where the charter provided for the payment of six per cent. of the bank's profits in lieu of taxes; Livingston County *v.* Hannibal, etc. R. R., 60 Mo. 516 (1875), where, however, an exemption from county taxes was held not to include a school tax which originated after the charter was granted; St. Joseph *v.* Hannibal, etc. R. R., 39 Mo. 476 (1867), holding that an exemption from county taxation will not prevent taxation by a city. A contract between the state and a railroad, that the latter shall pay a certain tax and no more, is not repealable by the state. State Board *v.* Morris, etc. R. R., 49 N. J. L. 193 (1886). Though a charter may be repealable, yet an amendment giving an exemption from taxation may be irrepealable, since the latter may be a contract and not a franchise. State Board *v.* Morris, etc. R. R., 49 N. J. L. 193 (1886). A bonus to the state on increase of capital stock cannot apply to previous charters having charter right to increase. Commonwealth *v.* Erie, etc. Transp. Co., 107 Pa. St. 112 (1884); Railroad Cos. *v.* Gaines, 97 U. S. 698 (1878), holding that a new corporation invested with the powers and privileges of, and subject to the obligations of the charter of, another corporation, does not take an exemption from taxation. To same effect, Railroad Co. *v.* Commissioners, 103 U. S. 1 (1880); Dauphin, etc. Ry. *v.* Kennerly, 74 Ala. 583 (1883). But see East Tennessee, etc. R. R. *v.* Pickerd, 24 Fed. Rep. 614 (1885); Delaware Railroad Tax, 18 Wall. 206 (1873); Dartmouth College *v.* Woodward, 4 Wheat. 518 (1819); Providence Bank *v.* Billings, 4 Pet. 514 (1830); Binghamton Bridge, 3 Wall. 51 (1865); Humphreys *v.* Pegues, 16 Wall. 244 (1872); Pacific R. R. *v.* Maguire, 20 Wall. 36 (1873); North Missouri R. R. *v.* Maguire, 20 Wall. 46 (1873); People *v.* Soldiers' Home, etc., 95 Ill. 561 (1880); University *v.* People, 99 U. S. 309 (1878), holding void a statute limiting a general exemption previously conferred to property in immediate use by a corpo-

are not favored by the courts, and are strictly limited to the terms of the exemption. An amendment exempting a corporation from

ration; Farrington *v.* Tennessee, 95 U. S. 679 (1877); Railway Co. *v.* Philadelphia, 101 U. S. 528 (1879); Hoge *v.* Railway Co., 99 U. S. 348 (1878); Dodge *v.* Woolsey, 18 How. 331 (1855), holding that the adoption of a new constitution declaring that corporate property shall be taxed will not be allowed to impair the contract; Mobile, etc. R. R. *v.* Kennerly, 74 Ala. 566 (1883); Richmond *v.* Richmond, etc. R. R., 21 Gratt. (Va.) 604 (1872), holding also that an exemption of corporate property in a city from taxation, which conflicts with the charter of the city previously granted, is not unconstitutional if the city has remaining ample means of taxation to meet its needs; Commonwealth *v.* Fayette R. R., 55 Pa. St. 452 (1867), holding that, where power to alter or repeal the exemption is reserved, the exercise of the power is no impairment of the contract; State *v.* Miller, 30 N. J. L. 368 (1863), holding that the repeal may be made by a general law; State *v.* Commissioners of Taxation, 37 N. J. L. 240 (1874), holding that, where a general exemption from taxation is granted to a corporation without reserving the power to alter or repeal it, and there is a provision for a special mode of assessing its property, it may consent to another mode of assessment without surrendering or altering its exemption from general taxation; East Tennessee, etc. R. R. *v.* Pickerd, 24 Fed. Rep. 614 (1885); Temple Grove Seminary *v.* Cramer, 98 N. Y. 121 (1885), holding that an incorporated academy does not waive or forfeit its exemption from taxation by reason of having leased its building for a boarding-house during vacations; Elizabethtown, etc. R. R. *v.* Elizabethtown, 12 Bush (Ky.), 233 (1876), holding that an exemption of railroad property from taxation precludes any imposition of taxes by the state, whether for state or local purposes. In Mott *v.* Pennsylvania R. R., 30 Pa. St. 9 (1858), a sale of a railroad and canal by the state on terms exempting the vendee from future taxes was enjoined. The exemption was held to be unconstitutional. County Com'rs *v.* Woodstock Iron Co., 82 Ala. 151 (1886), holding that an exemption of private corporations from taxation made by a general law was not a contract, but only a legislative bounty, subject to be repealed.

The act by which the exemption from taxation is made must be clear and unequivocal; the intent to confer the immunity must be beyond reasonable doubt. Ohio, etc. Trust Co. *v.* Debolt, 16 How. 416 (1853); Delaware Railroad Tax, 18 Wall. 206 (1873); North Missouri R. R. *v.* Maguire, 20 Wall. 46 (1873); Mobile, etc. R. R. *v.* Kennedy, 74 Ala. 566 (1883), holding that a reasonable doubt is to be construed against the exemption; Dauphin, etc. Ry. *v.* Kennerly, 74 Ala. 583 (1883); Richmond *v.* Richmond, etc. R. R., 21 Gratt. (Va.) 604 (1872). An exemption of a corporation from taxation upon payment of a fixed annual tax on the capital stock is not voidable. State *v.* Butler, 86 Tenn. 614 (1888). A particular mode of taxation may be changed under the reserved right to amend the charter. Detroit St. Rys. *v.* Guthard, 51 Mich. 180 (1883). See also Bank of Republic *v.* Hamilton County, 21 Ill. 53 (1858); Mayor, etc. *v.* Twenty third Street R. R., 113 N. Y. 311 (1889). A specific rate of taxation prescribed in the charter raises no implication of a legislative contract to impose no further burdens by way of taxation. Iron City Bank *v.* Pittsburgh, 37 Pa. St. 340 (1860). A constitutional prohibition as to exemptions from taxation does not apply to railroad corporations, they being quasi-public. Yazoo, etc. R. R. *v.* Levee Com'rs, 37 Fed. Rep. 24 (1888). A charter exemption from all taxation upon payment of a certain

taxation may be repealed, there being no consideration for the contract.[1] Moreover, under a reservation of power to alter, amend, or

tax is legal. Franklin County Court v. Deposit Bank, 87 Ky. 370 (1888). An exemption from taxation which is a gift may be repealed. Philadelphia v. Pennsylvania Hospital, 134 Pa. St. 171 (1890). An exemption from taxation may be repealed under the reserved right to amend, etc. Wagner, etc. Institute v. Philadelphia, 132 Pa. St. 612 (1890). An exemption from all other taxation is an exemption from local as well as state taxation. People v. Coleman, 121 N. Y. 542 (1890). A railroad may give up its exemption from state taxation and still retain its exemption from county taxation. State v. Hannibal, etc. R. R., 101 Mo. 136 (1890). A railroad that is divided by the legislature with the consent of the stockholders does not lose its exemptions. Louisville, etc. R. R. v. Commonwealth, 89 Ky. 531 (1890). An exemption from taxation is not a franchise. Hence *quo warranto* does not lie to oust the corporation from such exemption. International, etc. Ry. v. State, 75 Tex. 356 (1889). The decision of the state court that an exemption does not apply to certain property is not an impairment of a contract. St. Paul, etc. Ry. v. Todd County, 142 U. S. 282 (1892). Where a contract of exemption from taxation between a state and a waterworks company is declared unconstitutional by the highest court of the state, there is no impairment of the contract by subsequent legislation which assumes the old contract to have been invalid. New Orleans v. New Orleans, etc. Works, 142 U. S. 79 (1891). In Citizens' Bank v. Board of Assessors, 54 Fed. Rep. 73 (1893), an exemption from taxation was held to apply to extensions of the original charter. Although the charter provides that the real and personal property of the company shall be taxed the same as that of individuals, this does not exempt the capital stock from taxation. State v. Simmons, 70 Miss. 485 (1893). An exemption from taxation does not pass to a company that buys out the company which is exempt. Commonwealth v. Nashville, etc. Co., 93 Ky. 430 (1892). A company to generate and sell electric power is not a manufacturing company as regards taxation. Commonwealth v. Northern, etc. Co., 145 Pa. St. 105 (1891); Commonwealth v. Brush, etc. Co., 145 Pa. St. 147 (1891). An exemption of manufacturing corporations from taxation was construed to exempt merely such of their property as was invested in manufacturing, in Commonwealth's Appeal, 129 Pa. St. 346 (1889); Commonwealth v. Mahoning Rolling-Mill Co., 129 Pa. St. 360 (1889). Where, subsequently to the incorporation of a company, a general act reserves to the legislature the right to amend or repeal any and all charters, the legislature may repeal any amendments to the charter, so far as such amendments are passed after the general act, where the amendments do not expressly waive the legislative right of amendment or repeal, unless the amendment is worded "saving, whenever that power was exerted, all rights previously vested." An exemption from taxation may be repealed under the reserve power. (Approving Tomlinson v. Jessup, 15 Wall. 454 — 1872, and Railroad Co. v. Maine, 96 U. S. 499 — 1877.) Creditors stand upon the same footing in this respect. Louisville Water Co. v. Clark, 143 U. S. 1 (1892). A contract of a lessee to pay taxes upon the real and personal property, franchises, capital stock, or gross receipts does not bind the lessee to pay taxes on dividends. Jersey City Gaslight Co. v. United Gas Imp. Co., 58 Fed. Rep. 323 (1893). An exemption of a corporation may not exempt also its

[1] Manistee, etc. Co. v. Commissioner of Railroads, 118 Mich. 349 (1898).

repeal the charter, the legislature may take away an exemption from taxation.[1]

Where a corporation whose property is exempt from taxation is merged into or consolidated with another, the question of whether the exemption from taxation passes with its property to the lessee, vendee, or consolidated company is a question which turns largely on the words granting the exemption.[2]

Where a consolidation is effected after the adoption of constitutional provisions prohibiting the legislature from exempting the property of corporations from taxation, the consolidated company is looked upon as a new corporation, which is not entitled to exemptions from taxation possessed by the companies of which it is composed.[3] Consolidation, being a dissolution of the old companies, destroys an exemption of one of them from taxation.[4]

timber lands. Todd County *v.* St. Paul, etc. Ry., 38 Minn. 163 (1888). See also, on this subject, § 501, *supra*, and § 639, *infra*.

[1] Louisville Water Co. *v.* Clark, 143 U. S. 1 (1892); Pearsall *v.* Great Northern Ry., 161 U. S. 646, 663 (1896).

[2] An exemption from taxation pertains to the franchise as a corporation, and does not pass with the sale of the franchise to operate the road. Chesapeake, etc. Ry. *v.* Miller, 114 U. S. 176 (1885); Memphis R. R. *v.* Com'rs, 112 U. S. 609 (1884); Tomlinson *v.* Branch, 15 Wall. 460 (1872); Branch *v.* Charleston, 92 U. S. 677 (1875); Central R. R. *v.* Georgia, 92 U. S. 665 (1875), reversing s. c., 54 Ga. 401; Chesapeake, etc. R. R. *v.* Virginia, 94 U. S. 718 (1876); Delaware Railroad Tax, 18 Wall. 206 (1873). See also cases in preceding note, and § 897, *infra*. Where by statute "all rights" of a railway are to pass to another, an exemption from taxation passes. Atlantic, etc. R. R. *v.* Allen, 15 Fla. 637 (1876). It certainly will not be extended to the property of other corporations consolidated with it. Philadelphia, etc. R. R. *v.* Maryland, 10 How. 376 (1850); Chesapeake, etc. R. R. *v.* Virginia, 94 U. S. 718 (1876); Delaware Railroad Tax, 18 Wall. 206 (1873). See also Wait, Insolv. Corp. 381. An exemption of railroad lands from taxation may pass to a railroad purchasing the same. Stevens County *v.* St. Paul, etc. Ry., 36 Minn. 467 (1887). Consolidation in Missouri destroys exemption from taxation. Keokuk, etc. R. R. *v.* County Court, 41 Fed. Rep. 305 (1890). A consolidated company under the Missouri statutes relative to railroads meeting at the state line is a new corporation, and the old one is dissolved. An exemption from taxation of the old corporation is thereby lost. State *v.* Keokuk, etc. R. R., 99 Mo. 30 (1889). Although an exemption from taxation is to pass to a consolidated company, yet this is a gratuity to the new company and may be repealed. Wilmington, etc. R. R. *v.* Alsbrook, 110 N. C. 137 (1892).

[3] Memphis, etc. R. R. *v.* Berry, 112 U. S. 609 (1884); St. Louis, etc. R. R. *v.* Berry, 113 U. S. 465 (1885); Chesapeake, etc. R. R. *v.* Miller, 114 U. S. 176 (1885). Where the legislature ceded to a company to be formed "all the right, interest, and privileges of whatever kind" of a defunct railroad company, it was held that an exemption from taxation conferred on the old company was not vested in the new one. Railroad Co. *v.* Georgia, 98 U. S. 359 (1878). In this case the restriction upon granting exemptions was in a statute instead of a constitutional provision.

[4] Keokuk, etc. R. R. *v.* Missouri, 152

If the franchises and property of a corporation be transferred by a sale in foreclosure, an exemption from taxation does not accompany the transfer. The exemption is a personal privilege and not a franchise.[1] A statute exempting the property of a corporation from being taxed does not prevent the taxation of land held by it merely for convenience and not necessary to its operation.[2] Where a corporation owns property in excess of an amount specified and limited by the charter, an exemption from taxation does

U. S. 301 (1894), reviewing the cases on this subject of dissolution, and holding that the presumption is always against the dissolution. Where, in consolidating, new certificates of stock are issued, a new board of directors elected, and the constituent companies cease their functions, the old companies are thereby dissolved and a new company is formed, even though the name of the new company is the same as one of the old companies. Hence exemptions from taxation existing under the old charters cease where a new constitution enacted prior to such consolidation prescribes that the property shall be taxed in proportion to its value. Yazoo, etc. Ry. *v.* Adams, 180 U. S. 1 (1901), aff'g 77 Miss. 194, 187 U. S. 258.

[1] Morgan *v.* Louisiana, 93 U. S. 217 (1876); Louisville, etc. R. R. *v.* Palmes, 109 U. S. 224 (1883); Wilson *v.* Gaines, 103 U. S. 417 (1880), where the transfer was under proceedings to enforce a statutory lien of a state; Arkansas Midland R. R. *v.* Berry, 44 Ark. 17 (1884). See also Picard *v.* East Tennessee, etc. R. R., 130 U. S. 637 (1889), and cases *supra.* Where the exemption is to all the property of a railroad its franchise is included. Wilmington R. R. *v.* Reid, 13 Wall. 264 (1871). As to whether an exemption from taxation is a franchise or privilege, see Keokuk, etc. R. R. *v.* Missouri, 152 U. S. 301, 311 (1894). Where a railroad is foreclosed an exemption from taxation does not pass to the purchaser at the foreclosure sale, even though the statutes give to such purchaser all the rights, immunities, privileges, etc., of the former company. Baltimore, etc. Ry. *v.* Ocean City, 89 Md. 89 (1899).

[2] State *v.* Commissioners, 23 N. J. L. 510 (1852); State *v.* Collectors, 25 N. J. L. 315 (1855). In these cases lands owned by a railroad and occupied by dwellings for employees, car and locomotive works, coal mines, etc., were held to be subject to taxation. See also Toll-bridge Co. *v.* Osborn, 35 Conn. 7 (1868), where lands held for wharves by a bridge company by authority of law were held taxable as real estate — a provision in its charter that all its property should be considered personal property and be divided into shares being construed to relate to the property of the stockholders as represented by the shares; *Re* Swigert, 119 Ill. 83 (1886), holding that a railroad exemption did not exempt its elevator. In ascertaining, under the New Jersey taxation statute, whether one-half of the capital is employed in the state in manufacturing, the capital employed in disposing of the manufactured product in the state is included. *Re* Consolidated Electric Storage Co., 26 Atl. Rep. 983 (N. J. 1893). For cases passing upon the exemption of manufacturing corporations from taxation in Pennsylvania, see Commonwealth *v.* Keystone Bridge Co., 156 Pa. St. 500 (1893); Commonwealth *v.* J. B. Lippincott Co., 156 Pa. St. 513 (1893); Commonwealth *v.* Thackara Mfg. Co., 156 Pa. St. 510 (1893); Commonwealth *v.* Pottsville Iron, etc. Co., 157 Pa. St. 500 (1893); Commonwealth *v.* Juniata Coke Co., 157 Pa. St. 507 (1893); Commonwealth *v.* National Oil Co., 157 Pa. St. 516 (1893).

not apply to such excess.[1] In general, an exemption from taxation by the state is not an exemption also from municipal taxation for local purposes,[2] nor from assessments for improvements,[3] nor from a license fee.[4]

§ 572c. *Taxation of foreign corporations.*— Any state may tax foreign corporations doing business within its borders.[5]

[1] Seashore House, etc. *v.* City of Atlantic City, 48 Atl. Rep. 242 (N. J. 1900).

[2] Elizabethtown, etc. R. R. *v.* Elizabethtown, 12 Bush (Ky.), 233 (1876); Roosevelt Hospital *v.* Mayor of New York, 84 N. Y. 108 (1881), where real estate exempted from state taxation was held to be subject to assessment by a city for the construction of a sewer. *Cf.* Applegate *v.* Ernst, 3 Bush (Ky.), 648 (1868), where a tax by a county upon a railroad to obtain money to pay a county subscription for the purpose of completing the road was held to be unlawful. An exemption from local taxation is not an exemption from state taxation. Wilkes Barre, etc. Bank *v.* Wilkes Barre, 148 Pa. St. 601 (1892).

[3] New Jersey, etc. R. R. *v.* Jersey City, 42 N. J. L. 97 (1880). An exemption from taxation does not apply to assessments for improvements. Illinois Cent. R. R. *v.* Mattoon, 141 Ill. 32 (1892).

[4] An exemption of the capital stock from taxation is not an exemption from a license fee, inasmuch as a tax means a tax on property, while a license fee is a form of tax on occupations. State *v.* Citizens' Bank, 52 La. Ann. 1086 (1899).

[5] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870); s. c., Oliver *v.* Liverpool, etc. Co., 100 Mass. 531 (1868). Goods in New York for sale, also money on deposit in New York, also other property in the state, form the proper basis for taxation of such part of the capital stock of foreign corporations as is employed in the state. Taxation for such part of the capital stock as sales in New York bear to all the sales is unjust, since many sales may be by sample. People *v.* Wemple, 133 N. Y. 323 (1892). A tax on foreign manufacturing corporations to the extent of the business which they do in the state is constitutional and enforceable. People *v.* Wemple, 131 N. Y. 64 (1892). The New York statute taxing foreign corporations doing business in the state on the same basis as domestic corporations is constitutional. Horn Silver, etc. Co. *v.* New York, 143 U. S. 305 (1892). The New York tax upon the business of all foreign and domestic corporations doing business in the state is a tax on the right to be a corporation and to do business, and is not a tax upon the franchise, even though the tax is measured by the dividends declared. The tax is legal although the corporation owns United States bonds. Home Ins. Co. *v.* New York, 134 U. S. 594 (1890). Where foreign corporations are required to report stock, bonds, etc., owned by residents for taxation, it need report only such as its books disclose, and is not to be held liable further. Commonwealth *v.* N. Y. etc. R. R., 145 Pa. St. 57 (1891). *Cf.* Commonwealth *v.* American, etc. Teleph. Co., 129 Pa. St. 217 (1889). Foreign corporations doing business in New Jersey are subject to taxation. State *v.* Berry, 52 N. J. L. 308 (1890). Where a parent corporation of Massachusetts owns stock in a branch corporation of New York and collects royalties, etc., from the latter, the parent corporation is not subject to taxation in New York. People *v.* American, etc. Teleph. Co., 117 N. Y. 241 (1889). Debts due to a foreign corporation from residents cannot be taxed in Louisiana. Barber, etc. Co. *v.* New Orleans, 41 La. Ann. 1015 (1889). The New York statute levying a tax on

A state may impose on foreign insurance companies a tax equal to the tax levied by the state creating the foreign corporation on

foreign corporations doing business in the state, the tax being upon "the amount of capital stock employed within the state," is legal, and a New Jersey corporation is liable to taxation for maintaining a sales agency and office and bank account in New York City, even though its factories, books of account, etc., are in other states. Southern Cotton Oil Co. *v.* Wemple, 44 Fed. Rep. 24 (1890).

The Pennsylvania statute imposing a quarter of a mill license tax on the capital stock of foreign corporations having an office in the state, and prohibiting such offices unless the tax is paid, the act applying to all foreign corporations except insurance companies, is constitutional. A state may exclude or impose conditions upon foreign corporations unless they are engaged in interstate or foreign commerce, or are employed by the government. Pembina Min. Co. *v.* Pennsylvania, 125 U. S. 181 (1888); Blackstone Mfg. Co. *v.* Blackstone, 79 Mass. 488 (1859); State *v.* Lathrop, 10 La. Ann. 402 (1855); State *v.* Fosdick, 21 La. Ann. 434 (1869); Tatem *v.* Wright, 23 N. J. L. 429 (1852); State *v.* Western Union Tel. Co., 73 Me. 518 (1882); Commonwealth *v.* Gloucester Ferry Co., 98 Pa. St. 105 (1881); Norfolk, etc. R. R. *v.* Commonwealth, 114 Pa. St. 256 (1886); Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212, 218 (1851); Boston Loan Co. *v.* Boston, 137 Mass. 332 (1884); Singer Mfg. Co. *v.* County Com'rs, 139 Mass. 266 (1885); Att'y-Gen. *v.* Bay State, etc. Co., 99 Mass. 148 (1868); Commonwealth *v.* Texas, etc. R. R., 98 Pa. St. 90 (1881), holding, however, that a corporation created by the United States congress is not a foreign corporation within the revenue act of Pennsylvania; Commonwealth *v.* Gloucester, etc. Ferry Co., 98 Pa. St. 105 (1881); People *v.* Equitable Trust Co., 96 N. Y. 387 (1884), holding that a tax may be imposed upon the business done by a foreign corporation in New York, but not upon its property in other states, nor upon its franchise. A foreign corporation doing business in and taxed in New York is not entitled to a deduction for its debts. People *v.* Barker, 141 N. Y. 118 (1894). Otherwise as to domestic corporations. People *v.* Barker, 141 N. Y. 196 (1894). Under the New York act in arriving at the basis of taxation of corporations, the commissioners are bound to take the statements under oath of the corporate officers, except that they may call for further information. People *v.* Barker, 139 N. Y. 55 (1893). A foreign corporation is not liable to taxation in New York, where its business is conducted in another state, and all the parties interested in it and its officers reside in another state, and all its contracts made, and its product manufactured, sold and delivered in another state; and where it transacts none of its corporate business in the state, but merely has an office there, with a salaried agent, as a convenient place to discuss with patrons questions preliminary to the making of contracts, the contracts themselves being executed out of the state, and the company having no bank account in the state. People *v.* Campbell, 139 N. Y. 68 (1893). For the New York act which applies to foreign corporations, see Parker Mills *v.* Commissioners, 23 N. Y. 242 (1861); People *v.* Horn, etc. Co., 105 N. Y. 76 (1887). They are to be taxed where their principal offices in the state are situated. People *v.* McLean, 17 Hun, 204 (1879). A corporation chartered by the federal government is not such a foreign corporation as is obliged to pay a license fee under the Pennsylvania statutes. Commonwealth *v.* Texas, etc. R. R., 98 Pa. St. 90 (1881). Unless a statute otherwise provides, a

corporations foreign to the latter state.[1] Where a railroad corporation is incorporated by the United States, a state cannot tax its franchises; it may tax the tangible property, but not the franchise.[2] Where an assessment of taxes against a railroad company has been affirmed by the supreme court, *mandamus* may be used to compel payment of them, if there is no other adequate remedy.[3] The tax lien on a railroad may by delay be rendered subordinate to a mortgage.[4] The New York statute requiring foreign corporations before doing business in that state to pay a certain license tax is constitutional.[5]

§ 572*d*. *Taxation must not interfere with interstate commerce.*— "It is not and cannot be doubted that each state of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the national government are not interfered with."[6] A state statute taxing a corporation having interstate property may levy the tax not only on the tangible property within the state, but on such portion of the earning power of the property as the property in the state bears towards the whole property. This is not interfering with interstate commerce by levying a tax for the privilege of transacting such commerce.[7] A state through which a railroad runs may require, upon the consolidation of the company with companies in other states so as to make an interstate railroad, the payment of a tax on the whole consolidated capital stock.[8] But a state cannot tax corporations so as to interfere with interstate commerce. The Pennsylvania license fee which all foreign corporations keeping an office in the state are required to pay, with a few exceptions, is uncon-

lien upon corporate property for state taxes attaches in preference to pre-existing judgments or decrees; it has been held that a sale under a judgment or decree will not avoid such a lien. Osterburg *v.* Union Trust Co., 93 U. S. 424 (1876). See 72 Pac. Rep. 268.

[1] Home Ins. Co. *v.* Swigert, 104 Ill. 653 (1882); Phila. Fire Assoc. *v.* New York, 119 U. S. 110 (1886).

[2] California *v.* Pacific R. R., 127 U. S. 1, 40 (1888). A county ordinance requiring a railroad chartered by the United States to take out a license is void. San Benito County *v.* Southern Pac. R. R., 77 Cal. 518 (1888).

[3] Person *v.* Warren R. R., 32 N. J. L. 441 (1868); Silverthorn *v.* Warren R. R., 33 N. J. L. 173 (1868). And the party making return to an alternative *mandamus* must show that he has complied with the order to the extent of his ability; want of funds is not a sufficient return where it is the result of the voluntary act of the party.

[4] Cooper *v.* Corbin, 105 Ill. 224 (1883); Parsons *v.* East, etc. Co., 108 Ill. 380 (1884).

[5] New York State *v.* Roberts, 171 U. S. 658 (1898).

[6] Western Union Tel. Co. *v.* Taggart, 163 U. S. 1 (1896).

[7] Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185 (1897).

[8] Ashley *v.* Ryan, 153 U. S. 436 (1894).

stitutional as regards a foreign railroad corporation which owns a railroad in the state, such railroad being part of an interstate system of railroads.[1] But a state may levy a tax on the capital stock of a foreign sleeping-car company, which runs its cars through the state, the tax being on such part of the capital stock as the number of miles which its cars run in the state bears to the whole number of miles which its cars run in all the states.[2]

A tax on interstate telegraph messages is unconstitutional.[3] But a state may tax a foreign telegraph company engaged in interstate telegraph business, the tax being graded according to the amount and value of the company's property in the state measured by miles, and the tax being in place of taxes levied directly on the property. Such a tax is a franchise tax.[4] A city, under authority of a statute, may compel an interstate telegraph company to pay an annual license of $500 for the privilege of doing business in such city. This is a tax, and is not a condition or restriction on the privilege of doing business in the state.[5] A state cannot prohibit the agents of foreign express companies from doing business in the state, except upon obtaining a license. Such a law is an interference with interstate commerce.[6] A tax may be levied, based on the gross receipts, and, if the road is but partly in the state, on a proportion of the gross receipts determined by a mode prescribed by statute.[7] A state may tax a railroad on business that passes out of the state into another state and back into the first state again.[8] Various other decisions on taxation in its bearings upon interstate commerce are given in the notes below.[9]

[1] Norfolk, etc. R. R. *v.* Penn, 136 U. S. 114 (1890).

[2] Pullman's Car Co. *v.* Penn, 141 U. S. 18 (1891), the court holding that a tax on the capital stock on account of the property owned is a tax on the property itself. A similar decision was made concerning a tax on the capital stock of a foreign telegraph company, the capital stock being valued at the aggregate value of all its shares of stock, and the proportion of its lines within the state to those outside of it being the basis of taxation. Massachusetts *v.* Western Union Tel. Co., 141 U. S. 40 (1890).

[3] Western Union Tel. Co. *v.* Alabama, 132 U. S. 472 (1889).

[4] Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688 (1895). The Post Road Act of Congress of 1866 does not prevent a state taxing an interstate telegraph company on the value of its property and franchises in the state. Such value may be ascertained by taking such part of the value of the entire system as the part of the system in the state bears to the entire system. State *v.* Western Union Tel. Co., 165 Mo. 502 (1901).

[5] Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692 (1894).

[6] Crutcher *v.* Kentucky, 141 U. S. 47 (1891).

[7] Maine *v.* Grand Trunk, etc. Ry., 142 U. S. 217 (1891).

[8] Lehigh Valley R. R. *v.* Penn, 145 U. S. 192 (1892).

[9] A tax on sleeping-car companies may be illegal as interfering with inter-

§ 572e. *Inheritance tax.*— During the past fifteen years the various states of the Union, in their eager search for new modes of taxation, in order to meet the lavish expenditures of state and municipal governments, have found a rich source of income in an inheritance tax, levied upon the wealth of the dead. Indeed, so fruitful and easy is this mode of taxation, it is being adopted throughout the Union and will soon become almost universal. Pennsylvania led the way some sixty years ago.[1] The Pennsylvania inheritance

state commerce. State *v.* Woodruff, etc. Co., 114 Ind. 155 (1888). A state tax on interstate railroad earnings is unconstitutional. Fargo *v.* Michigan, 121 U. S. 230 (1887); Phila. etc. Co. *v.* Pennsylvania, 122 U. S. 326 (1887); Delaware, etc. Canal Co. *v.* Commonwealth, 17 Atl. Rep. 175 (Pa. 1888); Northern Pac. Ry. *v.* Raymond, 5 Dak. 356 (1888). A state may tax a foreign telegraph company on such a proportion of its capital stock as its lines in the state bear to all of its lines; but the state cannot enjoin the operation of the telegraph until the tax is paid. Western Union Tel. Co. *v.* Massachusetts, 125 U. S. 530 (1888); Erie Ry. *v.* New Jersey, 31 N. J. L. 531 (1864), holding that a state tax upon foreign corporations transporting passengers and freight through the state, graduated by the number of passengers and weight of the goods, is in violation of that clause of the United States constitution giving congress the right to regulate commerce between the states; Indiana *v.* American Exp. Co., 7 Biss. 227 (1876); s. c., 13 Fed. Cas. 24, where a tax upon transportation through a state was held to be an interference with interstate commerce and unconstitutional. So held also of a tax upon locomotives, cars, etc., of a foreign railroad company in Minot *v.* Philadelphia, etc. R. R., 2 Abb. (U. S.) 323 (1870); s. c., 17 Fed. Cas. 458. As to an interstate bridge, see Anderson *v.* Chicago, etc. R. R., 117 Ill. 26 (1886). Pullman cars operated wholly within the state may be taxed as a privilege. Gibson County *v.* Pullman, etc. Co., 42 Fed. Rep. 572 (1890). A foreign corporation's rolling stock used in interstate commerce is not taxable by the state. Bain *v.* Richmond, etc. R. R., 105 N. C. 363 (1890). Interstate express companies may be taxed on the business which they do within the state. Pacific Express Co. *v.* Seibert, 44 Fed. Rep. 310 (1890). As to telegraph companies, see also Western Union Tel. Co. *v.* Lieb, 76 Ill. 172 (1875); Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876). As to fees required of foreign corporations before doing business in the state, see §§ 696–700, *infra.* An express company may be taxed on its gross receipts, although it pays a part thereof to a railroad, and the railroad is taxed again on the same. A statute against double taxation does not apply to this. Commonwealth *v.* U. S. Express Co., 157 Pa. St. 579 (1893). The New Jersey annual tax of one-tenth of one per cent. of the capital stock is not unconstitutional as interfering with interstate commerce, even as affecting a bridge company which operates a bridge connecting two states. Lumberville, etc. Co. *v.* State Board of Assessors, 55 N. J. L. 529 (1893). An express company may be compelled to pay a license fee wherever it does business. Osborne *v.* State, 33 Fla. 162 (1894). A state may tax the rolling-stock of a foreign corporation in the proportion which the number of miles within the state bears to the whole number of miles of the road, even though the rolling-stock is used in interstate traffic. Board of Assessors *v.* Pullman's Palace Car Co., 60 Fed. Rep. 37 (1894).

[1] See the brief yet comprehensive and

tax law, like the New York law, does not require payment of the tax at once where the property is left to trustees for a life estate and a remainder to certain persons who may survive.[1] The New York tax on inheritances attaches to shares of stock held by residents in foreign corporations.[2] But the fact that a non-resident's certificates of stock in foreign corporations are in New York state does not render them subject to taxation in that state.[3] The New York inheritance tax applies to stock in domestic corporations although held by non-residents at the place of their residence, but does not apply to bonds issued by domestic corporations and held by non-residents at the place of their residence.[4] This statute covers bonds owned by a non-resident, but kept in a safe-deposit vault in New York, excepting United States bonds. The statute also covers certificates of stock of domestic corporations owned by non-residents, but deposited in New York.[5]

A gift of stock, the donee to have the possession and management of the same, but the donor to have the income during his life, makes the donee trustee until the death of the donor, and hence such gift is taxable under the New York statutes as a transfer to take effect on his death.[6] The collateral inheritance tax is a lien on stock owned by a citizen of Connecticut in a New York corporation.[7] Under the Massachusetts statute imposing a tax on inheritances, stock owned by a citizen of New York in a Massachusetts corporation is subject to such tax, and even though the New York executor has transferred such stock, yet upon ancillary administration being taken out in Massachusetts the title of the New York

clear statement of the history of inheritance taxation statutes in Magoun *v.* Illinois T. & Sav. Bank, 170 U. S. 283 (1898), upholding the Illinois statute on this subject. The tax for that state varies according to the size of the estate, and in case it is over $50,000 the tax is six per cent.

[1] *In re* Coxe's Estate, 193 Pa. St. 100 (1899).

[2] *Re* Merriam, 141 N. Y. 479 (1894). As to the constitutionality of a progressive inheritance tax, see Guthrie on the Fourteenth Amendment, p. 122, and cases cited in note 1 on that page. In estimating the value of stocks under the inheritance tax law the stock exchange prices therefor may be taken as the basis. Walker *v.* People, 192 Ill. 106 (1901). *Cf.* Chicago, etc. Co. *v.* State Board of Equalization, 112 Fed. Rep. 607 (1901). In estimating the value of stock under an inheritance tax statute, the earning capacity, good-will, and income of the corporation may be considered. Matter of Brandreth, 28 Misc. Rep. 468 (1899).

[3] *Re* James, 144 N. Y. 6 (1894); *Re* Whiting, 150 N. Y. 27 (1896).

[4] *Re* Bronson, 150 N. Y. 1 (1896). Stock in a domestic corporation is subject to the inheritance tax, although owned by a non-resident. Matter of Fitch, 160 N. Y. 87 (1899).

[5] *Re* Whiting, 150 N. Y. 27 (1896).

[6] Matter of Cornell, 170 N. Y. 423 (1902). A sale of stock in consideration of an annuity is not subject to the New York inheritance tax. Matter of Edgerton, 35 N. Y. App. Div. 125 (1898).

[7] Matter of Fitch, 39 N. Y. App. Div. 609 (1899).

executor is subordinate to the title of the ancillary administration. The court said that the statute assumed that in such cases a local administrator or executor would be appointed.[1]

Where an English company allows the American executor of the estate of a deceased American stockholder to transfer the stock to himself as executor on the company's books without paying the English succession tax, the company is liable to the English government for such tax. The court held that such is the law, although the statutes do not expressly render the company liable for the tax.[2] In England an income tax is collected.[3] In this country such a tax might legally be levied by a state, but cannot be imposed by the federal government.[4]

[1] Greeves *v.* Shaw, 173 Mass. 205 (1899). Stock in a consolidated interstate railroad holding a charter in Massachusetts and also in New York is subject to the Massachusetts inheritance tax. Moody *v.* Shaw, 173 Mass. 375 (1899).

[2] Attorney-General *v.* New York, etc. Co., [1898] 1 Q. B. 205; aff'd, H. of L. [1899] A. C. 62. In this case the court, in holding that an English corporation was liable for an inheritance tax on shares of stock which it had allowed to be transferred on its books by American executors of the estate of a deceased American owning such stock, said: "The American will, as regards these English assets, had no validity whatever in this country, nor had the American executors any right under it to receive the testator's assets here. Until they had taken out representation to their testator in this country, they were pure strangers to the English assets. This American will, to the knowledge of all parties, was never to come into operation as a will in this country; the American executors were never to become executors in this country, it being the express intention of all parties that they should not."

[3] Where there is a parent company with minor companies abroad, and dividends are paid abroad to stockholders there without the money going to England, the English income tax does not apply to such moneys. Bartholomew Brewing Co. *v.* Wyatt, [1893] 2 Q. B. 499. Where an insurance company having a capital stock divides every five years its surplus among its policy-holders, such surplus is "annual profits or gains" and is subject to the English income tax, although the company is an American corporation. Equitable, etc. Soc. *v.* Bishop, [1900] 1 Q. B. 177, aff'g [1899] 2 Q. B. 439. Even though an English corporation owns ninety-five per cent. of the stock of an American corporation, yet the separate identity of the two corporations continues, and the income of the American corporation cannot be taxed in England as the income of the English corporation. Kodak Limited *v.* Clarke, 87 L. T. Rep. 99 (1902).

[4] Pollock *v.* Farmers' L. & T. Co., 158 U. S. 601 (1895); s. c., 157 U. S. 429.

CHAPTER XXXV.

FORMS OF ACTIONS AND MEASURE OF DAMAGES WHERE A STOCKHOLDER HAS BEEN DEPRIVED OF HIS STOCK.

§ 573. *Pleading and practice in actions relative to stock.*— When an owner of stock who is out of possession brings an action for its recovery, or for the recovery of the certificate, or for damages for the detention or conversion of either the stock or the certificate, it is important to determine what action will lie, in what court the action is to be prosecuted, and what is the measure of damages. Similar questions arise when suits are brought for breach of contract to subscribe for stock, or of contracts to sell and convey stock. There are certain well-settled rules as to the form of action in these cases which are deduced from the older common-law pleading and practice. These rules, even in the code states, where the old actions have been abolished in name, are still partially applicable. Some knowledge, therefore, of the procedure at common law in stock cases is necessary.[1]

§ 574. *Assumpsit.*— An action of *assumpsit*, or *indebitatus assumpsit* at common law, lies against a corporation for unjustly refusing to register a transfer, or for refusing to issue a certificate to one entitled to it.[2] So, also, *assumpsit* lies for breach of contract to

[1] On this subject the author refers, for more particular information, to the excellent work, Andrews' Stephen's Pleadings, especially chapter II.

[2] Rex *v.* Bank of England, 2 Doug. 524 (1780); Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 (1838); Arnold *v.* Suffolk Bank, 27 Barb. 424 (1857); Wyman *v.* American Powder Co., 62 Mass. 168 (1851); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Hayden *v.* Middlesex Turnp. Co., 10 Mass. 397 (1813); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); Hill *v.* Pine River Bank, 45 N. H. 300 (1864). *Cf.* Foster *v.* Essex Bank, 17 Mass. 479 (1821); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857). *Assumpsit* does not lie against

return borrowed bank stock on demand.[1] But *mandamus* is not a proper remedy in these cases, and it generally will not lie to compel a corporation to transfer stock.[2] The form of a complaint or declaration in an action by a pledgor against a pledgee for the conversion of the stock held in pledge may be in tort or in *assumpsit*, but not in both.[3] A corporation may sue in *assumpsit* its treasurer who has illegally issued excessive stock and converted the proceeds to his own use.[4] In a suit by a remainderman to recover from a corporation the value of stock which the corporation had transferred to the life tenant absolutely and which had been lost, the statute of limitations does not begin to run until the death of the life tenant, even though the trust was created in 1854 and the life tenant died in 1898.[5]

§ 575. *Trespass on the case.*—An action of trespass on the case may be brought against the corporation for a denial to a stockholder of a certificate of stock,[6] and an action on the case lies for a conversion of shares of stock.[7] The appropriate remedy of a purchaser against a corporation for refusal to register a transfer to himself is an action on the case, wherein the measure of damages

a corporation for refusal to register a transfer of stock. Action on the case is the remedy. Telford, etc. Co. *v.* Gerhab, 13 Atl. Rep. 90 (Pa. 1888).

[1] McKenney *v.* Haines, 63 Me. 74 (1873).

[2] See § 390, *supra.*

[3] Stevens *v.* Hurlbut Bank, 31 Conn. 146 (1862). See also § 475, *supra.*

[4] Rutland R. R. *v.* Haven, 62 Vt. 39 (1889).

[5] Wooten *v.* Wilmington, etc. R. R., 128 N. C. 119 (1901).

[6] Bank of Ireland *v.* Evans's Charities, 5 H. L. Cas. 389 (1855); Rex *v.* Bank of England, 2 Doug. 524 (1780); Davis *v.* Bank of England, 2 Bing. 393 (1824); Coles *v.* Bank of England, 10 Ad. & E. 437 (1839); Gray *v.* Portland Bank, 3 Mass. 364, 381 (1807); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); Webster *v.* Grand Trunk Ry., 3 L. Can. Jur. 148 (1859); s. c., 2 L. Can. Jur. 291 (construing the judicature act, 12 Vict., cap. 38, § 87); Protection Life Ins. Co. *v.* Osgood, 93 Ill. 69 (1879); Baker *v.* Wasson, 53 Tex. 150 (1880); Smith *v.* Poor, 40 Me. 415 (1855); Catchpole *v.* Ambergate, etc. Ry., 1 El. & B. 111 (1852); Daly *v.* Thompson, 10 M. & W. 309 (1842). *Cf.* Swan *v.* North British, etc. Co., 7 H. & N. 603 (1862); Kortright *v.* Buffalo Commercial Bank, 20 Wend. 91 (1838). For an action of tort with a count in contract for refusal to transfer, see Bond *v.* Mount Hope Iron Co., 99 Mass. 505 (1868).

[7] Daggett *v.* Davis, 53 Mich. 35 (1884); Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873); Parsons *v.* Martin, 77 Mass. 111 (1858); Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877). A complaint which, after stating that shares of stock had been pledged to defendant, avers that "defendant, in consideration of the premises, then and there undertook and promised to plaintiff" to hold the stock only as pledgee, but that, in violation of its promise, defendant sold and converted the stock to its own use, without giving plaintiff notice of the sale, and in which plaintiff seeks to recover as damages the full value of the shares alleged to have been converted, though informal, is good as a complaint in case. Sharpe *v.* Birmingham Nat. Bank, 87 Ala. 644 (1888). This case discussed also the difference between *assumpsit* and case in such an action.

is the value at the time of refusal to transfer.[1] A transferee's action upon the case for damages, instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage.[2] A count in case may be joined with one in trover.[3] Trover and case lie against a tax collector for selling bank stock for an illegal tax.[4]

§ 576. *Trover.*— It is a very generally accepted rule that trover will lie for the conversion of shares of stock,[5] and in certain cases the party guilty of the conversion may be arrested.[6] This is the

[1] German Union, etc. Assoc. *v.* Sendmeyer, 50 Pa. St. 67 (1865); Morgan *v.* Bank of North America, 8 Serg. & R. (Pa.) 73 (1822); Presbyterian Cong. *v.* Carlisle Bank, 5 Pa. St. 345 (1847).

[2] McLean *v.* Charles Wright Med. Co., 96 Mich. 479 (1893). See also § 585, *infra.*

[3] Nabring *v.* Bank of Mobile, 58 Ala. 204 (1877).

[4] Sprague *v.* Fletcher, 69 Vt. 69 (1896).

[5] Hine *v.* Commercial Bank, etc., 119 Mich. 448 (1899); Ayres *v.* French, 41 Conn. 142 (1874); Payne *v.* Elliot, 54 Cal. 339 (1880); Kuhn *v.* McAllister, 1 Utah, 273 (1875); s. c. *sub nom.* McAllister *v.* Kuhn, 96 U. S. 87 (1877); Bank of America *v.* McNeil, 10 Bush (Ky.), 54 (1873); Boylan *v.* Huguet, 8 Nev. 345 (1873); Morton *v.* Preston, 18 Mich. 60 (1869); Jarvis *v.* Rogers, 15 Mass. 389 (1819) — a case where trover was held to lie for the value of Mississippi scrip, representing one hundred and fifty thousand acres of land. Anderson *v.* Nicholas, 28 N. Y. 600 (1864); Freeman *v.* Harwood, 49 Me. 195 (1859); Connor *v.* Hillier, 11 Rich. L. (S. C.) 193 (1857); Sturges *v.* Keith, 57 Ill. 451 (1870); Budd *v.* Multnomah Street Ry., 12 Oreg. 271 (1885). *Cf.* Atkins *v.* Gamble, 42 Cal. 86, 100 (1871); Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 267 (1866). The action for conversion lies, even though the plaintiff uses the term "shares of stock" and "certificates of stock" interchangeably. Godfrey *v.* Pell, 49 N. Y. Super. Ct. 226 (1883). A party whose stock has been converted may sue for damages instead of following the stock. Moore *v.* Baker, 4 Ind. App. 115 (1892). For the allegations in an action for the conversion of a bond, see Saratoga, etc. Co. *v.* Hazard, 55 Hun, 251 (1889); aff'd, 121 N. Y. 677. Where defendant purchased stock for the plaintiff and accounted therefor, but refused to account for dividends received while he held the stock, the defendant is guilty of conversion. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887). There are many cases in the lower courts of New York on this subject. A refusal to return a pledge after payment is a conversion. See Roberts *v.* Berdell, 52 N. Y. 644 (1873); s. c., 15 Abb. Pr. (N. S.) 177. As to conversion of railway shares in a foreign country, see Northern Ry. *v.* Carpentier, 13 How. Pr. 222 (1856).

[6] Trover and arrest lie for conversion of certificates of stock. Barry *v.* Calder, 48 Hun, 449 (1888); aff'd, 111 N. Y. 684. As to arrest for conversion, replevin thereby being waived, see Chappel *v.* Skinner, 6 How. Pr. 338 (1851); Person *v.* Civer, 29 How. Pr. 432 (1865), rev'g 28 How. Pr. 139; Niver *v.* Niver, 43 Barb. 411 (1864); Dubois *v.* Thompson, 1 Daly, 309 (1863); Cousland *v.* Davis, 4 Bosw. 619 (1859). In Butts *v.* Burnett, 6 Abb. Pr. (N. S.) 302 (1869), involving the arrest of a broker who had sold the pledge before the note was due, the court said: "It is very questionable, I think, whether a demand after a default in payment of the debt for which property is pledged as secu-

favorite remedy when the stockholder has been unjustly deprived of his stock; and it is nowhere denied, except in Pennsylvania,[1] that this form of action is proper. But even there, for the conversion of a certificate of stock, trover will lie.[2] For the maintenance of the action of trover there must be title in the plaintiff to the subject of the action, and an actual conversion by the defendant. If either of these elements is wanting the action will not lie. Thus, trover will not lie for the conversion of a certificate where the title to the shares is divested.[3]

And, upon the other hand, withholding possession of a certificate of stock cannot amount to a conversion of the stock itself so long as the certificate is not indorsed; but it may amount to a technical conversion of the certificate.[4] A transfer of a certificate

rity will render a refusal to deliver the pledged property a tortious conversion of it. No doubt the pledgor can redeem upon a tender of the debt, or he may recover the difference between the value of the pledge and the debt. But to lay the foundation for an action for conversion, I am of opinion that an offer and demand must be made on the day, and is not sufficient if made after the day on which the debt has become payable." See also § 457, *supra*. Where an agent writes the stockholder's name on the back of the certificate of stock, and disposes of it without authority, he is guilty of conversion and may be arrested. Reigner *v.* Spang, 5 N. Y. App. Div. 237 (1896). A pledgee of bonds may maintain an action for conversion thereof, and may cause the arrest of a re-pledgee who has disposed of such bonds. Blanck *v.* Nelson, 39 N. Y. App. Div. 21 (1899).

[1] Sewall *v.* Lancaster Bank, 17 S. & R. (Pa.) 285 (1828); Neiler *v.* Kelley, 69 Pa. St. 403 (1871).

[2] Biddle *v.* Bayard, 13 Pa. St. 150 (1850); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Sewall *v.* Lancaster Bank, 17 Serg. & R. (Pa.) 285 (1828). *Cf.* Aull *v.* Colket, 2 W. N. Cas. 322 (1875). So in Michigan. Daggett *v.* Davis, 53 Mich. 35 (1884). In trover the goods ought to be set out with some degree of certainty of description; but the same certainty is not required as in detinue and replevin, damages being recovered in trover, the very articles in detinue and replevin. Neiler *v.* Kelley, 69 Pa. St. 403 (1871).

[3] Broadbent *v.* Farley, 12 C. B. (N. S.) 214 (1862). Trover does not lie against a person to whom stock is given to sell and use the proceeds to start in business. Borland *v.* Stokes, 120 Pa. St. 278 (1888). Where several shareholders mutually agree to contribute a number of shares each, to be sold for the benefit of the corporation, one of them cannot, after the rest have contributed their proportion, refuse to allow his shares to be sold as agreed; and if the corporation takes them under the agreement and sells them, he cannot have an action of trover. Conrad *v.* La Rue, 52 Mich. 83 (1883). In trover for a certificate of stock, the acceptance by the plaintiff of the certificate ends the suit, and nothing further can be recovered. Collins *v.* Lowry, 78 Wis. 329 (1890).

[4] Daggett *v.* Davis, 53 Mich. 35 (1884). *Cf.* Morton *v.* Preston, 18 Mich. 60 (1869). Where an administrator sells stock pledged to the deceased in his life-time as security for a loan of money, and receives the proceeds and properly accounts to the estate, this is not a conversion of the shares, and the pledgor cannot have an action of trover. If any action lies it is for money had and received. Von Schmidt *v.* Bourn, 50

of stock in the usual form may constitute a transfer of the right to bring suit for the conversion of such stock.[1] It is well established that a refusal of a corporation to register a transfer in the name of one entitled to the stock is a conversion of the shares.[2] In New York a transferee may try his right to registry in an action for dividends,[3] but not after commencing an action for conversion.[4] Where the corporation has been held liable for conversion, it cannot then tender the stock back to the stockholder and avoid the payment of the damages.[5] A failure or refusal by the corporation to issue a certificate to an original subscriber, when by the terms of the contract of subscription it ought to be issued, may be treated as a conversion.[6] So, also, in certain cases, a failure to deliver stock according to a contract for delivery,[7] or to return borrowed stock

Cal. 616 (1875). For an example of an insufficient complaint in trover for shares, in that there was no sufficient averment of a conversion or of facts from which a conversion might be inferred, see Edwards *v.* Sonoma Valley Bank, 59 Cal. 136 (1881); and see also Cumnock *v.* Newburyport Sav. Inst., 142 Mass. 342 (1886).

[1] Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897).

[2] Allen *v.* American Building, etc. Assoc., 49 Minn. 544 (1892); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); West Branch, etc. Canal Co.'s Appeal, 81* Pa. St. 19 (1870); Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238 (1871); McMurrich *v.* Bond Head Harbor Co., 9 U. C. Q. B. 333 (1852). Trover lies against a corporation at the instance of a purchaser of certificates of stock for refusal to transfer the stock on the books of the company. Ralston *v.* Bank of California, 112 Cal. 208 (1896). But see New London Nat. Bank *v.* Lake Shore, etc. Ry., 21 Ohio St. 221, 232 (1871). The corporation may interplead in certain cases. See § 387, *supra*. In suing for damages for conversion against the corporation for depriving a person of his stock, the latter need not tender the certificates. Carpenter *v.* American Bldg. etc. Assoc., 54 Minn. 403 (1893). Where the transferee of certificates of stock in a bank presents them to the cashier of the bank for transfer, and the cashier and a director delay transfer until a debt of the transferrer to the bank becomes due, and then in behalf of the bank levy an attachment on the stock for such debt, the transferee may hold the bank and the cashier and such director liable in trover for conversion of the stock, and it is no defense that the transfer of the certificate was made to defraud creditors. Hine *v.* Commercial Bank, etc., 119 Mich. 448 (1899). Where the purchaser of a certificate of stock sends it to the corporation for transfer, and the secretary replies that the corporation has a lien on the stock, the corporation is not liable for a conversion of the stock, no demand for the return of the certificate being shown. Cummins *v.* Peoples', etc. Assoc., 61 Neb. 728 (1901).

[3] Robinson *v.* Nat. Bank of New Berne, 95 N. Y. 637 (1884).

[4] Hughes *v.* Vermont Copper Min. Co., 72 N. Y. 207 (1878).

[5] Carpenter *v.* American Bldg. etc. Assoc., 54 Minn. 403 (1893).

[6] See § 61, *supra*.

[7] Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); North *v.* Phillips, 89 Pa. St. 250 (1879); Noonan *v.* Ilsley, 17 Wis. 314 (1863); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861). Trover lies against a vendor for the conversion of stock, even though the

on demand, or at the time when by agreement it ought to be returned,[1] and an unauthorized sale of stock by a pledgee in violation of the terms of the contract of bailment,[2] or by a broker in violation of his contract,[3] are examples of conversion of stock. In Oregon it is said that any interference subversive of the right of the owner of stock to enjoy and control it is a conversion.[4] Trover will not lie by a trustee, on stock which stands in the name of the *cestui que trust*, against a person taking title from a co-trustee. A suit in equity is the proper remedy.[5] Where a certificate of stock is supposed to be burned, but is afterwards found, a conversion for refusal to deliver dates from the time when it is found.[6] Proof of demand is necessary in order to support the action of trover, where the defendant came into lawful possession of the stock and had an interest in it.[7] A settlement between a principal and his agent is no bar to a subsequent suit by the principal against the agent for

certificate was not transferred. Mahaney *v.* Walsh, 16 N. Y. App. Div. 601 (1897). A person entitled to stock on a contract cannot maintain trover for failure to deliver. Reid *v.* Caldwell, 40 S. E. Rep. 712 (Ga. 1902).

1 McKenney *v.* Haines, 63 Me. 74 (1873); Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799). Where a person loans stock to another to borrow money upon, conversion does not lie for a failure to return the stock. Barrowcliffe *v.* Cummins, 66 Hun, 1 (1892). Where bonds are loaned to use temporarily upon an agreement to return them when called for, and the member of the firm to whom they are delivered uses them for his own purposes, he converts them. Birdsall *v.* Davenport, 43 Hun, 552 (1887). Where a stockholder in an insolvent corporation turns over his stock to another person to deposit under a reorganization agreement, the latter agreeing to pay the assessment on the stock and to deliver to the stockholder the new securities upon repayment of such assessment, and he refuses so to do thereafter, he is guilty of a conversion and of a fraud upon the stockholder. Miller *v.* Miles, 58 N. Y. App. Div. 103 (1901).

2 Maryland F. Ins. Co. *v.* Dalrymple, 25 Md. 242, 267 (1866); Freeman *v.* Harwood, 49 Me. 195 (1859); Fisher *v.* Brown, 104 Mass. 259 (1870). An illegal sale of the pledge by pledgee is a conversion, and a complaint for such conversion will not be construed as a complaint for breach of contract. Smith *v.* Hall, 67 N. Y. 48 (1876), distinguishing Austin *v.* Rawdon, 44 N. Y. 63 (1870). For refusal of pledgee to return property, the action of pledgor may be in tort or contract. International Bank *v.* Monteath, 39 N. Y. 297 (1868). See also notes 5 and 6, p. 1248, *supra*. Conversion lies for an unauthorized sale of stock and also for dividends received thereon. Shaughnessy *v.* Chase, 7 N. Y. St. Rep. 293 (1887).

3 See ch. XXV, *supra;* Sadler *v.* Lee, 6 Beav. 324 (1843).

4 Budd *v.* Multnomah Street Ry., 12 Oreg. 271 (1885).

5 Onondaga, etc. Co. *v.* Price, 87 N. Y. 542 (1882); S. C., in a court of equity, as White *v.* Price, 39 Hun, 394 (1886); aff'd, 108 N. Y. 661 (1888).

6 McDonald *v.* Mackinnon, 104 Mich. 428 (1895).

7 Moynahan *v.* Prentiss, 10 Colo. App. 295 (1897).

conversion of stock where the principal was not aware of the facts when he made the settlement.[1]

§ 577. *Detinue and replevin.*— The common-law action of detinue will lie for the recovery of a certificate of stock unlawfully detained.[2] In this action the judgment is conditional, either to restore the thing detained, or pay the value and damages for the detention. The more modern action of replevin or its equivalent will doubtless lie for the recovery of a certificate, the same as for any other tangible personal property. Replevin lies by an administrator to recover a certificate of stock which he had illegally pledged as administrator.[3]

§ 578. *Money had and received.*— A pledgor whose stock has been wrongfully sold by the pledgee, in violation of the contract of bailment, may have an action against the pledgee for money had and received.[4]

§ 579. *Bill in equity.*— A bill in equity may be maintained by a *bona fide* purchaser of stock against the corporation to compel a transfer of the stock upon the corporate books.[5] A bill in equity may be filed also to relieve a stockholder from an unauthorized forfeiture;[6] to rescind a subscription obtained by fraud;[7] to compel a specific performance of an agreement to sell stock;[8] to remedy a purchase, sale, or transfer of stock induced by fraud;[9] and to redeem stock held in pledge.[10] A preliminary injunction against transferring stock is also frequently granted.[11] An injunction

[1] Ballard *v.* Beveridge, 171 N. Y. 194 (1902).

[2] Williams *v.* Peel River, etc. Co., 55 L. T. Rep. 689 (1886); Williams *v.* Archer, 5 C. B. 318 (1847), where it was held that detinue lay to recover two hundred and fifty scrip certificates; Peters *v.* Heyward, Cro. Jac. 682 (1624), where detinue was allowed for a bond detained. As to replevin in *cepit* for bonds wrongfully received in pledge from a pledgee, see Thompson *v.* St. Nicholas Nat. Bank, 113 N. Y. 325 (1889). Concerning the nature of stock and a certificate of stock, and as to whether trover or replevin will lie, see 1 University Law Rev. 218 (1894).

[3] Parks *v.* Mockenhaupt, 133 Cal. 424 (1901).

[4] Von Schmidt *v.* Bourn, 50 Cal. 616 (1875); Marsh *v.* Keating, 1 Bing. N. C. 198 (1834). *Cf.* Jones *v.* Brinley, 1 East, 1 (1800); Rex *v.* St. John Maddermarket, 6 East, 182 (1805). In an old case a contrary rule is laid down. Nightingal *v.* Devisme, 5 Burr. 2589 (1770). In a suit for profits received by defendant as agent for plaintiff in buying and selling stock, the value of the stock need not be alleged with any particular definiteness. Herrlich *v.* McDonald, 80 Cal. 460 (1889). Where a corporation repudiates a pledge of stock made by its treasurer, it cannot sue the pledgee for the money received by the pledgee upon a sale of the stock by the latter. Holden *v.* Metropolitan Nat. Bank, 151 Mass. 112 (1890).

[5] See § 391, *supra.*

[6] See § 134, *supra.*

[7] See §§ 155, 156, *supra.*

[8] See § 338, *supra.*

[9] See § 356, *supra.*

[10] See § 475, *supra.*

[11] Heck *v.* Bulkley, 1 S. W. Rep. 612 (Tenn. 1886), holding also that a viola-

against a pledgee disposing of stock owned by a certain party, or an attachment upon the interest of that party, does not prevent the pledgee selling the stock if such stock really belonged to the wife of that party.[1] A stockholder whose stock has been wrongfully pledged may enjoin the corporation from allowing a transfer by the pledgee who has applied for the same, and the pledgor need not allege that the pledgee took with notice. It is for the pledgee to intervene and prove that the pledge was *bona fide*.[2] A court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration.[3] A bill in equity is the proper remedy to obtain possession of certificates of stock.[4] A

tion of the injunction is a bar to damages upon a dissolution of it. The preliminary injunction, being an equitable remedy, is not granted if only legal relief is sought by the action. See McHenry *v.* Jewett, 90 N. Y. 58 (1882). A principal who is suing an agent to obtain shares of stock may enjoin the agent from transferring the same *pendente lite*. Chedworth *v.* Edwards, 8 Ves. Jr. 46 (1802). Where a proposed consolidation is attacked by a stockholder, a preliminary injunction, granted so as not to render useless the whole suit in case it is successful, will not be disturbed by the court of appeals. Young *v.* Rondout, etc. Co., 129 N. Y. 57 (1891). Where a stockholder has delivered his stock to the directors to be divided into smaller certificates, and the directors claim that it was agreed that a part of the stock should be sold for the benefit of the corporation, the stockholder may have a preliminary injunction against such sale pending his suit to compel delivery of the stock. Bedford *v.* American, etc. Co., 51 N. Y. App. Div. 537 (1900). A stockholder cannot prevent other stockholders from selling their stock on the ground that the purchaser may manage the company to the detriment of minority stockholders; and the fact that the plaintiff's stock was on deposit with the trust company and that he cannot get the stock and thus accept the order to purchase his stock also, is no ground for an injunction. Ingraham *v.* National Salt Co., 72 N. Y. App. Div. 582 (1902). A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902).

[1] Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897).

[2] Reynolds *v.* Touzalin Imp. Co., 62 Neb. 236 (1901).

[3] Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899).

[4] This rule of law has frequently been applied in actions by a pledgor to obtain from a pledgee the stock which has been pledged. The rule itself is

bill in equity filed by a partner to hold his copartners and third persons liable for a misappropriation of stock owned by the firm cannot be sustained where it is not alleged that the third persons knew of such misappropriation at the time of such misappropriation.[1] In a suit by a claimant of stock to obtain the stock from another person, the corporation is a proper but not a necessary party.[2] In a suit by a stockholder to hold a corporation liable for his stock and dividends, by reason of its allowing a transfer by an unauthorized agent of the stockholder, the subsequent owners of the stock are not necessary parties.[3] A suit by the purchaser of a certificate of stock to compel delivery may be brought at the place where the certificate is, and absent defendants may be served by publication.[4] In a suit against a corporation to compel it to issue stock to the plaintiff or else pay the value thereof, the proper form of judgment is an order to issue the stock. A money judgment should be entered only after proof of the corporation's failure to comply with the main order.[5]

well established. White *v.* Price, 39 Hun, 394 (1886); aff'd, 108 N. Y. 661; Hasbrouck *v.* Vandervoort, 4 Sandf. 74 (1850); Bryson *v.* Rayner, 25 Md. 424 (1866); Conyngham's Appeal, 57 Pa. St. 474 (1868); Koons *v.* First Nat. Bank, 89 Ind. 178 (1883). Where a stockholder transfers the certificate on the back to a person, and leaves it in his own safe-deposit box, and writes a letter to such person directing him to distribute it among a list of charitable corporations, but no list is attached, the latter takes no title, and the executors may compel him to transfer the certificate to them. Bliss *v.* Fosdick, 76 Hun, 508 (1894). In the case of Lamb, etc. Co. *v.* Lamb, 119 Mich. 568 (1899), where a party claiming to be the real owner of stock filed a bill to compel the holder of such stock to deliver up the same, but it appeared that the defendant had already disposed of the stock before the commencement of the suit, the court refused to grant relief, even though it further appeared that the defendant had other stock in the same corporation equal in amount to the stock in issue.

[1] Wall *v.* Old Colony, etc. Trust Co., 174 Mass. 340 (1899).

[2] Williamson *v.* Krohn, 66 Fed. Rep. 655 (1895); Johnson *v.* Kirby, 65 Cal. 482 (1884). *Cf.* Rogers *v.* Van Nortwick, 45 Fed. Rep. 513 (1891). In a suit between stockholders as to the title to stock the corporation is a proper party defendant, but is a nominal party, and is not considered in determining whether the suit is removable to the United States court. Higgins *v.* Baltimore, etc. R. R., 99 Fed. Rep. 640 (1900). And see §§ 338, 356, 361, *supra.*

[3] St. Romes *v.* Levee, etc. Co., 127 U. S. 614 (1888). In this case the bill of a claimant of stock against the company to hold it liable for allowing a transfer of the stock in fraud of his rights was barred by laches, the suit having been brought thirty-five years after the cause of action had accrued. *Cf.* § 392, *supra.*

[4] Ryan *v.* Seaboard, etc. R. R., 83 Fed. Rep. 889 (1897). See also cases in § 363, *supra.*

[5] Consolidated, etc. Co. *v.* Huff, 62 Kan. 405 (1901). Where a transaction is adjudged to be a loan and not a sale, and the defendant is ordered to return the stock, it is error to add an alternative money judgment for the value of the stock. Fanny Rawlings Min. Co. *v.* Tribe, 68 Pac. Rep. 284 (Colo. 1902).

Where stock is deposited with one trust company as additional security for a mortgage given to another trust company, and upon default the former company refuses to deliver the stock, and the latter trust company then commences a suit in equity to compel the former trust company to deliver the stock, and during that suit the stock declines in value, a bondholder secured by such mortgage cannot hold liable the trust company holding the stock, on account of the decline in value, inasmuch as the suit in equity determined all questions, including the amount of damage.[1]

§ 580. *Pleading under the codes.*— In general, a pleading under the code is not a safe pleading, unless it conforms substantially to the rules of pleading at common law. Some verbiage may be omitted, but the relief granted by the various common-law actions cannot be obtained even under the code without the necessary averments entitling the plaintiff to that relief. It is the allegation of the facts, and not the method of alleging them, that constitutes a sufficient pleading under the code.[2]

§ 581. *The measure of damages — (a) The first rule — Value how shown when there is no market value.*— Great difficulty has been experienced in determining what shall be the measure of damages for the conversion of stock. As the manner and conditions of the

[1] Bracken *v.* Atlantic T. Co., 167 N. Y. 510 (1901). Where stock is tied up by an injunction which is afterwards vacated, and in the meantime the stock depreciates in value, the loss can be recovered from the enjoining party if the stocks could and would have been sold before the depreciation if they had not been so tied up. But if such stocks are in pledge, and the pledgor does not pay the loan while the stocks are so tied up, no damages can be recovered. Fourth Nat. Bank, etc. *v.* Crescent, etc. Co., 52 S. W. Rep. 1021 (Tenn. 1897). See also § 388, *supra.*

[2] Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878). *Cf.* Tockerson *v.* Chapin, 52 N. Y. Super. Ct. 16 (1885). In Nevada there is a statutory action of claim and delivery. Bercich *v.* Marye, 9 Nev. 312 (1874). See Webster *v.* Grand Trunk Ry., 3 L. Can. Jur. 148 (1859); s. c., 2 L. Can. Jur. 291, for a construction of that provision of the judicature act (12 Vict., c. 38, § 87) which governs actions of this nature in the Canadian provinces. In Kuhn *v.* McAllister, 1 Utah, 273 (1875), it is held that the language used in the pleadings in these actions is not material, or that the language is that of one form of action or another, or of no form, but that the question is whether the facts entitle the plaintiff to recover. A declaration in an action for the wrongful conversion of the shares of the capital stock of a corporation is sufficient for the purposes of pleading if it states the ultimate facts to be proven. The circumstances which tend to prove those facts may be used for the purpose of evidence, but they have no place in the pleadings. McAllister *v.* Kuhn, 96 U. S, 87 (1877), affirming Kuhn *v.* McAllister, 1 Utah, 273 (1875). As to a misjoinder of causes of action under the California code, where the plaintiff sues to recover certain stock, see Johnson *v.* Kirby, 65 Cal. 482 (1884). Upon the question of what is, in New York, a sufficient pleading in an action to compel delivery of stock, see Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878). See also 2 Chitty, Pleadings, p. 618; Lowell, Transfers, § 11.

conversion vary, so also will the measure of damages vary from nominal damages to the highest value of the stock with dividends and interest, and also any special damages which the plaintiff can establish. In general, the courts incline to the rule that the true measure of damages is the value of the stock at the time of the conversion,[1] or a reasonable time after.[2] By the phrase "the value of the stock" is usually to be understood the market value.[3] The

[1] *Re* Bahia, etc. Ry., L. R. 3 Q. B. 584 (1868); Williams *v.* Archer, 5 C. B. 318 (1847); Tempest *v.* Kilner, 3 C. B. 249 (1846); Shaw *v.* Holland, 15 M. & W. 136 (1846); Pott *v.* Flather, 5 Railw. & Can. Cas. 85 (1847); Davidson *v.* Tulloch, 6 Jur. (N. S.) 543 (1860); Wells *v.* Abernethy, 5 Conn. 222 (1824); O'Meara *v.* North American Min. Co., 2 Nev. 112 (1866); Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); McKenney *v.* Haines, 63 Me. 74 (1873); Sturges *v.* Keith, 57 Ill. 451 (1870); Noonan *v.* Ilsley, 17 Wis. 314 (1863); Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364 (1845); White *v.* Salisbury, 33 Mo. 150 (1862); Connor *v.* Hillier, 11 Rich. L. (S. C.) 193 (1857); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857); Boylan *v.* Huguet, 8 Nev. 345 (1873); Bercich *v.* Marye, 9 Nev. 312 (1874); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Fisher *v.* Brown, 104 Mass. 259 (1870); Wyman *v.* American Powder Co., 62 Mass. 168 (1851); North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); Neiler *v.* Kelley, 69 Pa. St. 403 (1871); Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886); Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874). See also Eicholz *v.* Fox, 12 Phila. (Pa.) 382 (1878); Larrabee *v.* Badger, 45 Ill. 440 (1867); Barned *v.* Hamilton, 2 Railw. & Can. Cas. 624 (1841). *Cf.* Moody *v.* Caulk, 14 Fla. 50 (1872); Orange, etc. R. R. *v.* Fulvey, 17 Gratt. (Va.) 366 (1867); Jefferson *v.* Hale, 31 Ark. 286 (1876); Third Nat. Bank *v.* Boyd, 44 Md. 47 (1875); Thomas *v.* Sternheimer, 29 Md. 268 (1868). The measure of damages to a customer by reason of a broker illegally selling his stock, the broker having become bankrupt, is the value of the stock on the day of filing the petition in bankruptcy, the exact time of the sale not being ascertainable. *In re* Graff, 117 Fed. Rep. 343 (1902).

[2] Colt *v.* Owens, 90 N. Y. 368 (1882); Baker *v.* Drake, 53 N. Y. 211 (1873); s. c., 66 N. Y. 518 (1876); Gruman *v.* Smith, 81 N. Y. 25 (1880); Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874); Brewster *v.* Van Liew, 119 Ill. 554 (1886); Budd *v.* Multnomah Street Ry., 15 Oreg. 413 (1887). Upon what is reasonable time herein in transactions on the stock exchanges, see Stewart *v.* Cauty, 8 M. & W. 160 (1841); Field *v.* Lelean, 6 Hurl. & N. 617 (1861).

[3] By the "market value of stock" is meant the actual price at which it is commonly sold. That price may be fixed by sales of the stock in market at or about a given time. If no sales can be shown on the precise day, recourse may be had to sales before or after the day, and for that inquiry a reasonable range in point of time is allowable. Douglas *v.* Merceles, 25 N. J. Eq. 144 (1874). *Cf.* Stewart *v.* Cauty, 8 M. & W. 160 (1841); Sturges *v.* Keith, 57 Ill. 451 (1870); Seymour *v.* Ives, 46 Conn. 109 (1878). The measure of damages for non-delivery of stock at a certain date is presumptively the par value. The defendant is obliged to prove differently if this price is incorrect. Harris's Appeal, 12 Atl. Rep. 743 (Pa. 1888). If there is no market value of stock, proof of a few sales is competent. Brown *v.* Lawton, 6 N. Y. Supp. 137 (1889).

fact that the shares of stock have no known market value will not prevent recovery, where the actual value is ascertainable, in an action to recover damages. The value may be proven by showing the value of the property and business of the corporation, less the amount of the liabilities.[1] The question of what was the market value at the

[1] Vail *v.* Reynolds, 118 N. Y. 297 (1890); Patterson *v.* Plummer, 10 N. Dak. 95 (1901). Where there is no market value to stock its value may be shown by showing the value of the property of the corporation as compared with the liabilities. Beaty *v.* Johnston, 66 Ark. 529 (1899). In determining the value of stock which has no market value, the actual value of the assets of the corporation is considered, but not the good-will, where the company never did a profitable business. Even though the assets are subsequently sold, yet, if the sale was a forced sale, the price realized is not admissible to prove such actual value. Feige *v.* Burt, 124 Mich. 565 (1900). In estimating the value of stock under an inheritance tax statute, the earning capacity, good-will and income of the corporation may be considered. Matter of Brandreth, 28 Misc. Rep. 468 (1899). Where the stock has no market value, the value of the property of the corporation in excess of its debts is admissible. McDonald *v.* Danahy, 196 Ill. 133 (1902). The value of stock may be ascertained by comparing the corporate assets with the liabilities. Nelson *v.* First Nat. Bank, 69 Fed. Rep. 798 (1895). The value of stock may be shown "by proof of the value of the property and business of the corporation, its good-will and dividend-earning capacity." State *v.* Carpenter, 51 Ohio St. 83 (1894). The value of the stock may be determined "from all the facts and circumstances of the case." McCloy *v.* Cox, 12 Ind. App. 27 (1895). "In the absence of better evidence, the market value of all the property of the corporation may be shown, with the view to arriving at the proportional value of the shares in controversy." Hewitt *v.* Steele, 118 Mo. 463 (1893). Where there is no market value, value may be shown by past dividends, the value of the corporate assets, and the price of individual sales not under compulsion. If there is no market value, it is presumed to be worth par. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). The value of stock may be shown by its dividend-paying qualities. Greer *v.* Lafayette County Bank, 128 Mo. 559 (1895). The actual value of the tangible property of the corporation cannot be resorted to, to ascertain the value of the stock, if there is any better evidence of the value of the stock. State *v.* Sattley, 131 Mo. 464 (1895). Where stock has no market value its actual value may be shown, and proof may be given of the value of the corporate assets and dividends paid, and the character and permanency of the business, and the control of the stock, and other circumstances. A sale of a single share of stock which carries the control does not fix the market value, but a sale two years prior may be shown. If there is no evidence the par value is presumed to be the actual value. Moffitt *v.* Hereford, 132 Mo. 513 (1896). The value of the stock for four years afterwards, without a showing as to the relative condition of the company on the two dates, is not admissible. Jones *v.* Ellis, 68 Vt. 544 (1896). The fact that there is no market value for stock does not show that the stock is without value. Pabst, etc. Co. *v.* Montana, etc. Co., 19 Mont. 294 (1897). The value may be proved by other sales. Kuhn *v.* McKay, 7 Wyo. 42 (1897). In ascertaining the value of stock in a corporation owning undeveloped property, where the stock has no market value, particular sales, prices, and options on the stock may be shown. Moynahan *v.* Prentiss, 10 Colo.

time of the conversion is generally a question for the jury;[1] and it may be shown by tables of prices current published in the newspapers or otherwise at the time of the conversion, and these may be read in evidence.[2] But market quotations are evidence of the

App. 295 (1897). In ascertaining the value of stock for the purposes of taxation, the amount paid in on the stock may be taken as the value if there have been no sales of the stock, and if there is no other evidence as to its value. Commonwealth *v.* People's, etc. Co., 183 Pa. St. 405 (1898). "In actions for conversion of personal property, such as these shares are, the damages are not limited to the market value of the stock. Its actual value, to be determined under all the circumstances, such as the dividend-making capacity, the good-will, etc., is the measure of damages." Freon *v.* Carriage Co., 42 Ohio St. 30, 38 (1884). In Hitchcock *v.* McElrath, 72 Cal. 565 (1887), the court allowed evidence to be given showing the market value of all the property of the corporation, there being no other method of ascertaining the value of the stock. See also McGuffey *v.* Humes, 85 Tenn. 26 (1886). The value of stock may be shown by showing the value of the property of the corporation, the amount of capital stock, and the amount of debts. It may be shown, also, by proving how much could be borrowed on the stock at the place where the company's headquarters were. Smith *v.* Traders' Nat. Bank, 82 Tex. 368 (1891). See also Simpkins *v.* Low, 54 N. Y. 179 (1873). Where a vendor of stock in a corporation which has a franchise, but nothing else, is entitled to two thousand shares of full-paid stock at a later date, according to the contract of sale, his measure of damages for failure of the vendee to deliver the two thousand shares is nominal damages, where there was no market or actual value for the stock. Barnes *v.* Brown, 130 N. Y. 372 (1892). The value of stock may be shown by the value of its assets, where there is no known market value. Redding *v.* Godwin, 44 Minn. 355 (1890). The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Not the nominal but the true value of the shares is what the plaintiff is entitled to recover. Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Enders *v.* Board of Public Works, 1 Gratt. (Va.) 364 (1845). Where a railroad is sold to be paid for in bonds, a failure to deliver the bonds enables the vendor to recover their par value from the vendee. Texas Western Ry. *v.* Gentry, 69 Tex. 625 (1888).

[1] 1 Sedgw. Damages (7th ed.), 585, and cases cited; Dos Passos, Stockbrokers, 801. See Cameron *v.* Durkheim, 55 N. Y. 425 (1874); Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876); Harris *v.* Tumbridge, 83 N. Y. 92 (1880), and notes *supra.* Where there is no evidence that the stock is worthless, the question of value should be submitted to the jury; the rule of damages in a case for fraud as to representations as to the value of the stock being the difference between the value of the stock as represented, and what it was in fact worth. Maxted *v.* Fowler, 94 Mich. 106 (1892).

[2] Cliquot's Champagne, 3 Wall. 114 (1865); Whelan *v.* Lynch, 60 N. Y. 469 (1875). A price-current or market report is admissible in certain cases to prove the fluctuations and value of stock. Seligman *v.* Rogers, 113 Mo. 642 (1893).

value of stock only when such quotations are based on actual sales. Where there have been no sales, evidence of a bid for the stock is not admissible, unless it is shown under what circumstances the bid was made, and whether it was in good faith and with intent to fulfill.[1]

A conversion arises at the time when the stockholder, being entitled to the immediate possession or delivery of the stock or the certificate, makes a demand for it which is refused.[2] Accordingly, where a demand has been made and refused, the measure of damages is the value of stock on the day of the demand and refusal.[3]

[1] Wildes *v.* Robinson, 50 N. Y. App. Div. 192 (1900). In estimating the value of stocks under the inheritance tax law the stock exchange prices therefor may be taken as the basis. Walker *v.* People, 192 Ill. 106 (1901). In the case of Chicago, etc. Co. *v.* State Board of Equalization, 112 Fed. Rep. 607 (1901), the court, in speaking about the unreliability of quotations of stock as a basis for its intrinsic value, said (p. 612): "The court knows by experience and observation that railroad properties when sold as an entirety, almost without exception, yield nothing to the stockholder, although the stock may have been sold in share lots upon the stock exchange for years previously at advanced figures. The court knows also, from observation, that these stock quotations are frequently advanced by contending interests for control, or by short interests in the market, such as ran the Northern Pacific within a year to quotations almost tenfold its real value. The court also knows from observation that the speculative public, dealing in stock sales, and making its quotations, are governed largely by the prospect of present dividends, and not by any general conception of permanent earning capacity. These, and other considerations that could be mentioned, make stock quotations an *indicia*, but an unstable *indicia*, of the real value of the capital stock as an entirety."

[2] Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

[3] So when stock held as collateral is improperly sold by the pledgee, the value on the day when the pledgor pays his debt and demands his stock is to be taken. Fisher *v.* Brown, 104 Mass. 259 (1870). In Freeman *v.* Harwood, 49 Me. 195 (1859), shares of stock standing in the name of the defendant as collateral security for a debt which had been paid were sold for non-payment of an assessment and bought by defendant. It was held that the defendant was liable in trover for the value of the shares at the time of the sale, with interest, and all dividends received thereon, deducting the amount of the assessment and the expenses of the sale. In Sturges *v.* Keith, 57 Ill. 451 (1870), it is held that where the demand and refusal constitute the conversion, or afford presumptive evidence of it, the date of such demand and refusal is the proper time for estimating the value. Again, where the corporation wrongfully refuses to register a transfer and to issue a certificate, the measure of damages is the value of the stock on the day when the transfer was demanded and refused. Wyman *v.* American Powder Co., 62 Mass. 168 (1851); Eastern R. R. *v.* Benedict, 76 Mass. 212 (1857); West Branch, etc. Canal Co.'s Appeal, 81* Pa. St. 19 (1870); Baltimore Ry. *v.* Sewell, 35 Md. 238 (1871); McMurrich *v.* Bond Head Harbor Co., 9 Up. Can. Q. B. 333 (1852), where it is said that while the rule as announced above is the proper one, yet, when the jury allows a larger sum,

Where the pledgee of stock wrongfully sells it, the injured party may recover the highest market price between the time of notice of sale and a reasonable time within which he might have bought the stock elsewhere.[1] In a suit against a corporation for refusal to transfer stock on its books, "the rule of damages is the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner has received notice of the con-

the question of the measure of damages not having been pressed at the argument, the court will not reduce the verdict. So also where there is a failure to return borrowed stock on demand, or according to the terms of the bailment, the value on the day of demand, or on the day when the stock ought by contract to have been returned, is the measure of damages. McKenney *v.* Haines, 63 Me. 74 (1873); Fosdick *v.* Greene, 27 Ohio St. 484 (1875); Day *v.* Perkins, 2 Sandf. Ch. 359 (1845). *Cf.* Cortelyou *v.* Lansing, 2 Caines' Cas. 200 (1805); West *v.* Wentworth, 3 Cow. 82 (1824); Clark *v.* Pinney, 7 Cow. 681 (1827); Wilson *v.* Mathews, 24 Barb. 295 (1857); 2 Sedgwick, Damages (7th ed.), 141, 365, n. In an old case, where borrowed stock was not returned, the plaintiff was allowed to recover the value at the time of the transfer to the borrower, no account being taken of an increase in value. Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799). See also McKenney *v.* Haines, 63 Me. 74 (1873). In McArthur *v.* Seaforth, 2 Taunt. 258 (1810), it was held that, upon the failure to replace stock, the measure of damages was the price on the day of such failure or the price on the day of the trial, at plaintiff's option. Upon a failure to deliver stock according to contract or on demand, the value at the time of the demand is the value to be taken. Noonan *v.* Ilsley, 17 Wis. 314 (1863); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878). *Cf.* Pott *v.* Flather, 5 Railw. & Can. Cas. 85 (1847); Barned *v.* Hamilton, 2 Railw. & Can. Cas. 624 (1841); Shaw *v.* Holland, 15 Mees. & W. 136 (1846); Tempest *v.* Kilner, 2 C. B. 300 (1845); s. c., 3 C. B. 249 (1846); Gainsford *v.* Carroll, 2 Barn. & C. 624 (1824). Williams *v.* Peel River, etc. Co., 55 L. T. Rep. 689 (1886), holds that suit for damages for wrongful detention lies against a party who has wrongfully obtained possession of stock, and that the measure of damages, where the defendant afterwards abandons his claim, is the intervening fall in the value of the stock. Bankers of trustees wrongfully sold out stock and applied the proceeds to their own purposes. The measure of their liability is the amount paid in replacing the stock. Sadler *v.* Lee, 6 Beav. 324 (1843). As to damages in cases of trust, see Story's Eq. (13th ed.), §§ 1263, 1264.

[1] Wright *v.* Bank of Metropolis, 110 N. Y. 237 (1888); Galigher *v.* Jones, 129 U. S. 193 (1889), the court saying in the latter decision that the measure of damages is "the highest intermediate value of the stock between the time of its conversion and a reasonable time after the owner has received notice of it to enable him to replace the stock." For an illegal sale the pledgor may recover the "highest price which his stock reached within a reasonable time after its illegal sale by defendants." Smith *v.* Savin, 141 N. Y. 315 (1894), where five weeks were held to be reasonable, the pledgor not having discovered the sale for some time. The measure of damages in a suit against a pledgee for selling stock illegally is the highest market price between the time of default and a reasonable time after notice to the pledgor. *In re* Swift, 114 Fed. Rep. 947 (1902).

version to enable him to replace the stock."[1] A bondholder who has agreed to sell his bonds to a reorganizer in exchange for new bonds and stock may sue for the value of the new bonds and stock if the reorganizer refuses to perform, and the measure of damages is the highest value of the new bonds for a reasonable time after the breach of contract.[2]

The New York court of appeals, after many variations, has settled on the rule that "in the absence of special circumstances, in an action for conversion of personal property as well as one for failure to deliver it in performance of a contract, where consideration has been received, the value of the property at the time of such conversion or default, with interest, is the measure of compensation."[3] Where directors have issued stock to themselves at a price less than the market price, they may be held liable at the instance of a stockholder suing for the benefit of the corporation, for the difference between the price they paid and the price of the stock when it was issued to them. The highest market price since that day for small amounts of stock is no basis for the measure of damages.[4]

§ 582. (*b*) *The second rule.*— In another line of cases the true measure of damages in these actions is said to be the value of the stock on the day of the trial.[5] In an English case it is said that this is a sound rule in the ordinary cases of conversion of stock, but that in cases of failure to deliver stock the true measure of damages is the value when the demand is made and refused.[6] This second rule has found little favor, and there is believed to be no sound reason for its adoption.

§ 583. (*c*) *The third rule.*— It has been held in still another class of decisions that the measure of damages for the conversion of stock is the highest market value of the stock between the date of

[1] And a general allegation of damage is sufficient, inasmuch as the plaintiff is entitled to nominal damages anyway. Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

[2] Turner *v.* Jackson, 63 S. W. Rep. 511 (Tenn. 1899).

[3] Barnes *v.* Brown, 130 N. Y. 372 (1892).

[4] Shaw *v.* Holland, [1900] 2 Ch. 305.

[5] Owen *v.* Routh, 14 C. B. 327 (1854); Shepherd *v.* Johnson, 2 East, 211 (1802); Bercich *v.* Marye, 9 Nev. 312 (1874). *Cf.* Williams *v.* Archer, 5 C. B. 318 (1847); and see Wilson *v.* Little, 2 N. Y. 443, 450 (1849), wherein there is a *quere* as to whether this may not be the better rule. In Fowle *v.* Ward, 113 Mass. 548 (1873), it is held that the measure of damages is the value of the stock upon the day when the bill in equity is filed, it being an equitable action by a pledgor against a pledgee. The measure of damages may be the price at which the defendant sold the securities, if already sold, and, if not sold, then the amount of depreciation in value since plaintiff demanded them, together with intervening dividends. Simmons *v.* London Joint Stock Bank, [1891] 1 Ch. 270.

[6] Shaw *v.* Holland, 15 M. & W. 136, 145 (1846).

the conversion and the day of the trial. This is the rule in California in some cases.[1] So, also, in South Carolina,[2] Georgia;[3] and it was formerly the rule in New York[4] and Pennsylvania.[5] The courts of the two latter states have, however, in later cases wholly receded from this position; and in both the rule is now established, in such actions, that the measure of damages is not the highest price of the stock, but the value at the date of the conversion.[6] Where

[1] Cal. Code, § 3336, is as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: 1. The value of the property at the time of the conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." This is held to apply to the conversion of the shares of stock. Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882); Dent *v.* Holbrook, 54 Cal. 145 (1880). *Cf.* Thompson *v.* Toland, 48 Cal. 99 (1874). The courts have held that this section of the code applies to the conversion of shares of stock, but they have not worked out a very consistent rule on the subject. In Douglass *v.* Kraft, 9 Cal. 562 (1867), the "highest value" rule is adopted, but in later cases the court seems to incline toward the modern New York rule. Hamer *v.* Hathaway, 33 Cal. 117 (1867); Page *v.* Fowler, 39 Cal. 412 (1870); Dent *v.* Holbrook, 54 Cal. 145 (1880); Tulley *v.* Tranor, 53 Cal. 274 (1878); Thompson *v.* Toland, 48 Cal. 99 (1874); Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882).

[2] Kid *v.* Mitchell, 1 Nott & M. (S. C.) 334 (1818).

[3] Central R. R. etc. Co. *v.* Atlantic, etc. R. R., 50 Ga. 444 (1873). For failure to deliver bonds as called for by a contract, the vendee may recover the highest market price between the date of the breach of the contract and the date of the trial. San Antonio, etc. Ry. *v.* Wilson, 4 Tex. Civ. App. 178 (1893).

[4] Markham *v.* Jaudon, 41 N. Y. 235 (1869); Romaine *v.* Van Allen, 26 N. Y. 309 (1863). In an action to recover damages for the unlawful conversion of grain, the rule in New York was held to be the highest price up to the time of trial. Lobdell *v.* Stowell, 51 N. Y. 70 (1872). To same effect, Kent *v.* Ginter, 23 Ind. 1 (1864). See 1 Sedgwick, Damages (7th ed.), 578, and note (a). *Cf.* Burt *v.* Dutcher, 34 N. Y. 493 (1866); Scott *v.* Rogers, 31 N. Y. 676 (1864); Devlin *v.* Pike, 5 Daly (N. Y.), 85 (1874). For the modern rule in New York, see § 581, *supra*.

[5] Bank of Montgomery *v.* Reese, 26 Pa. St. 143 (1856); Musgrave *v.* Beckendorff, 53 Pa. St. 310 (1866); Reitenbaugh *v.* Ludwick, 31 Pa. St. 131, 141 (1858). In Pennsylvania, where one was accountable for stock as trustee, and converted it, he was held chargeable with the highest market value. Reitenbaugh *v.* Ludwick, 31 Pa. St. 131 (1858); North *v.* Phillips, 89 Pa. St. 250 (1879). *Cf.* Bates *v* Wiles, 1 Handy (Ohio), 532 (1855). Where, upon a reorganization, an old stockholder is wrongfully refused his stock in the new, he may recover the highest market price of the same up to the time of the insolvency of the corporation. Reading Trust Co. *v.* Reading Ironworks, 137 Pa. St. 282 (1890).

[6] North *v.* Phillips, 89 Pa. St. 250 (1879); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); Work *v.* Bennett, 70 Pa. St. 484 (1872); Neiler *v.* Kelley, 69 Pa. St. 403 (1871). *Cf.* Wilson *v.* Whitaker, 49 Pa. St. 114 (1865). So also in the later New York cases. Baker *v.* Drake, 53 N. Y. 211 (1873); s. c., 66 N. Y. 518 (1876); White *v.* Smith, 54 N. Y. 522

an agent conceals from his principal the amount of stock received by the agent for property, and keeps a part of the stock, the principal may hold him liable for the highest market value of the stock reached between the act and a reasonable time after discovery of the act by the principal.[1]

§ 584. *Interest, dividends, and special damages.*— It is settled law that, in addition to the value of the stock at the date of conversion, the plaintiff may recover legal interest upon such valuation from the date of the conversion to the day of the trial. It follows as of course that, if the plaintiff has been damaged in an ascertained sum, he may, in an action for damages, recover not only that sum, but interest thereon in the meantime.[2] There are also authorities

(1874); Harris *v.* Tumbridge, 83 N. Y. 92 (1880); Colt *v.* Owens, 90 N. Y. 368 (1882); Randall *v.* Albany City Nat. Bank, 1 N. Y. St. Rep. 592 (1886). *Cf.* Suydam *v.* Jenkins, 3 Sandf. (N. Y.) 614 (1850); Matthews *v.* Coe, 49 N. Y. 57 (1872); Bryan *v.* Baldwin, 52 N. Y. 232 (1873). See also Seymour *v.* Ives, 46 Conn. 109 (1878); McGuffey *v.* Humes, 85 Tenn. 26 (1886). It is now held in Pennsylvania that where a corporation, through innocent mistake, permits a transfer on its books of shares of stock under a forged power of attorney, the owner's measure of damages is the value of the stock at the time of the transfer, with interest from the date of the verdict, and not the highest price reached by the stock between the date of the conversion and the time of bringing suit, with the dividends since declared. Pennsylvania Co. *v.* Philadelphia, etc. R. R., 153 Pa. St. 160 (1893).

[1] McKinley *v.* Williams, 74 Fed. Rep. 94 (1896). Where a person holds land for himself and a partner, and transfers the same to a corporation for stock and conceals all the facts from his partner, the latter may recover the value of his share of the stock, and the measure of the value is the highest value between the day of receiving the stock and the day when the plaintiff received notice thereof. Morris *v.* Wood, 35 S. W. Rep. 1013 (Tenn. 1896).

[2] O'Meara *v.* North American Min. Co., 2 Nev. 112 (1866); Boylan *v.* Huguet, 8 Nev. 345 (1873); Fisher *v.* Brown, 104 Mass. 259 (1870); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829): Seymour *v.* Ives, 46 Conn. 109 (1878): McKenney *v.* Haines, 63 Me. 74 (1873); Freeman *v.* Harwood, 49 Me. 195 (1859); Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874); White *v.* Smith, 54 N. Y. 522 (1874); Sturges *v.* Keith, 57 Ill. 451 (1870); Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238, 257 (1871); Pinkerton *v.* Manchester, etc. R. R., 42 N. H. 424 (1861); North *v.* Phillips, 89 Pa. St. 250 (1878); Huntingdon, etc. Coal Co. *v.* English, 86 Pa. St. 247 (1878); North America Building Assoc. *v.* Sutton, 35 Pa. St. 463 (1860); Noonan *v.* Ilsley, 17 Wis. 314 (1863); Forrest *v.* Elwes, 4 Ves. Jr. 492 (1799); *Re* Bahia, etc. Ry., L. R. 3 Q. B. 584 (1868); Blyth *v.* Carpenter, L. R. 2 Eq. 501 (1866); McMurrich *v.* Bond Head Harbor Co., 9 Up. Can. Q. B. 333 (1852). In the Civil Code of California, § 3336, interest in these cases is expressly provided for. Fromm *v.* Sierra Nevada, etc. Co., 61 Cal. 629 (1882); 2 Sedgwick, Damages (7th ed.), 391. The measure of damages is the market value at the time of conversion, with interest. Darling *v.* Potts, 118 Mo. 506 (1893). For refusal of the corporation to deliver stock which the plaintiff bought of it, the measure of damages is the value at the time of such refusal, with interest. Salt, etc. Co. *v.* Hickey, 36 Pac. Rep. 171 (Ariz.

to the effect that in addition to interest the plaintiff may recover also all dividends paid upon the stock between the date of the conversion and the day of the trial;[1] but, aside from unusual cases, the rule would seem to be a harsh one, except in those jurisdictions where the measure of damages is the value at the time of the trial. The better rule is that the plaintiff may also recover any special damages which he has sustained by reason of the detention of his stock.[2]

§ 585. *Nominal damages.*— In certain cases, where the plaintiff has been guilty of laches, or where the stock is of no actual value, or where the stock could, for a reasonable time after the conversion, have been purchased in the market for the same or a lower price, or in any other case where the plaintiff has suffered only a technical conversion without any actual pecuniary loss, only nominal damages can be recovered.[3] Thus, the measure of damages for

1894). Where the measure of damages is based upon the market value of stock, interest may be added. Kuhn *v.* McKay, 7 Wyo. 42 (1897).

[1] Bull *v.* Douglas, 4 Munf. (Va.) 303 (1814); Baltimore, etc. Ry. *v.* Sewell, 35 Md. 238 (1871); Bercich *v.* Marye, 9 Nev. 312 (1874); Bank of Montgomery *v.* Reese, 26 Pa. St. 143 (1856). *Cf.* Boston, etc. R. R. *v.* Richardson, 135 Mass. 473, 477 (1883). Where a broker, a gratuitous bailee of corporate stock, delivers the same to the company without authority, and the stock is converted to the use of the company, the bailee is liable for its value, irrespective of what his intentions were in the premises. In such case the bailor may recover the value of the stock at the time of conversion, with all dividends paid from the time of delivery, together with interest on the value of the stock from date of conversion, and on the dividends from date of respective payments. Hubbell *v.* Blandy, 87 Mich. 209 (1891). Where several years elapse between the commencement of the suit and the trial, the case not having been prosecuted with reasonable diligence, the value at the time of the conversion, with interest, is the measure of damages. Dividends are not to be added unless a separate demand for them is alleged and a separate cause of action therefor set forth. Ralston *v.* Bank of California, 112 Cal. 208 (1896). In an action for the conversion of stock the measure of damages is the highest intermediate value between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock. Dividends accruing after the conversion are not added, nor interest on such dividends. Citizens', etc. R. R. *v.* Robbins, 144 Ind. 671 (1896).

[2] Boylan *v.* Huguet, 8 Nev. 345 (1873); 2 Sedgwick, Damages (7th ed.), 391; Bodley *v.* Reynolds, 8 Q. B. 779 (1846); Davis *v.* Oswell, 7 Car. & P. 804 (1837). *Cf.* Seymour *v.* Ives, 46 Conn. 109 (1878).

[3] Thus, where a borrower of shares fails to return them until after the corporation is dissolved, the lender having made no demand during the existence of the company, the measure of damages, in an action to recover the shares, will be the market value of them at the time the cause of action accrued; that is, at the time of demand. And if at that time the stock is worthless, only nominal damages are recoverable. Fosdick *v.* Greene, 27 Ohio St. 484 (1875). See Cameron *v.* Durkheim, 55 N. Y. 425 (1874); Hope *v.* Lawrence, 50 Barb. 258 (1867). In an action by a

the conversion of a mere certificate of stock cannot be placed at the value of the shares themselves which the certificate represents, if the ownership of the shares is not affected.[1] Where a pledgee's debt has really been paid and he retains the stock, and by reason thereof the pledgor is unable to enter a reorganization, the pledgor may recover the actual damages sustained, but the value of the stock must be shown by him, otherwise it will be inferred that it had little or no value.[2]

§ 586. *Damages for failure to complete a purchase of stock and for fraud inducing a purchase of stock.*— The measure of damages for the failure of a purchaser of stock to complete his contract is considered elsewhere;[3] as is also the purchaser's measure of damages for a refusal of the vendor to deliver.[4] The measure of damages for fraud inducing the purchase of stock "is the difference between the value of the stock at the time it was purchased and the price paid for it."[5] A misrepresentation by promoters as to the

vendee on a contract for the sale of specific stock, which, without the knowledge of the vendor, had already been sold to another by his agent, the plaintiff may be able to recover only nominal damages. Wilson *v.* Whitaker, 49 Pa. St. 114 (1865); Skinner *v.* City of London, etc. Corp., L. R. 14 Q. B. D. 882 (1885). See Fowler *v.* New York Gold Exch. Bank, 67 N. Y. 138 (1876). A transferee's action upon the case for damages instead of in trover for conversion, against the corporation for refusal to register the transfer, entitles him to nominal damages only, unless he proves special damage. McLean *v.* Charles Wright Med. Co., 96 Mich. 479 (1893). See also Blair Co. *v.* Rose, 26 Ind. App. 487 (1901).

[1] Daggett *v.* Davies, 53 Mich. 35 (1884), by Cooley, C. J.

[2] Griggs *v.* Day, 158 N. Y. 1 (1899). This preceding case arose out of a controversy between a contractor in the construction of a railroad and the chief stockholder and promoter who advanced money on the security of stock and corporate notes. It was many years in the courts.

[3] See § 336, *supra.*

[4] See § 336, *supra.*

[5] Redding *v.* Godwin, 44 Minn. 355 (1890). In an action for damages for fraud inducing the plaintiff to purchase stock, the measure of damages is "not the difference between the contract price and the reasonable market value if the property had been as represented to be, even if the stock had been worth the price paid for it; nor, if the stock were worthless, could the plaintiff have recovered the value it would have had if the property had been equal to the representations. What the plaintiff might have gained is not the question, but what he had lost by being deceived into the purchase." The defendant "was bound to make good the loss sustained, such as the moneys the plaintiff had paid out and interest, and any other outlay legitimately attributable to defendant's fraudulent conduct; but this liability did not include the expected fruits of an unrealized speculation." Smith *v.* Bolles, 132 U. S. 125 (1889). The true measure of the damages suffered by one who is fraudulently induced to make a contract of sale, purchase, or exchange of property is the difference between the actual value of that which he parts with and the actual value of that which he receives under the contract. Rockefeller *v.* Merritt, 76 Fed. Rep. 909 (1896).

amount of money they paid to the corporation for stock may sustain an action by the purchaser of such stock from them for damages.[1] The measure of damages for deceit in inducing a party to purchase stock is the difference between the price and the real value at the time of the purchase. Subsequent events growing out of the then existing condition of things may be introduced in evidence.[2] The measure of damages for fraud in inducing a person to sell stock at less than its real value is the difference between the value of the stock as represented and the actual value.[3] At com-

In Smith *v.* Duffy, 57 N. J. L. 679 (1895), the measure of damages for fraud in the sale of stock was held to be the actual loss suffered by the vendee, irrespective of the market price of the stock. As to the measure of damages in an action against a broker for fraud inducing the plaintiff to invest in "Grant and Ward" securities, see James *v.* Work, 70 Hun, 296 (1893). The measure of damages in an action by a vendee for fraud in the sale of stock is the difference between the selling price and the real value at the time of the sale. High *v.* Berret, 148 Pa. St. 261 (1892). Where, in an action by a vendee of stock for fraud in inducing purchase, the jury find that the stock had no value whatever and render a verdict for the purchase price, it is immaterial that the court erred in regard to the measure of damages. Honsucle *v.* Ruffin, 172 Mass. 420 (1899). The vendee may bring an action for damages for deceit even where he has paid part of the price and given security for the balance. He may recover damages to the extent only that the representations were false. Weaver *v.* Shriver, 79 Md. 530 (1894). If a director misrepresents the financial condition of the company and thus induces a stockholder to sell his stock to him, he is liable to the vendor for the difference between the actual value of the stock and the price paid. Hume *v.* Steele, 59 S. W. Rep. 812 (Tex. 1900). The measure of damages is the difference between the actual value of the stock and the value it would have had if the representations as to the financial condition of the company had been true. Drake *v.* Holbrook, 66 S. W. Rep. 512 (Ky. 1902). And where one with intent to cheat and defraud induces another, by false and fraudulent representations, to purchase shares for value which he knows to be worthless, he is liable for the damages sustained, whether the purchase was made from him or from another at his instance. Hubbell *v.* Meigs, 50 N. Y. 480 (1872); 28 N. Y. App. Div. 1 (1898). See 88 L. T. Rep. 431.

[1] Honsucle *v.* Ruffin, 172 Mass. 420 (1899).

[2] Hindman *v.* First Nat. Bank, 112 Fed. Rep. 931 (1902).

[3] Potter *v.* Necedah, etc. Co., 105 Wis. 25 (1899). Where there is no market value for stock the measure of damages in an action for deceit, causing a party to purchase the stock, is the difference between the value of the stock and its value if the corporation had had the amount of property represented, that being the subject of the misrepresentation. Boddy *v.* Henry, 113 Iowa, 462 (1901). In a suit by a purchaser of stock to hold the directors liable for a false annual report which caused him to purchase, the measure of damages is the difference between the value of the stock as it is and as it would have been had the annual report been true. Parsons *v.* Johnson, 28 N. Y. App. Div. 1 (1898). The measure of damages for fraud in the sale of stock is the difference between the real value of the stock at the time of sale and what the value would have been had the representations been true. The market value

mon law an action to recover back the whole of the purchase-money upon a rescission for fraud is virtually a suit for money had and received.[1]

§ 587. *Damages in actions between stock-brokers and their customers.*— This subject is considered elsewhere.[2]

may be shown as bearing upon the real value. Warner *v.* Benjamin, 89 Wis. 290 (1895); Titus *v.* Poole, 73 Hun, 383 (1893); aff'd, 145 N. Y. 414. A person who purchases bank stock from the bank itself may hold the bank liable for damages, where the public statement of the bank which he relied on in purchasing was false. The measure of damages is the difference between the value of the stock if the statement had been true and its actual value. Exchange Bank *v.* Gaitskill, 37 S. W. Rep. 160 (Ky. 1896). In an action for damages for deceit inducing the plaintiff to purchase stock, the measure of damages is "a sum of money equal to the difference between the value of the property as it was in fact and the value as it would have been if the representations had been true." In this kind of action no tender of the stock is necessary or proper. Testimony as to the value of the property of the corporation and of a sale of stock by a witness is admissible. Vail *v.* Reynolds, 118 N. Y. 297 (1890). Where one has been induced by fraudulent misrepresentations to buy or subscribe for shares of stock, the measure of damages, in an action against the vendor, is the difference between the value of the stock as represented and the actual value. Miller *v.* Barber, 66 N. Y. 558, 568 (1876).

[1] Gassett *v.* Glazier, 165 Mass. 473 (1896).

[2] See §§ 460–462, *supra.*

CHAPTER XXXVI.

STOCKHOLDERS' MEETINGS — CALLS, TIME, PLACE, AND CLASSES OF MEETINGS.

§ 588. *Introductory.*— The stockholders of a corporation constitute the origin, existence, and continuance of the corporation itself. They elect the directors, control the general policy through them, and within the charter limits may prolong or dissolve the corporate existence at their pleasure. All these vital powers of the stockholders can be exercised by them only in corporate meetings, duly convened and properly organized for the transaction of business. Accordingly, the method of calling together a corporate meeting, the time and place of that meeting, the notice to be given to the stockholders, and the various incidents relative to a proper convening of the members of the corporation, are of great importance. They constitute the subject of this chapter.

§ 589. *The place of meeting of stockholders must be within the state creating the corporation.*— The first and most general rule as to the place where stockholders may hold corporate meetings is that the place of meeting should be within the boundaries of the state which created the corporation, although through its agents, of course, the corporation may make contracts, carry on business, sue and be sued, and buy and sell property in another state.[1]

There is a difference of opinion as to the effect of business transacted at a stockholders' meeting held beyond the borders of the state creating the corporation. Upon the one hand, it is held that all the acts and proceedings of such a meeting are wholly invalid

[1] See chs. XIII, §§ 237–240, *supra*, and XLI, §§ 696–700, *infra*.

and void; that the corporation is not bound thereby, and that the meeting is as though it had never been held.[1]

But it is the sounder view to regard the votes and proceedings at such a meeting as voidable rather than void. The corporation itself cannot allege that such proceedings are void. It is estopped from so doing.[2] So also are the stockholders who participate in the meeting.[3] As to the creditors of the corporation the authori-

[1] Craig Silver Co. *v.* Smith, 163 Mass. 262 (1895), citing the above text. Directors elected at a stockholders' meeting held out of the state, and to which all did not agree, are not directors. The old board holds over. Hodgson *v.* Duluth, etc. R. R., 46 Minn. 454 (1891); Miller *v.* Ewer, 27 Me. 509 (1847), where a mortgage executed by the authority of directors who were elected at the organization meeting of corporators held outside of the state which granted the charter was declared void. Cited and followed in Freeman *v.* Machias Water, etc. Co., 38 Me. 343 (1854), where a forfeiture of stock was declared illegal; Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874), where it was held that a forfeiture of stock by authority of a by-law adopted by stockholders of a Vermont corporation at a meeting held in New York was not valid; Mitchell *v.* Vermont Copper Min. Co., 40 N. Y. Super. Ct. 406 (1876); aff'd, 67 N. Y. 280; Smith *v.* Silver Valley Min. Co., 64 Md. 85 (1885), the organization being held out of the state; Camp *v.* Byrne, 41 Mo. 525 (1867), to the same effect. Stockholders cannot legally meet out of the state. Harding *v.* American, etc. Co., 182 Ill. 551 (1899). In Copp *v.* Lamb, 12 Me. 312 (1835), thirty years' user was held to have cured any defect. A Virginia corporation cannot be organized by an organization meeting in New York. Nor can the charter be assigned by a blank assignment after an organization in Virginia. The assignment must be of the stock. The corporation is neither *de facto* nor *de jure*. Suits against it fail. Welch *v.* Old Dominion, etc. Ry., 10 N. Y. Supp. 174 (1890). Stockholders' meetings held out of the state are voidable if not void, and at the instance of minority stockholders may be good ground for an injunction. Jones *v.* Pearl Min. Co., 20 Colo. 417 (1894). Where a charter is taken out in one state and the organization meetings are held in another state, the presumption is that no corporation is organized; and unless proof is given that the statutes of the first-named state authorized the holding of the organization meeting in another state, the stockholders are liable as partners. Duke *v.* Taylor, 37 Fla. 64 (1896). Where parties take out a charter in Tennessee, but, instead of holding their organization meetings in Tennessee, hold them in Florida, where they do all their business, they are liable in Florida as partners. Taylor *v.* Branham, 35 Fla. 297 (1895). The dicta in this decision as to the liability of stockholders generally in foreign corporations doing business in Florida are startling, to say the least.

[2] Heath *v.* Silverthorn, etc. Co., 39 Wis. 146 (1875), holding that the corporation may be estopped to deny the validity of acts done outside the state, when the rights of third parties intervene, even though that meeting was the organization meeting. The legislature may validate the acts passed at such a meeting. Graham *v.* Boston, etc. R. R., 118 U. S. 161, 176 (1886), aff'g s. c., 14 Fed. Rep. 753 (1883). *Cf.* Grenada County *v.* Brogden, 112 U. S. 261 (1884), and the various cases of municipal subscriptions, ch. VI, § 94, n., *supra*.

[3] A *bona fide* holder of a note given by a stockholder in payment of his subscription may enforce it, even

ties differ.[1] If the corporation has been incorporated in two or more states, it is lawful to hold meetings of the stockholders in either state.[2] And proceedings at a meeting in any one of the states are valid in respect to the property of the corporation in all of them, without a repetition of the meeting in any other of those states.[3] Where the statute allows elections to be held at a place fixed by the by-laws, the election need not be held at the city where the principal place of business is, but may be held at any other place in the state.[4]

though the organization and all other meetings of the company were held out of the state. Camp *v.* Byrne, 41 Mo. 525 (1867). In Ohio, etc. R. R. *v.* McPherson, 35 Mo. 13 (1864), the charter declared the directors to be the corporation. They met out of the state and organized and made a call on subscriptions. The court upheld the call. But the mere neglect on the part of a stockholder, who did not attend a meeting of this kind, or a mere failure to take affirmative action for a period of time short of that prescribed by the statute of limitations, will not deprive that stockholder of his right to attack the proceedings as irregular and in fraud of his rights. Ormsby *v.* Vermont Copper Min. Co., 56 N. Y. 623 (1874). A stockholders' meeting held outside of the state cannot be attacked by those who participate in it or receive the benefits of it. A statute against holding elections out of the state does not prevent stockholders' meetings for other purposes. Handley *v.* Stutz, 139 U. S. 417 (1891). An increase of capital stock which is voted at a stockholders' meeting held out of the state is valid if all the stockholders assent. "No valid objection can be made to a stockholders' meeting held in a foreign jurisdiction, provided all the shareholders give their consent to such meeting or ratify its action." Stutz *v.* Handley, 41 Fed. Rep. 531, 538 (1890). By-laws enacted by a board of directors of a Texas corporation at a meeting of stockholders held in Paris are void, and a stockholder may disregard them, although he was represented by proxy at the meeting. The directors are not even *de facto.* Franco-Texan Land Co. *v.* Laigle, 59 Tex. 339 (1883). A special charter must be accepted before the corporation exists, and such acceptance cannot be at a meeting held out of the state. Hence a bill by a stockholder to set aside a forfeiture of his stock was dismissed by the court. Smith *v.* Silver Valley Min. Co., 64 Md. 85 (1885). A stockholders' meeting out of the state is "irregular, if not void." Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890).

1 Where a meeting of stockholders other than the first organization meeting is held out of the state, and directors are elected, the acts of those directors cannot be attacked by corporate creditors on the ground that the election was illegal. Wright *v.* Lee, 2 S. D. 596 (1892). For cases to the contrary see notes *supra.* Where a person takes title to land for a corporation to be formed, and thereafter he joins in the formation of the corporation, he cannot defend an action against the corporation to obtain title by setting up that its organization meetings were held outside of the state. Tuckasegee Min. Co. *v.* Goodhue, 118 N. C. 981 (1896).

2 Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886); Covington, etc. Co. *v.* Mayer, 31 Ohio St. 317 (1877). See also Ohio, etc. Ry. *v.* People, 123 Ill. 467 (1888); and ch. LIII, § 910, *infra.*

3 Same cases.

4 Union, etc. Bank *v.* Scott, 53 N. Y. App. Div. 65 (1900).

§§ 590, 591. *First meeting under a special charter.*— Where an act incorporates three specified persons and their "associates," those three alone organize the company and are entitled to subscribe the capital stock or to allow others to subscribe.[1]

Statutory provisions as to notice of the first meeting are directory. They need not be observed if the stockholders acquiesce.[2]

Where several persons, their associates and successors, are declared to be a corporation, one of them with new parties may meet, organize, and adopt by-laws, without the capital being first subscribed and without the others if they do not object.[3] As to an over-subscription for stock, the rules that govern the subject are considered elsewhere.[4] The survivors of those who by special act are made a corporation may call the first meeting many years after the act was passed, and may open books for subscription to

[1] Lechmere Bank *v.* Boynton, 65 Mass. 369 (1853); Hughes *v.* Parker, 20 N. H. 58 (1849). See also p. 525, *supra.* The grant of corporate powers to one person and his associates and successors does not require of such person that he should take associates before the act can take effect or corporate powers be exercised, but confers upon him alone the powers of the corporation, and his acts within the grant of such powers become the acts of the corporation. Penobscot Boom Corp. *v.* Lamson, 16 Me. 224 (1839). Where a special charter named the incorporators and commissioners, and the notice called for by the charter of the opening of the books of subscription was given, and all incorporators attended the meeting and verbally subscribed for stock, and gave checks to apply on the same, and a meeting of the stockholders was held and directors elected, and the directors held their meeting and elected officers, and annual meetings were held thereafter for five years, when the company was practically abandoned, and the checks were never used,— all this amounted to a legal organization of the corporation. Moreover, the corporation existed by the charter itself, without action on the part of the incorporators. A company thus organized may enjoin from exercising its franchises a subsequent attempted organization of the company made sixteen years thereafter, the subsequent organization having been made by part only of the incorporators. The incorporators cease to have any powers after the first organization meeting. The remedy may be in equity, and need not be in *quo warranto.* Union Water Co. *v.* Kean, 52 N. J. Eq. 111 (1893). Where the incorporators named in a special charter organize by subscribing one share each and allowing another person to subscribe for the remainder, he at the same time entering into a personal contract with them that he would construct the street railway called for by the charter within a certain time, and for failure so to do he was to "return the charter," a suit by the original incorporators to cancel his subscription and to obtain control of the board of directors will not lie, inasmuch as the contract was an attempt to transfer the corporate franchise. Simonds *v.* East Windsor, etc. Ry., 73 Conn. 513 (1901).

[2] Braintree, etc. Co. *v.* Braintree, 146 Mass. 482 (1888).

[3] McGinty *v.* Athol, etc. Co., 155 Mass. 183 (1892).

[4] See §§ 57, 58, *supra.*

the stock.[1] But where a company is chartered in 1860, and does not organize until 1884, an exemption from taxation contained in the charter is lost by reason of a constitutional provision enacted in 1870 forbidding such exemptions.[2]

§ 592. *Directors' meetings.*— The various questions connected with directors' meetings, the place where such meetings may be held, the notice that is required, the question of whether the directors may act without meeting, and the requirements as to a quorum, are discussed elsewhere.[3] Where a statute provides that the charter may be amended in certain respects upon the directors or a majority of them making and signing a certificate, such making and signing need not be at a meeting of the directors. No meeting is required.[4]

§ 593. *By whom meetings are to be called — Mandamus — Fraud in the call.*— Where the time and place of a meeting and the business to be transacted at that meeting are not so fixed by charter or otherwise that the stockholders are bound to take notice of them, it is necessary that the meeting be called in accordance with the by-laws, or, in the absence of a by-law, by the highest existing corporate authority.[5]

In the absence of any special authority to any particular person to call meetings, it has been held that the general agent of the corporation may make the call,[6] but that the secretary cannot;[7] yet even though the secretary calls a stockholders' meeting with-

[1] Marmora, etc. Co. *v.* Murney, 1 C. P. Rep. (Can.) 29 (1850).

[2] Planters' Ins. Co. *v.* Tennessee, 161 U. S. 193 (1896).

[3] See § 713*a*, *infra*.

[4] Burden *v.* Burden, 159 N. Y. 287 (1899).

[5] Evans *v.* Osgood, 18 Me. 213 (1841), holding that, where a proprietors' meeting could be called "by a petition signed by twelve of them at least," it was not a legal call if eleven signed, although they owned twelve shares; Congregational Soc. of Bethany *v.* Sperry, 10 Conn. 200 (1834); State *v.* Pettineli, 10 Nev. 141 (1875), where the by-laws of a corporation provided that meetings of the stockholders should be called by the trustees, and it was held that any other mode of calling, such as by the president, was insufficient. In Johnston *v.* Jones, 23 N. J. Eq. 216 (1872), the charter provided for annual elections, but no by-laws had been made fixing the time. The authority to call an election being in the directors, it was held not sufficient for a majority of these to sign the notice without stating that it was given by order of the board, and without designating themselves as directors. See also Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839), holding that notices of meetings could not be proved by parol where there was a by-law requiring the clerk to post written notice.

[6] Stebbins *v.* Merritt, 64 Mass. 27 (1852).

[7] The secretary and a person holding proxies on stock owned by the state cannot call a meeting to elect officers; nor can a statute order an election in a brief time. Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502, 701 (Ky. 1888). The secretary has no inherent right to call a meeting of the stockholders,

out authority of the board, nevertheless, if the next day the board ratifies the proceedings, the notice is good.[1] The president and secretary have no power to call a stockholders' meeting.[2] The board of directors may always call a meeting of the stockholders.[3] Although a meeting of the board of directors at which a quorum is not present calls a stockholders' meeting, and the stockholders' meeting takes action, yet where no stockholders object until six months thereafter the court will not interfere.[4] And even though, on account of vacancies in the board of directors, it cannot act, yet the remaining directors may call a stockholders' meeting to hold an election.[5]

Statutory provisions as to who shall call the meeting, whether it be the first and organization meeting, or a subsequent one, may be waived by unanimous consent of the incorporators or stockholders.[6]

especially where the statute provides that the directors may call a stockholders' meeting. *Re* State of Wyoming Syndicate, [1901] 2 Ch. 431.

[1] Hooper *v.* Kerr, etc. Co., 83 L. T. Rep. 729 (1900).

[2] Dusenbery *v.* Looker, 110 Mich. 58 (1896).

[3] Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502, 701 (Ky. 1888). The board of directors may fix the time if the charter or by-laws do not. Commonwealth *v.* Smith, 45 Pa. St. 59 (1863).

[4] Southern, etc. Bank *v.* Rider, 73 L. T. Rep. 374 (1895).

[5] Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882). *Cf.* § 713*a*, *infra*.

[6] See § 234, notes, *supra*, also §§ 590, 599, *infra;* Angell & Ames, Corp., § 491, to the effect that "want of authority may be waived by the presence and consent of all who have a right to vote." Although the charter prescribes that the commissioners who receive the subscriptions shall call the first meeting by publishing a notice, yet this call may be waived, and the stockholders may meet and organize without a call, if all assent. Judah *v.* American, etc. Co., 4 Ind. 333 (1853); Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864), where the statute provided that, as soon as ten per cent. on the capital stock should be subscribed, the persons named in the certificate of incorporation, or any three of them, might give notice of an election of directors. It was held simply directory, and not indispensable to an election, that the notice be so given. In Newcomb *v.* Reed, 94 Mass. 362 (1866), the court declared the purpose of such statutes to be to avoid such difficulty as would arise where two parties should attempt to organize separately under the same charter. It was there held that persons elected officers at a meeting held in variance with such statutory direction were directors nevertheless, and were subject to the statutory liability for corporate debts. Where three persons are appointed to make a call, and one of them calls the meeting of incorporation, the other two making no objection, the organization of the company at the meeting so called is valid. Walworth *v.* Brackett, 98 Mass. 98 (1867); Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834), holding that if the call for the meeting to elect the first directors be signed by the commissioners authorized to make the call individually, and not by virtue of a formal order of the commissioners, or if their names be signed to such a call by the secretary without objection by

If, upon the organization of a corporation, a majority of the subscribers refuse to proceed in calling a meeting, the minority may call it, and bind the corporation.[1]

Where the statute requires due notice to be given, it need not be given by any particular person nor in any particular form.[2] A charter provision or by-law authorizing the calling of a meeting in a certain way does not necessarily prevent the meeting being called in a different way, but unless waived the rule is otherwise, where the charter or by-law is peremptory.[3] The president and cashier of a bank have no authority to call a stockholders' meeting, where the charter provides that stockholders' meetings may be called by the board of directors or any three stockholders.[4] The officers or agents of a corporation whose duty it is to call meetings may, in case they neglect or refuse to issue the call, be compelled by *mandamus* to call a meeting at the instance of a stockholder who is injured by reason of their failure.[5] Courts have no power to call corporate meetings except by *mandamus*.[6]

them, these irregularities will not affect the validity of the proceedings at the meeting.

[1] Busey *v.* Hooper, 35 Md. 15 (1871).

[2] West Koshkonong Cong. *v.* Ottesen, 80 Wis. 62 (1891).

[3] Where a by-law provides that special meetings may be called by the president, or in his absence by the secretary, on application made by ten members in writing, the directors may call a special meeting without such an application. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 90 Mass. 217 (1864). But where a by-law authorizes the trustees to call a meeting, a meeting called by the president is irregular. State *v.* Pettineli, 10 Nev. 141 (1875). When the by laws require a call to be posted in writing, a call by parol is insufficient. Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839). The manner of making the call may be prescribed by by-law; and when so prescribed, provided the by-law is reasonable, calls made in that way are valid, even though the charter said that three stockholders might call a meeting. Taylor *v.* Griswold, 14 N. J. L. 222 (1834).

[4] Matthews *v.* Columbia Nat. Bank, 79 Fed. Rep. 558 (1897).

[5] People *v.* Cummings, 72 N. Y. 433 (1878); State *v.* Wright, 10 Nev. 167 (1875); People *v.* Governors of Albany Hospital, 61 Barb. 397 (1871); McNeely *v.* Woodruff, 13 N. J. L. 352 (1833); Regina *v.* Aldham, etc. Soc., 6 Eng. L. & Eq. 365 (1851). A *mandamus* to compel the calling of a meeting of the stockholders to elect directors should be against the board of directors and not against the president and secretary. Dusenbury *v.* Looker, 110 Mich. 58 (1896). *Mandamus* lies to compel the calling of a special stockholders' meeting in accordance with the by-laws. Bassett *v.* Atwater, 65 Conn. 355 (1895). The court will not order the directors to call a meeting for business other than an election when they or a certain proportion of the stockholders may call it. MacDougall *v.* Gardiner, L. R. 10 Ch. App. 606 (1875). In Goulding *v.* Clark, 34 N. H. 148 (1856), it is held

[6] The fact that foreclosure proceedings are pending and a receiver is in possession does not give the court jurisdiction to call a stockholders' meeting to hold an election. Taylor *v.* Philadelphia, etc. R. R., 7 Fed. Rep. 381 (1881).

If there is any fraud in the calling of the meeting, the proceedings of the meeting may be attacked in the courts. The fraud may consist in concealing the notice,[1] or in changing the time of the meeting,[2] or in misstating the business.[3] A court of equity may restrain the directors from fixing the time for an annual meeting at a date when many members are in the country, the purpose being to prevent them from exercising their right to vote.[4]

§ 594. *When the stockholders are entitled to notice of corporate meetings.*— If the time and place at which a corporate meeting is to be held and the business to be transacted are distinctly fixed in the charter or by a by-law, this is of itself sufficient notice to all the stockholders, and no further call or notice of that meeting is necessary, unless the charter or by-laws require it.[5] But an annual meet-

that, where there is no officer competent to call a meeting, there is no way of convening except by reorganization of the company or a published notice given under the statutes. All the stockholders, of course, could convene and thereby waive notice. See § 599, *infra*. The proper officer may be commanded by *mandamus* to send out notices of the annual election. People *v.* Hart, 11 N. Y. Supp. 670, 673 (1890). *Mandamus* lies to compel a meeting of vestrymen. People *v.* Winans, 9 N. Y. Supp. 249 (1890). Where those who have the right to call a meeting of the shareholders refuse to exercise that right, for the express purpose of preventing the shareholders from duly assembling, the court will, if necessary, interfere to protect the shareholders against an abuse of power on the part of those intrusted with the management of the affairs of the company. Foss *v.* Harbottle, 2 Hare, 461 (1843); Isle of Wight R. Co. *v.* Tahourdin, L. R. 25 Ch. D. 320 (1883). *Mandamus* lies to compel the annual election of the entire body of directors or trustees. Commonwealth *v.* Keim, 38 Leg. Int. 32 (1881); People *v.* Fairbury, 51 Ill. 149 (1869). Dictum that *mandamus* lies to compel election. *Re* Union Ins. Co., 22 Wend. 591 (1840).

[1] See § 596, *infra.*

[2] In a stockholder's suit to enjoin a consolidation the court will consider the legality of an election, the time of holding which was illegally changed by the board of directors. Nathan *v.* Tompkins, 82 Ala. 437 (1887).

[3] If directors convene a meeting to pass resolutions favorable to themselves on questions in which the interests of the directors are opposed to those of the shareholders, by a circular which is misleading, and which contains statements calculated to obtain proxies in their favor without giving the shareholders the information necessary to enable them to form a just judgment as to who are the proper persons to whom to intrust their votes, the court will grant an injunction to restrain the holding of the meeting or to restrain the directors from laying such resolutions before the meeting. Jackson *v.* Munster Bank, 13 L. R. Ir. 118 (1884).

[4] Cannon *v.* Trask, L. R. 20 Eq. 669 (1875). A majority of the board of directors cannot lengthen their term of office by shortening the time of the annual meeting of the stockholders, in violation of the stockholders' by-laws, so that the election is held when they control the stock. Nathan *v.* Tompkins, 82 Ala. 437 (1887).

[5] Warner *v.* Mower, 11 Vt. 385, 393 (1839): State *v.* Bonnell, 35 Ohio St. 10, 15 (1878). If the charter or by-laws of a corporation fix the time and place at which regular meetings shall be held, this is itself sufficient notice to stockholders, and no further notice is neces-

ing of the stockholders has no power to change the by-laws by increasing the number of directors, where no notice of such proposed change was given, the change itself being of vital importance and outside the usual business transacted at an annual meeting.[1] A by-law which fixes the day of meeting without also fixing the hour and place is insufficient as a notice of the meeting.[2] And it is a general and settled rule of law that notice, in some way or other, must be given to every person entitled to be present at a corporate meeting.[3] When, therefore, no sufficient notice is given by charter or statute or by-law, each stockholder is entitled to an express notice of every corporate meeting.[4] No usage can operate to excuse a failure to give such a notice.[5] These rules are based on the neces-

sary. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893). As to whether notice is necessary of the annual meeting, where the corporation has long been defunct, see Morrill *v.* Little Falls Mfg. Co., 60 Minn. 405 (1895). Where the by-laws fix the time and place for the annual meeting no notice is necessary, and even if a notice was misleading, yet if a majority met and elected a trustee, a suit instituted by the corporation under control of such trustee is legally instituted. Jones *v.* Hilldale, etc. Soc., 65 S. W. Rep. 838 (Ky. 1901).

1 Bagley *v.* Reno, etc. Co., 201 Pa. St. 78 (1902).

2 The fact that one of the by-laws of the corporation fixes the day upon which the annual meeting of the corporation shall be held is not of itself a sufficient notice of the hour and place at which the meeting is to be held. There must be an express notice of the hour and place of meeting. Otherwise, unless all the stockholders are present and consent, either in person or by proxy, the meeting cannot legally be held. San Buenaventura, etc. Co. *v.* Vassault, 50 Cal. 534 (1875). Though the by-laws of a corporation fix the date of the annual meeting, that of itself will not be notice of the meeting. Notice must be given of the place of the meeting; and a provision of the charter for the calling of all meetings is a mandatory provision, applicable alike to general and special meetings. U. S. *v.* McKelden, 1 MacArthur & M. 162 (D. C. 1879).

3 "To support the validity of corporate acts, each member must be actually summoned." Angell & Ames, Corp., § 492. A member who is expelled at a meeting of which he had no notice may cause the proceedings to be set aside. Medical, etc. Soc. *v.* Weatherly, 75 Ala. 248 (1883). "Due notice of the time and place of a corporate meeting is, by the English law, essential to its validity, or its power to do any act which shall bind the corporation." Dillon, Mun. Corp., § 200.

4 Stow *v.* Wyse, 7 Conn. 214 (1828), the court saying, in a dictum: "If no particular mode of notifying the stockholders be provided, either in the charter or in any by-law, yet personal notice might be given; and this, in such case, would be indispensable." Wiggin *v.* Freewill Baptist Church, 49 Mass. 301 (1844), a dictum; Jackson *v.* Hampden, 20 Me. 37 (1841); Rex *v.* Langhorn, 4 Ad. & El. 538 (1836); s. c., 6 Nev. & M. 203 (1836); Smyth *v.* Darley, 2 H. L. Cas. 789 (1849), the last four cases being municipal corporation cases. See also Stebbins *v.* Merritt, 64 Mass. 27 (1852), where a meeting called by a general agent in the absence of a statute or by-law was upheld though one member was mentally incapable of receiving notice.

5 Wiggin *v.* Freewill Baptist Church, 49 Mass. 301 (1844); Rex *v.* Hill, 4 Barn.

sity of protecting the rights of stockholders, and especially of the minority. A stockholder who takes part in a meeting cannot raise the objection that other stockholders were not notified of the meeting.[1]

§ 595. *The essential elements of a notice of a meeting are time, place, and business.*— The contents of the notice depend upon the character of the meeting. There are three matters concerning every corporate meeting of which the members are entitled to notice, namely: the time, the place, and the business proposed to be transacted. Some or all of these may be known to him by virtue of a charter provision or a by-law or a statute. But if any one of them is not known in that way, the stockholders are entitled to an actual notice thereof. Accordingly, it is the rule that, in the absence of other valid notice, the call must specify the time and place of meeting and the business to be considered. Although the time of a meeting is fixed by charter, nevertheless the meeting may be held at a subsequent time and be valid.[2] The precise hour at which the meeting is to be held must be stated in the notice.[3]

In general, the notice need not specify the business to be considered where the meeting is one prescribed by charter, or where the business is prescribed by charter or statute or by-law, and no other business is to be transacted.[4] But if the meeting is to be held at a time not provided by the charter, the call must specify particularly the time and also the business;[5] and the better rule is that, where

& C. 426 (1825), where an ancient custom of calling a meeting for an election of burgesses by ringing a bell was held not to be sufficient notice.

[1] See § 599, *infra.*

[2] People *v.* Cummings, 72 N. Y. 433 (1878); Hughes *v.* Parker, 20 N. H. 58 (1849). Elections need not be held on the day fixed by the by-laws. They may be held at any subsequent time. Beardsley *v.* Johnson, 121 N. Y. 224 (1890), aff'g s. c., 1 N. Y. Supp. 608 (1888).

[3] San Buenaventura, etc. Co. *v.* Vassault, 50 Cal. 534 (1875).

[4] Quoted and approved in Bagley *v.* Reno, etc. Co., 201 Pa. St. 78 (1902). Notice need not be given of special business to be transacted at the regular annual meeting of the stockholders. Chicago, etc. Ry. *v.* Union Pac. Ry., 47 Fed. Rep. 15 (1891); Sampson *v.* Bowdoinham Steam Mill Co., 36 Me. 78 (1853), holding that the notice of the annual meeting need not specify that the officers are to be elected, even though the by-laws require the notice to state the business; Warner *v.* Mower, 11 Vt. 385 (1839), where a provision of the by-laws relating to notices was considered as not affecting those for stated meetings, and holding that a notice of a stated annual meeting need not specify the business to be transacted, there being nothing in the by-laws limiting or specifying the business. It is believed, however, that the rights of stockholders will be best preserved by requiring notice to be given of any extraordinary business that may come before an annual meeting.

[5] *Re* Bridport Old Brewery Co., L. R. 2 Ch. 191 (1866); *Re* Silkstone Fall Colliery Co., L. R. 1 Ch. D. 38 (1875). *Cf.* Wright's Case, L. R. 12 Eq. 335, n., 345, n. (1868); Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877), holding that at com-

unusual business is to be transacted, even at a regular meeting, the notice of that meeting should state the unusual business.[1] Thus, at a meeting called to alter the by-laws and transact other business, an election cannot lawfully be held.[2] Nor can an assessment be levied at a special meeting when the stockholders were not duly notified that that matter would come up for consideration.[3] A notice of a meeting to increase stock need not specify what the

mon law all notices of meetings for special or exceptional purposes were required to state the object of the call. Citing Ang. & A., Corp., § 492. A meeting to organize and elect directors is invalid where no notice of the business is given. *Re* London, etc. Co., L. R. 31 Ch. D. 223 (1885); Shelby R. R. Co. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876), in which a sale of a railroad was set aside because authorized at a meeting of stockholders called by a notice not sufficient in point of time, and defective in not stating the object of the meeting; Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381, 400 (1859), holding that, though the notice was insufficient, yet one who was represented by proxy cannot object, especially where he delayed a long time in complaining. A notice of a meeting of a benevolent society called to dissolve must state the object of the meeting. St. Mary's, etc. Assoc. *v.* Lynch, 64 N. H. 213 (1886). A resolution passed at an extraordinary meeting, upon a matter for the consideration of which it was not avowedly called, or which was not specified in the notice convening the meeting, is altogether inoperative. Imp. Bank of China *v.* Bank of Hindustan, L. R. 6 Eq. 91 (1868); Anglo-Californian Gold Min. Co. *v.* Lewis, 6 H. & N. 174 (1860); Stearic Acid Co., 9 Jur. (N. S.) 1066 (1863). Notice of a meeting to consider the giving of a mortgage is sufficient to enable the meeting to authorize a mortgage. Evans *v.* Boston Heating Co., 157 Mass. 37 (1892). One and the same meeting may be both ordinary and extraordinary; ordinary for the purpose of transacting the usual business of the company, and extraordinary for the transaction of some particular business of which special notice may have been given. See Cutbill *v.* Kingdom, 1 Exch. 494 (1847); Graham *v.* Van Diemen's Land Co., 1 H. & N. 541 (1856).

[1] An annual meeting of the stockholders has no power to change the by-laws, increasing the number of directors, where no notice of such proposed change was given, the change itself being of vital importance and outside of the usual business transacted at an annual meeting. Bagley *v.* Reno, etc. Co., 201 Pa. St. 78 (1902), citing the above text. The annual meeting cannot vote an increase of the capital stock unless special notice of that business has been given, even though the by-laws provide that any business may be transacted at the annual meeting without special notice; the statute, however, prescribing that an increase of capital stock may be at "any meeting called for the purpose." Jones *v.* Concord, etc. R. R., 67 N. H. 234 (1892). By custom any business may be transacted at the annual meeting without special notice thereof being given, but any specific restriction as to any particular business modifies such rule. Mutual F. Ins. Co. *v.* Farquhar, 86 Md. 668 (1898).

[2] People's Ins. Co. *v.* Westcott, 80 Mass. 440 (1860). Nor an amotion made. Rex *v.* Liverpool, 2 Burr. 723 (1759); Rex *v.* Doncaster, 2 Burr. 738 (1759).

[3] Atlantic De Laine Co. *v.* Mason, 5 R. I. 463 (1858).

money is to be used for.[1] Where a special meeting is called to rescind the by-laws and adopt others in their place, the notice of the meeting may state that a copy of the proposed by-laws can be inspected at the company's office and will be submitted at the meeting.[2] At a special meeting which has been called for a particular purpose, only the business specified in the call can lawfully be transacted.[3] The transaction, however, of business other than that for which the meeting was called will not invalidate the entire proceedings at that meeting. There is only an invalidity *pro tanto*.[4]

The notice of the business to be transacted must "be a fair notice, intelligible to the minds of ordinary men. . . . The court does not scrutinize these notices with a view to excessive criticism to find out defects, but it looks at them fairly."[5] An explanatory circular accompanying a notice may be considered a part of it.[6] A notice of a stockholders' meeting to approve of the sale of the prop-

[1] Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234.

[2] Young *v.* South African, etc. Synd., [1896] 2 Ch. 268. Although a notice of a corporate meeting, and proxies given for a corporate meeting, add to the name of the corporation the place where it is located, this is immaterial. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892).

[3] Warner *v.* Mower, 11 Vt. 385 (1839).

[4] *Re* British Sugar Ref. Co., 3 Kay & J. 408, 413 (1857); *Re* Irrigation Co. of France, L. R. 6 Ch. 176 (1871). But it is held that at a special meeting, all the members being present and consenting, business other than that specified in the call may lawfully be transacted. Rex *v.* Theodorick, 8 East, 543 (1807).

[5] Henderson *v.* Bank of Australasia, 62 L. T. Rep. 869 (1890), reversed on another point in L. R. 45 Ch. D. 330; South School District *v.* Blakeslee, 13 Conn. 227 (1839). A notice that in case certain things happen a meeting will be held is not good. It is conditional and not absolute. Alexander *v.* Simpson, L. R. 43 Ch. D. 139 (1889). Where one company buys out another, the former may agree to pay a certain sum to the directors and secretary of the latter "as compensation for loss of office." This agreement is legal if the stockholders of the selling company ratify the same. The notice of a meeting of the stockholders, however, to ratify such an agreement must specify such payment, in addition to stating that the object of the meeting is to ratify the agreement generally. A circular subsequently sent to the stockholders referring to the payment to the directors and secretary is not sufficient, even though it was sent before the meeting was held. Kaye *v.* Croydon, etc. Co., [1898] 1 Ch. 358. A resolution relative to directors' pay passed at a special stockholders' meeting may differ from the resolution specified in the notice of the meeting; but if the meeting adjourns and such resolution is confirmed at the adjourned meeting, it must not differ from the resolution as first passed. Torbock *v.* Lord Westbury, 87 L. T. Rep. 165 (1902).

[6] "There is no inconvenience, irregularity or impropriety in supplementing, as is often done, a notice by an explanatory circular; and the shareholder, though perhaps strictly he might say, 'Why trouble me with the circular? What I am entitled to is a notice,' still I think ought fairly to look at the two as one document, and

erty of the company for stock in another company should disclose the fact that the directors of the selling company are to receive a personal advantage in the new company for underwriting its debentures, if such is a part of the agreement.[1] In a meeting called to affirm the action of a prior meeting such action may be affirmed in part and rejected in part.[2]

§ 596. *Service of the notice.*— If the particular form of the notice or the manner in which it shall be served is prescribed by charter or by-law or by statute, the notice must be given in that manner, unless notice is waived by unanimous consent; otherwise all the proceedings of the meeting are invalid.[3] Under a statute requiring "fourteen days' public notice at the least . . . by advertisement," it has been held that fourteen clear days' notice must be given.[4] The New York statutes, on the contrary, exclude the

he has both before him for his consideration." Tiessen *v.* Henderson, [1899] 1 Ch. 861.

[1] Tiessen *v.* Henderson, [1899] 1 Ch. 861.

[2] *Re* Trench, etc. Co. Ltd., [1900] 1 Ch. 408.

[3] Shelby R. R. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876), where there was no such publication as was required by statute, and there was no waiver; Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877), where a consolidated company sued a subscriber to stock in one of the old companies, and he defeated the action by showing that the statutory notice of the proposed consolidation had not been given; Reilly *v.* Oglebay, 25 W. Va. 36 (1884), where a notice by *the secretary,* when the statute required to be given by the *board of directors* or by *stockholders holding one-tenth of the capital,* was held insufficient, although it was shown that he had the authority from stockholders holding the required amount of stock; Stevens *v.* Eden Meeting-house Soc., 12 Vt. 688 (1839), holding that, where a by-law required notice to be posted, parol proof of such posting was incompetent unless the written notice was shown to have been lost; Swansea Dock Co. *v.* Levien, 20 L. J. (Exch.) 447 (1851), where a notice was held bad because the statute declared it should be printed in a newspaper circulating in the district of the principal place of business, while in this case there was no proof that the paper selected ever circulated there. Hence the removal of directors at such a meeting was illegal. Swansea Dock Co. *v.* Levien, 20 L. J. (Exch.) 447 (1851). As to waiver, see § 599, *infra.*

[4] *Re* Railway Sleepers Supply Co., L. R. 29 Ch. D. 204 (1885), holding that where by statute a second meeting to confirm the action of a first meeting must be held "at an interval of not less than fourteen days," both of the days on which the meetings were held must be excluded; Reg. *v.* Aberdare Canal Co., 14 Q. B. 854 (1850), holding that where notice must be published "at least sixteen days before such meeting" in condemnation proceedings, a notice published January 27th for a meeting February 12th was insufficient; Reg. *v.* Justices of Shropshire, 8 Ad. & E. 173 (1838), not a corporation case, but holding that notice of appeal to be "fourteen days at least" before the opening day must be fourteen days exclusive of the day of serving notice and of the day of the event. To same effect, Norton *v.* Salisbury Town Clerk, 4 C. B. 32 (1846). A notice for four weeks successively, once a week, next preceding the time, requires publication for four full weeks

day of publication and include the day of the event.[1] In the absence of an express provision as to the manner of serving a notice of a meeting, it is the common-law rule that each member of the corporation is entitled to notice, either personal or by a writing, actually received.[2] Notice of a call for the payment of a subscription must be served personally, and service by mail is insufficient, unless the by-laws authorize service in that manner.[3] The physical or mental incapacity of one of the stockholders will not excuse a failure to give him notice of a meeting; but it is very clear that the meeting may lawfully convene and transact business, although one of the members is incapable, by reason of imbecility, of receiving the notice.[4] The absence of a stockholder from home does not excuse a failure to leave the notice.[5] And where one of the stockholders dies after notice of a meeting, but before the meeting convenes, and no administrator is appointed in time to act at that meeting, there is on this account no ground to impeach the regularity of the meeting.[6] A by-law that no representative of a deceased stockholder shall have a right to notice of meetings, unless the stock has been registered in his name, is valid.[7] It has been held that a pledgee of shares is not entitled to a notice of corporate meetings if the pledgor receives notice.[8] Where stock is owned by a firm, notice to one of the firm is sufficient.[9] If the notice is fraudulently concealed from the owner of a majority of the stock, even where the notice is published in accordance with statute, the election will be set aside.[10]

once a week, and such publication must begin four weeks next before such time, and four full weeks must elapse between the first publication and such time. Hodge *v.* United States Steel Corp., 54 Atl. Rep. 1 (N. J. 1903).

[1] L. 1892, ch. 677, § 27; Code Civ. Proc., § 787.

[2] Notice to non-residents by letter was upheld in Stebbins *v.* Merritt, 64 Mass. 27 (1852). For dicta to the effect that the notice must be personal, see Tuttle *v.* Michigan Air Line, 35 Mich. 247 (1877); Stow *v.* Wyse, 7 Conn. 214 (1828). See also § 713*a*, *infra*, as to the kind of notice required of directors' meetings. See also § 594, *supra*, and notes.

[3] North, etc. Co. *v.* Bishop, 103 Wis. 492 (1899).

[4] Stebbins *v.* Merritt, 64 Mass. 27 (1852).

[5] Jackson *v.* Hampden, 20 Me. 37 (1841). In Porter *v.* Robinson, 30 Hun, 209 (1883), it is held that notice need not be given to a member of a board of school trustees, the board being a body corporate who is absent from the state and cannot attend the meeting, and that a failure to notify such a member will not render the proceedings at the meeting irregular or invalid. Members of English joint-stock companies residing abroad are not entitled to any notice of corporate meetings. *Re* Union Hill Silver Co., 22 L. T. Rep. 400 (1870).

[6] Freeman's Nat. Bank *v.* Smith, 13 Blatchf. 220 (1875); s. c., 9 Fed. Cas. 760.

[7] Allen *v.* Gold Reefs, etc. Limited, [1900] 1 Ch. 656, rev'g [1899] 2 Ch. 40.

[8] McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850).

[9] Kenton Furnace, etc. Co. *v.* McAlpin, 5 Fed. Rep. 737, 747 (1880).

[10] Where, in addition to irregularities,

§ 597. *Notice must be served a reasonable time before the meeting.*— The notice must be served upon the stockholders at such time as is prescribed by the statutes or if the statutes are silent; by the by-laws, or if both are silent on the subject a reasonable time before the day of the meeting.[1]

§ 598. *The division of meetings into ordinary and extraordinary.* Corporate meetings of stockholders are frequently divided, both by the judges and the text-writers, into two classes — the first being special or extraordinary, and the second being ordinary, regular, stated, or general. By reason of this attempt at classification much confusion has been introduced into the law without any corresponding advantage. The terms employed to distinguish the various kinds of meetings are used in different senses by different writers, so that it is difficult to define them in such a way as to avoid confusion.[2]

§ 599. *Waiver of notice.*— A stockholder may expressly or by his acts waive his right to have a notice of a corporate meeting duly served upon him.[3] For instance, an admission at a stock-

the notice of the election at a deferred day, which is published in accordance with the charter, is concealed from the leading stockholder, the court will set the election aside. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872).

[1] *Re* Long Island R. R., 19 Wend. 37 (1837). See also Covert *v.* Rogers, 38 Mich. 363 (1878), where a similar rule is declared as to notice to directors of their meetings. The legislature cannot unreasonably shorten the time of the next meeting. Cassell *v.* Lexington, etc. Co., 9 S. W. Rep. 502 and 701 (Ky. 1888). A reorganization under the English statute will not be sustained as against American stockholders, where the entire business of the English company is to own and work American mines, and the by-laws of the company provide for a longer notice than is specified in the English statute. The notice of the meeting to reorganize not having reached the American stockholders in time to attend the meeting, the American courts will not sustain the reorganization. Brown *v.* Republican, etc. Mines, 55 Fed. Rep. 7 (1893). Where by statute it is provided that thirty days' notice shall be given of certain corporate meetings, that length of time may apply to notices of other meetings of the same corporation. Shelby R. R. *v.* Louisville, etc. R. R., 12 Bush (Ky.), 62 (1876).

[2] For instance, in England, all meetings of stockholders are called "general" meetings, and are either "ordinary" (*i. e.*, regular) or "extraordinary" (*i. e.*, special). In England the same meeting may be both ordinary and extraordinary. See Lindley on Companies, pp. 425, 426 (6th ed.).

[3] The acts of a meeting are valid, though held without notice, if all are present or subsequently ratify and approve of the action. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); affirmed as to this point, but reversed as to others, in Handley *v.* Stutz, 139 U. S. 417 (1891). A party accepting the benefit of a contract for a long time cannot repudiate it on the ground that the calls for the meetings of the executive committee and of the stockholders which authorized the contract were insufficient; nor can he set up in such a case that the directors had not authorized the contract. Union Pac. Ry. *v.* Chicago, etc. Ry., 51 Fed. Rep. 309 (1892). A

holders' meeting of the validity of a claim against the company is valid, even though the meeting was not called in accordance with the statutes, it not appearing that any stockholder has ever objected.[1] Although a stockholder is present at a meeting at which an increase in capital stock is voted, yet he may object thereto on the ground that special notice was not given that the question of the increase would be voted on at that meeting, inasmuch as if such notice had been given other stockholders might have attended and changed the result.[2] But the court will refuse to set aside an election where every share of stock was represented at the election, even though the minority refuse to vote on the ground that the meeting had been called on less than ten days' notice, required by the statute.[3]

Difficulty as to waivers has been encountered where by statute or by charter the notice must be published or must be given a specified length of time before the meeting is held. This question arises often in regard to the first and organization meeting of the company, or in regard to a meeting to increase the capital stock, or to issue bonds, or to give a mortgage, or to effect a consolidation. The rule, however, is now well established that such statutory notice is for the benefit of the stockholders themselves, and, if they waive it, the meeting and all the proceedings are as valid as they would be had the full statutory notice been given.[4]

stockholder who takes part in a meeting cannot afterwards object that it was not properly called. Weinburgh *v.* Union, etc. Co., 55 N. J. Eq. 640 (1897). Objections to the regularity of the notice which was given are waived if all are present at the meeting and do not object to such irregularity. Stebbins *v.* Merritt, 64 Mass. 27 (1852); Richardson *v.* Vermont, etc., 44 Vt. 613 (1872), holding that objections to the proceedings of a meeting called by a notice which did not state what its object was, had been waived by a ratification at a later meeting; Jones *v.* Milton, etc. Turnp., 7 Ind. 547 (1856), where the stockholders not notified appeared and voted by proxy; Kenton Furnace Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). See also § 606, *infra.* Where several persons, their associates and successors, are declared to be a corporation, one of them with new parties may meet, organize, adopt by-laws, etc. without the capital being first subscribed and without the others, if they do not object. McGinty *v.* Athol, etc. Co., 155 Mass. 183 (1892). Notice may be waived. People *v.* Twaddell, 18 Hun, 427 (1879); 54 Atl. Rep. 254.

[1] Clark *v.* Warwick, etc. Co., 174 Mass. 434 (1899).

[2] Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); aff'd, 67 N. H. 234 (1892).

[3] *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899).

[4] A constitutional and statutory requirement that bonded debt shall only be incurred, when voted at a meeting called on sixty days' notice, does not prevent a waiver of such notice by all the stockholders either by express waiver or by attendance without such notice. Riesterer *v.* Horton, etc. Co., 160 Mo. 141 (1901). A provision that notice must be given to stockholders thirty days before they vote in favor of a mortgage may be waived by them,

Participation as an officer in issuing the call is a waiver by him of informalities as to that call;[1] and recognition of an agent appointed at a certain meeting, by dealing and offering to deal with

and a waiver may be by failure to object. Bridgeport Electric, etc. Co. *v.* Meader, 72 Fed. Rep. 115 (1895). Even though the statutory notice of a stockholders' meeting is not given, a mortgage authorized by the board of directors elected at such a meeting is legal, where the corporation receives the benefit therefrom, without any stockholder objecting. Atlantic Trust Co. *v.* The Vigilancia, 73 Fed. Rep. 452 (1896). Where a mortgage is approved by the representatives of all the stock except two shares, it is good as an equitable mortgage, even though the meeting of stockholders authorizing it was not called by advertisement, as required by statute. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). A statutory provision that a certain notice must be given of a meeting to authorize a mortgage may be waived. Central Trust Co. *v.* Condon, 67 Fed. Rep. 84 (1895). Although the statutes of Montana require that a mortgage may be given only after a stockholders' meeting convened by publication of notice, etc., has voted it, yet all the stockholders, by voting therefor, waive the required notice, and no one can complain. The mortgage is valid. Campbell *v.* Argenta, etc. Co., 51 Fed. Rep. 1 (1892). Although the constitution provides that there shall be sixty days' notice of the meeting to authorize the issue of bonds, yet where all the stockholders assemble and authorize the issue without any notice, and the bonds pass into *bona fide* hands, they may be enforced. The absence of a nominal stockholder whose stock is really owned by one of those present is immaterial. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). A constitutional provision in regard to notice being given of a meeting for increasing the stock or bonds of a corporation is for the benefit of the stockholders and may be waived by them, or the omission of it may be ratified by them. Nelson *v.* Hubbard, 96 Ala. 238 (1892). The voluntary dissolution of a company under the statute, but without the ten days' notice required by the charter, is not such a dissolution as to prevent creditors from attaching the property of the company as though no dissolution had been had. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 82 (1893). But the dissolution cannot be enjoined by creditors in the absence of fraud. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 85 (1893). In general, see Columbia Nat. Bank's Appeal, 16 W. N. Cas. (Pa.) 357 (1885); Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889); Kenton Furnace Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880), where no notice was given, although prescribed by the charter and by-laws. It was held to have been waived by the presence of all the stockholders at the meeting and their participation in its action; *Re* British Sugar Ref. Co., 3 Kay & J. 408 (1857), where it was adjudged that a shareholder who had received a circular notice of the meeting and was present could not question the legality of the meeting on the ground that the charter required, in addition to the circular, publication in a newspaper, which was not made.

A person who takes part in a meeting cannot object that it was held on five days' notice instead of fourteen, as required by the charter. Bucksport,

[1] Bucksport, etc. R. R. *v.* Buck, 68 Me. 81 (1878); Schenectady, etc. Plank Road Co. *v.* Thatcher, 11 N. Y. 103 (1854). The stockholder who, as a director, votes to call the annual meeting at an irregular time cannot question the acts of such meeting. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

him as the agent of the company, is a waiver of the right to notice of that meeting.[1] One stockholder cannot avail himself of the neglect of the corporate officers to give due notice to another stockholder who does not himself complain.[2] But the failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though

etc. R. R. *v.* Buck, 68 Me. 81 (1878); Chamberlain *v.* Painesville, etc. R. R., 15 Ohio St. 225 (1864). A failure to give the statutory notice of the first meeting is immaterial where all but one stockholder were present and he afterwards ratified all that was done. Babbitt *v.* East, etc. Co. (N. J., 1876); Stew. Dig., p. 208, § 13. To same effect, p. 525, *supra*, and § 593, *supra;* also § 288, *supra.* A stockholder who knows of and approves of a proposed sale of a railroad by a stockholders' vote as allowed by statute cannot have the sale set aside on the ground that he was not notified of nor present at the meeting voting such sale, but he must be paid the value of his stock. Young *v.* Toledo, etc. R. R., 76 Mich. 485 (1889). The constitutional provision that bonds or stock shall not be increased except in a certain way does not apply to an original issue of bonds. Union, etc. Co. *v.* Southern, etc. Co., 51 Fed. Rep. 840 (1892). Directors elected at a meeting called on thirteen days' notice instead of fourteen, as required by statute, may make calls, where their election has been confirmed by a subsequent annual general meeting. Briton, etc. Assoc. *v.* Jones, 61 L. T. Rep. 384 (1889); People *v.* Peck, 11 Wend. 604 (1834), holding that a failure to comply with a statutory requirement regarding notice will not affect the proceedings of a meeting of a religious corporation where there is no claim that every voter was not present, or that evil resulted from the omission, and no fraud was involved. If all parties attended, they thereby admitted notice. See also Stebbins *v.* Merritt, 64 Mass. 27 (1852); Rex *v.* Chetwynd, 7 Barn. & C. 695 (1828), where the election of a burgess at a meeting of which no notice was given was held valid, because it appeared that all the members of the electing body were present; Rex *v.* Theodorick, 8 East, 543 (1807). *Cf.* U. S. *v.* McKelden, 11 MacArthur & M. 162 (D. C. 1879), where it was held that, although the date for the annual meeting is fixed by a by-law, the notice by publication provided for by the charter is necessary. See also *Re* Long Island R. R., 19 Wend. 37 (1837), in which it was said in a dictum that a notice regulated by statute "of course cannot be modified, or dispensed with." If all the incorporators meet and organize, a statutory requirement as to notice is waived and is not necessary. Ratification afterwards by one who was not present is equally sufficient. Benbow *v.* Cook, 115 N. C. 324 (1894). A corporation cannot defend a mortgage on the ground that the consent of the stockholders was not obtained, as required by statute. Atlantic T. Co. *v.* Crystal Water Co., 72 N. Y. App. Div. 539 (1902). See also § 808, *infra.*

[1] Bryant *v.* Goodnow, 22 Mass. 228 (1827).

[2] Nickum *v.* Burckhardt, 30 Oreg. 464 (1897); Schenectady, etc. Plank Road Co. *v.* Thatcher, 11 N. Y. 102 (1854). In this case the court said: "The court rejected the offer of the defendant to prove that no notice had been given of the first election of directors. I think this was properly rejected, on the ground that the defendant could not avail himself of a neglect to give notice to any other stockholder. The defendant himself was present at that meeting and voted, and was elected a director. He has not suffered by an omission to

the notice of the meeting stated what was to be done.[1] A stockholder in a corporation may be estopped from questioning the validity of a stockholders' meeting by reason of his participation in the proceedings by proxy, where his agent was authorized to act at lawful meetings.[2] The waiver of all the stockholders is essential in order to validate an election held at a meeting not properly called.[3] But where the treasurer has acted as such for several months without objection, notes signed by the treasurer cannot be repudiated on the ground that his election was invalid because the stockholders' meeting was not properly called.[4] He is a *de facto* officer.[5]

§ 600. *Notice is presumed to have been regularly given.*—It is a presumption of law that proper and valid notice of a corporate meeting has been duly given to every stockholder, and that the meeting itself was regularly and lawfully held. The burden of proof is therefore upon him who alleges want of notice or insufficiency of notice, or attacks the regularity and validity of the proceedings.[6]

§ 601. *Adjourned meetings.*—An adjourned meeting is but a continuation of the meeting which has been adjourned, and when that meeting was regularly called and convened and duly adjourned,

serve notice, and he is not in a situation to object as to others." A stockholders' meeting held without notice or call cannot be objected to by those who participate or receive the benefits of it. Handley *v.* Stutz, 139 U. S. 417 (1891). A stockholder who takes part cannot object that another stockholder had no notice. *Re* Union Hill Silver Co., 22 L. T. Rep. 400 (1870); *Re* British, etc. Co., 3 Kay & J. 408 (1857). A party who did not attend the meeting cannot object that the inspectors were not sworn. *Re* Mohawk & Hudson R. R., 19 Wend. 135 (1838). See also § 620, *infra.*

[1] McFadden *v.* Leeka, 48 Ohio St. 513 (1891).

[2] Columbia Nat. Bank *v.* Mathews, 85 Fed. Rep. 934 (1898). Even though the action taken at a special meeting is broader than as specified in the notice of the meeting, yet if a proxy votes and the stockholder delays for over a year in objecting, the stockholder is bound. Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902).

[3] State *v.* Pettineli, 10 Nev. 141 (1875).

[4] Merchants' Nat. Bank *v.* Citizens' Gas Light Co, 159 Mass. 505 (1893).

[5] See § 623, *infra.*

[6] McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850); Porter *v.* Robinson, 30 Hun, 209 (1883); Sargent *v.* Webster, 54 Mass. 497 (1847); South School, etc. *v.* Blakeslee, 13 Conn. 227, 235 (1839); Lane *v.* Brainerd, 30 Conn. 565 (1862); Pitts *v.* Temple, 2 Mass. 538 (1807); Wells *v.* Rodgers, 60 Mich. 525 (1886), holding that notice is presumed, and the burden of proof in attacking the legality of the meeting is on the plaintiff. See also § 606, *infra.* All the stockholders are presumed to have had notice of a meeting that has been held. Beardsley *v.* Johnson, 121 N. Y. 224 (1890). *Cf.* Wiggin *v.* Freewill, etc. Church, 49 Mass. 301, 312 (1844). Notice of the meeting and participation therein is presumed. Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902).

the stockholders may, at the adjourned meeting, consider and determine any corporate business that might lawfully have been transacted at the original meeting.[1]

But where there is an absence of good faith, and an adjourned meeting is held in such a way as to prevent certain of the stockholders from knowing of it, the proceedings are invalid.[2] Where the original meeting was duly called and convened, the stockholders are not entitled to any other notice of the adjourned meeting than that which is implied in the adjournment.[3] But nothing can, without notice, be transacted at an adjourned meeting except the business which might have been transacted at the first meeting if a quorum had been present.[4] Even though notice of an adjourned meeting is unnecessary, yet if one is given and it is less broad as

[1] Quoted and approved in Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902), and in State *v.* Cronan, 23 Nev. 437 (1897); Granger *v.* Grubb, 7 Phila. 350 (1870); Farrar *v.* Perley, 7 Me. 404 (1831); Scadding *v.* Lorant, 3 H. L. Cas. 418 (1851). *Cf.* People *v.* Batchelor, 22 N. Y. 128 (1860), where the New York city board of aldermen appointed a day for the election of a city officer. At a subsequent stated meeting this resolution was rescinded, and then an election was thereupon held. *Held*, that the election was void, as some members were absent from the former meeting and had no notice of the election. A board of aldermen cannot elect an assessor and then at an adjourned meeting reconsider and elect some one else. State *v.* Phillips, 79 Me. 506 (1887). See also Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834), where the stockholders at the first meeting proceeded to an election in spite of an adjournment by the commissioners, and the election was upheld. A meeting adjourned for want of a quorum may at the adjourned meeting proceed to business, if a quorum is present, and no notice of the adjourned meeting is necessary where the charter or by-laws provided for such adjournment. Smith *v.* Law, 21 N. Y. 296 (1860), involving a meeting of the board of directors.

[2] State *v.* Bonnell, 35 Ohio St. 10 (1878). Where an election is held, after many adjournments, and a minority are present and elect directors, who repudiate a contract which exists with the holder of a majority of the stock, the latter being ignorant of the intent to elect officers, equity will enjoin the repudiation of the contract. New York, etc. Co. *v.* Parrott, 36 Fed. Rep. 462 (1888).

[3] Smith *v.* Law, 21 N. Y. 296 (1860); Warner *v.* Mower, 11 Vt. 385 (1839). In U. S. *v.* McKelden, 11 MacArthur & M. 162 (D. C. 1879), it was held that the proceedings of an original meeting being invalid by reason of insufficient notice, the adjourned meetings were invalid also, they being merely continuations of the original. To same effect, Wiggin *v.* Freewill, etc. Church, 49 Mass. 301 (1844).

[4] Regina *v.* Grimshaw, 10 Q. B. 747 (1847). No business can be done at an adjourned meeting that could not have been done at the original meeting. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883). Where a meeting of the board of directors could not authorize suit to collect assessments because the assessments were not yet due, an adjourned meeting of that meeting cannot authorize such suit, all of the directors not being present at the adjourned meeting and no new notice thereof having been given. Bank of National City *v.* Johnston, 133 Cal. 185 (1901).

to the business to be transacted than the original notice, the second notice governs.[1] Where the president and a portion of the members of an unincorporated association withdraw from a meeting, the remaining members may adjourn the meeting and at the adjourned meeting may take action, a quorum being present.[2] A minority of an unincorporated voluntary association may adjourn from time to time, even if a majority of all the members is necessary to constitute a quorum in order lawfully to transact business.[3]

[1] Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902).

[2] Ostrom *v.* Greene, 161 N. Y. 353 (1900).

[3] Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying in regard to the adjourned meeting: "Personal notice to every member was unnecessary, for it was the same in effect as if the association had sat in continuous session and had adjourned each day to the next."

CHAPTER XXXVII.

ELECTIONS AND OTHER CORPORATE MEETINGS.

§ 602. *Scope of the subject.*— The business which the stockholders of a corporation in meeting assembled have the power to transact is not extensive, but it is of great importance. They elect the directors, pass upon amendments to the charter, determine whether any increase of the capital stock shall be made, make the by-laws, and dissolve or continue the corporation. These constitute the chief functions of a stockholders' meeting. They are extraordinary in their character, and although they are exercised at long intervals are of vital importance. This chapter treats of the business which may be transacted at stockholders' meetings and of the methods of its transaction.

§ 603. *Elections are to be by the stockholders, and may be compelled by mandamus.*— At common law the directors of a corporation are to be elected by the stockholders in corporate meeting assembled.[1] Generally this is declared to be the law by charter or statutory provisions. A contract and by-law giving a voting power to bondholders at corporate elections is void as against public policy and the statutes, where the statutes prescribe that the directors shall be elected by the stockholders and shall not be elected in any other manner.[2] In most corporations the president, and also the vice-president, secretary, treasurer, and agents of the corporation, are elected or appointed, not by the stockholders, but by the directors. All these matters, however, are generally regulated by the charter or a statute.

At common law *mandamus* lies to compel an election of corporate officers.[3]

All corporations for profit have power to elect a board of directors.[4]

The legislature may amend the charter so as to increase the num-

[1] It has been held that stockholders cannot fill vacancies in the board of directors at a special meeting, when elections can only be at annual meetings. Moses *v.* Tompkins, 84 Ala. 613 (1887). The soundness, however, of this decision may well be doubted. The by-laws may and generally do give this power to the directors. And see dictum in *Re* Union Ins. Co., 22 Wend. 591 (1840), and § 624, *infra.*

[2] Durkee *v.* People, 155 Ill. 354 (1895).

[3] See § 593, *supra.*

[4] A bank may have directors though the statute does not provide for them. All private corporations may have directors. Hurlbut *v.* Marshall, 62 Wis. 590 (1885). "The power inheres in the corporation to hold an election," where the charter or statutes are silent. Wright *v.* Commonwealth, 109 Pa. St. 560 (1885). "The power of electing both officers and members is an incident to every corporation. It is not necessary that such a power should be expressly conferred by the charter." Commonwealth *v.* Gill, 3 Whart. (Pa.) 228, 247 (1837). Authority in a charter to a cemetery corporation to do all things incident to a corporation does not give power to issue stock, and hence an election by so-called stockholders is not legal. Cooke *v.* Marshall, 196 Pa. St. 200 (1900).

ber of directors;[1] but it cannot deprive the members of the corporation of the privilege of electing its directors.[2]

Although the corporation is not a going concern, nevertheless it may have an election of directors.[3]

§ 604. *The meeting must be held at the prescribed hour, which must be reasonable.*— The particular time at which corporate meetings shall be held is often prescribed in the charter or a statute or in the by-laws of the corporation. When not so prescribed it is fixed by the officers who call together the corporate meeting. But, in whatever way it is decided upon, the meeting must be convened at the time decided upon, or within a reasonable time thereafter.[4] Accordingly if a meeting is convened before the hour at which it is called and business is transacted, the proceedings will be invalid.[5]

[1] Mower *v.* Staples, 32 Minn. 284 (1884). See also Gray *v.* Coffin, 63 Mass. 192 (1852); Longley *v.* Little, 26 Me. 162 (1846); Payson *v.* Withers, 5 Biss. 269 (1873); s. c., 19 Fed. Cas. 29; Joy *v.* Jackson, etc. Co., 11 Mich. 155 (1863); Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820); Greenville, etc. R. R. *v.* Johnson, 8 Baxt. (Tenn.) 332 (1874); Fall River Iron Works *v.* Old Colony, etc. R. R., 87 Mass. 221 (1862). See also §§ 499, 500, *supra.*

[2] The legislature cannot arbitrarily name and appoint trustees of an educational corporation, the charter providing that vacancies shall be filled by the remaining trustees. Sheriff *v.* Lowndes, 16 Md. 357 (1860). It cannot give to the city of Louisville the power to elect the trustees of the University of Louisville, an educational corporation. Louisville *v.* President, etc., 15 B. Mon. (Ky.) 642 (1855). It cannot vest the government of an incorporated academy in a new board of trustees. Norris *v.* Trustees, etc., 7 Gill & J. (Md.) 7 (1834). Under the reserved power to amend or repeal a charter, the legislature may amend the charter of an agricultural college which has private stockholders, but to which the state contributes funds, so that, instead of the state having four directors out of eleven, the state shall have seven out of twelve. Jackson *v.* Walsh, 75 Md. 304 (1892). But see Sage *v.* Dillard, 15 B. Mon. (Ky.) 340, 357 (1854), and §§ 500, 501, notes, *supra.;* 67 N. E. Rep. 207.

[3] Beardsley *v.* Johnson, 121 N. Y. 224 (1890).

[4] Where a meeting was held by a minority of the stockholders several hours after the time fixed in the notice, and an adjournment made until the following day, at which adjourned meeting, without the knowledge of the other members, an election was held, the election was unfair and invalid. State *v.* Bonnell, 35 Ohio St. 10 (1878). But a delay of an hour and five minutes after the time specified in the notice is not, as a matter of law, an unreasonable delay which will vitiate the proceedings. South School District *v.* Blakeslee, 13 Conn. 227, 235 (1839). The court will not sustain an election where the majority were given to understand that the election would go over to a later hour in the day, even though no formal adjournment was had. State *v.* Smalley, 7 Ohio C. C. 400 (1893).

[5] So, where a meeting was called for twelve o'clock, but was called to order and organized fifteen minutes before twelve, it was held to be a surprise and a fraud upon such of the stockholders as were not actually present at that hour, and that in consequence the proceedings were irregular and void. People *v.* Albany, etc. R. R., 55 Barb. 344

A meeting called to order at sun time and then postponed to standard time, before any proceedings are had, is legal.[1]

Frequently the particular office or place for meeting within the state is specified in the charter or by-laws of the corporation. In that event a meeting held at a different place will be irregular, and the proceedings at such a meeting void and ineffectual, if objected to.[2]

§ 605. *Inspectors of election — Conducting and closing elections.* Ordinarily a chairman and inspectors of election are elected or appointed by the stockholders.[3] The presiding officer at a stockholders' meeting need not be a stockholder,[4] and he need not be elected with any particular formality.[5]

The inspectors of election need not be stockholders.[6] If inspect-

(1869). Where commissioners, after calling a meeting of subscribers, ordered the election postponed, but the subscribers nevertheless refused to postpone and proceeded with the election, the election is not void, unless, in the opinion of the court, a postponement was clearly necessary. Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834). *Quære,* in this case, whether the election might not have been avoided if any considerable number of the stockholders were deprived of their election franchise by the failure to postpone. See also § 605, *infra.*

[1] Proctor, etc. Co. *v.* Finley, 98 Ky. 405 (1895).

[2] Where the customary place of meeting of a corporation is abandoned, and a new place fixed upon in a regular and lawful manner, a meeting at the old place is irregular, and the proceedings at such a meeting are invalid. Miller *v.* English, 21 N. J. L. 317 (1848). The meeting must be held at the usual place. American Primitive Soc. *v.* Pilling, 24 N. J. L. 653 (1855). *Cf.* McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850), holding that a meeting at a residence is good, if all assent, even though the statute requires the meetings to be at the counting-room of the company.

[3] Where the statutes give each share a vote, a by-law of the directors, prescribing who shall preside and pass upon the qualification of voters at the annual meeting, will not be presumed to be in violation of the statute, the directors having power to make the by-laws. Hence, an injunction will not be granted at the instance of a stockholder against the by-law being carried out. Mitchell *v.* Colorado, etc. Co., 117 Fed. Rep. 723 (1902). The same transaction was involved in Bartlett *v.* Gates, 118 Fed. Rep. 66, and a different conclusion was reached.

[4] Stebbins *v.* Merritt, 64 Mass. 27 (1852).

[5] Acquiescence in a person's assuming to act as chairman of a stockholders' meeting validates his acting as such. *Re* Argus Printing Co., 1 N. D. 434 (1891).

[6] People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869), holding also that, although an inspector is required by by-law to be a stockholder, yet the election of one who is not a stockholder is voidable and not void. An inspector may be a candidate for directorship. *Ex parte* Willcocks, 7 Cow. 402 (1827). A stockholder may be an inspector, but it is better to have an outside disinterested person. Dickson *v.* McMurray, 28 Grant's Ch. Rep. (Can.) 533 (1881). Where the scrutineers or inspectors are also candidates for election as directors, and they pass upon an instrument which affects the right to vote a majority of the stock, such stock being in

ors are provided for by the charter, and they do not act or are enjoined from acting, the stockholders may appoint others to take their place.[1] The duties of the inspectors are ministerial and not judicial. Their discretion and powers of investigation are very limited.[2] Even though by the by-laws the decision of the inspectors of election is made final and conclusive, yet their decision may be attacked for fraud in rejecting proxies.[3] The exclusion of a vote at an election may be upheld by the court on grounds different from those given at the election itself.[4]

A requirement that the election shall be by ballot does not invalidate an election by show of hand if no one objects.[5] Where a ballot contains the names of both candidates, one in print and one in writing, it is defective and is not counted for either candidate.[6] After the ballot has been counted and announced, it is too late to permit the ballot to be opened to receive the votes of any who have not voted.[7]

Where no time is specified by law during which the polls must be kept open, it rests within the sound discretion of the inspectors to say when the polls shall close.[8] So also it is held that holding the polls open after the hour specified in the notice for them to close will not, where the inspectors exercise a reasonable discretion, invalidate an election.[9] Failure to file in the office of the

the name of another person, but they claiming the right as beneficial owners to vote it, their decision practically controls the election, and if they decide in their own favor the court may set the election aside. Dickson *v.* McMurray, 28 Grant's Ch. Rep. (Can.) 533 (1881).

[1] People *v.* Albany, etc. R. R., 55 Barb. 344, 357 (1869). See also *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866). The failure of the inspector so appointed to take the prescribed oath will not invalidate the election. *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839). Where by statute an election is to be conducted by "inspectors," one inspector is insufficient. *Re* Lighthall, etc. Co., 47 Hun, 258 (1888); but see N. Y. L. J., June 29, 1889.

[2] See § 611, *infra; Re* Mohawk, etc. R. R., 19 Wend. 135 (1838). The office of the inspectors is ministerial rather than judicial. Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29 (1817). Inspectors at elections having once accepted a vote and declared the result cannot then reject it and declare a different result. Hartt *v.* Harvey, 32 Barb. 55 (1860).

[3] Triesler *v.* Wilson, 89 Md. 169 (1899).

[4] Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

[5] Christ Church *v.* Pope, 74 Mass. 140 (1857). It is not necessary that the voting be by ballot, even though the statute so prescribes. San Joaquin Land, etc. Co. *v.* Beecher, 101 Cal. 70 (1894).

[6] People *v.* Pangburn, 3 N. Y. App. Div. 456 (1896).

[7] Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893).

[8] *Re* Chenango County Ins. Co., 19 Wend. 634 (1839).

[9] *Re* Mohawk & Hudson R. R., 19 Wend. 135 (1838). An election is not vitiated by the fact that the polls are kept open after the designated hour and votes received. Rudolph *v.* South-

county clerk the oath of the inspectors of election, as required by statute, does not invalidate the election.[1]

§ 606. *Conducting and closing meetings generally — Irregularities and informalities — Minutes of meeting.*— The form or mode of conducting an election is in general not material, provided it violates no positive provision of the charter or of a statute regulating it, is orderly and in good faith, and is conducted by authorized or proper persons.[2] And as a general rule of law, where, in the election of corporate officers, no particular mode of proceeding is prescribed by law, if the wishes of the stockholders have been fairly expressed, and the election was conducted in good faith, it will not be set aside on account of any informality in the manner of conducting it.[3]

In the transaction of the business of a corporation the motions should be put in an intelligible way and then voted upon.[4] Nevertheless, even though no formal resolutions are passed or record made, yet if all the stockholders and directors are present, and it is agreed that certain things shall be done, this may bind the corporation.[5]

The parliamentary usages are the same as in other bodies, and mere irregularities in the manner of conducting the business are immaterial if the sense of the meeting has been fairly expressed.[6]

ern, etc. League, 23 Abb. N. Cas. 199 (1889); People *v.* Albany, etc. R. R., 55 Barb. 344, 356, 360 (1869).

[1] Union, etc. Bank *v.* Scott, 53 N. Y. App. Div. 65 (1900).

[2] Fox *v.* Allensville, etc. Turnp. Co., 46 Ind. 31 (1874).

[3] Philips *v.* Wickham, 1 Paige, 590 (1829). Quoted and approved in Titusville, etc. Dissolution, 8 Pa. Sup. Ct. 304, 309 (1898).

[4] A general understanding or assent or want of dissent is not equivalent to a question being put and voted upon. The statement by a minister of what salary he wished and the failure of members to object is not a sufficient expression of the meeting. Landers *v.* Frank, etc. Church, 114 N. Y. 626 (1889).

[5] Burke *v.* Sidra Bay Co., 92 N. W. Rep. 568 (Wis. 1902), where it was agreed that a stockholder should loan money to the company. The stockholders may agree among themselves informally to distribute a certain sum as dividends without going through the form of corporate action. No formal declaration is necessary either by the stockholders or board of directors, and a distribution of profits by unanimous consent without corporate action is legal. Groh's Sons *v.* Groh, 80 N. Y. App. Div. 85 (1903). See also § 714, *infra.*

[6] Philips *v.* Wickham, 1 Paige, 590 (1829); *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866); Downing *v.* Potts, 23 N. J. L. 66 (1851), in which it was held that non-compliance with a statute requiring a list of stockholders entitled to vote to be made out ten days before an election will not of itself make void an election, such provision being only directory. A motion may be put by the chairman, although it has neither been made nor seconded. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879). Although the meeting has voted down two motions to make calls, it may then pass another motion for a larger one. *Re*

After the meeting is organized the majority cannot withdraw and organize another meeting.[1] Where a part of the stockholders secede from the meeting, and hold another on the pretext of disorder, but in fact by reason of a previously devised plan, the election by the seceders is not legal.[2] The chairman cannot adjourn a meeting against the will of the stockholders. The stockholders may proceed to hold the meeting without him.[3]

Where the chairman refuses to entertain an amendment, the party proposing it need not object to the ruling or leave the meeting, and even though he then votes against the main question, he does not waive his right to object to the resolution as passed.[4] Although the chairman declares a resolution duly carried, yet the court may review his decision.[5] Where the chairman refuses to poll the vote

British, etc. Co., 3 Kay & J. 408 (1857). In England, by statute, any five stockholders may demand a poll. *Re* Phœnix, etc. Co., 48 L. T. Rep. 260 (1883); Hurrell & Hyde, Directors and Officers, 78. In general, see also Gorham *v.* Campbell, 2 Cal. 135 (1852); Hardenburgh *v.* Farmers', etc. Bank, 3 N. J. Eq. 68 (1834); People *v.* Peck, 11 Wend. 604 (1834). See also § 605, *supra*. In State *v.* Pettineli, 10 Nev. 141 (1875), the court held that an election was illegal where there was no presiding officer and no inspectors. Although the notice of a special stockholders' meeting states that the resolution will be presented and passed upon, to give to each share one vote, provided such share has been held by the party for six months prior to an election, an amendment proposed at the meeting striking out the latter part of the resolution must be considered and put to a vote by the chairman. Henderson *v.* Bank of Australasia, L. R. 45 Ch. D. 330 (1890). A provision in the charter to the effect that the rights of preferred stockholders may be modified by a three-fourths vote in interest at a meeting of the preferred stockholders only, is strictly construed, and where the statute provides for the mode of holding such meeting the procedure must be strictly observed. Hemans *v.* Hotchkiss, etc. Co., [1899] 1 Ch. 115. Where a voluntary unincorporated association has no constitution or by-laws or rules, the conduct of its meetings may be in accordance with the ordinary parliamentary rules of deliberative assemblies. Ostrom *v* Greene, 161 N. Y. 353 (1900).

1 *Re* Argus Printing Co., 1 N. D. 434 (1891).

2 Langdon *v.* Patterson, 158 Pa. St. 476 (1893).

3 State *v.* Cronan, 23 Nev. 437 (1897), holding also that if the president illegally adjourns the meeting and excludes the stockholders from the room, they may adjourn to another room and hold the meeting. 67 N. E. Rep. 17.

4 Henderson *v.* Bank of Australasia, 45 Ch. D. 330 (1890), reversing the court below. Where a special meeting is called, under the English statutes, to confirm or reject a resolution that had been adopted by a previous meeting, no amendment is in order. Wall *v.* London, etc. Corporation, [1898] 2 Ch. 469.

5 Young *v.* South African, etc. Synd., [1896] 2 Ch. 268. In England by statute the decision of the chairman as to a vote is conclusive, unless shown to be fraudulent. Wall *v.* London, etc. Corporation, [1899] 1 Ch. 550. Where the chairman declares a motion carried and there is no demand to poll the votes, the court will not inquire into the question of whether it was carried. Arnot *v.* United, etc. Lands, [1901] 1 Ch. 518. A decision of the chair as to whether a vote was carried or not is not binding

and declares the meeting adjourned, the courts will not necessarily interfere.[1] If any fraud, surprise, or deceit has been practiced in conducting the meeting a different rule prevails.[2] There should be applied to stockholders' meetings the rule in directors' meetings that the majority cannot exclude the minority from being heard, by delegating power to a committee; and "even if the minority had a voice given to them, still, if there existed a combination among the majority, before that voice was heard, to overbear it," the acts of such a body would be illegal.[3] The chairman may terminate the discussion after a reasonable time when the majority vote so to do.[4] The right to object to an informality may be waived, and a failure upon the part of those members not present to protest promptly, upon learning of the informality, is a waiver.[5] The presumption is that all proceedings were regular and lawful.[6] The minutes of a meeting duly signed are the best evidence of what the meeting did.[7] Where no written minutes are kept of the proceed-

where on the face of his statement his conclusion was incorrect. *Re* Caratal Mines, 87 L. T. Rep. 437 (1902).

[1] The courts will not interfere although the chairman of the meeting refused to poll the vote on a motion to adjourn, but declared the meeting adjourned on a *viva voce* vote and left. In regard to the right to be heard the court refused to sustain a bill "for the purpose of enabling one particular member of the company to have an opportunity of expressing his opinion *viva voce* at a meeting of the shareholders." MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875); National Dwellings Soc. *v.* Sykes, [1894] 3 Ch. 159.

[2] Johnston *v.* Jones, 23 N. J. Eq. 216 (1872); People *v.* Albany, etc. R. R., 55 Barb. 344 (1869); State *v.* Pettineli, 10 Nev. 141 (1875); Commonwealth *v.* Woelper, 3 Serg. & R. (Pa.) 29 (1817). See also §§ 596, 604, 605, *supra.*

[3] Great Western Ry. *v.* Rushout, 5 De G. & Sm. 290, 310 (1852). *Cf.* McDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875).

[4] Wall *v.* London, etc. Corporation, [1898] 2 Ch. 469.

[5] State *v.* Lehre, 7 Rich. L. (S. C.) 234, 325 (1854); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); Rex *v.* Trevenen, 2 B. & Ald. 339 (1819). Stockholders who receive reports of what takes place at meetings, and who do not object to what is being done, will be considered as acquiescing therein if what is done might have been validly sanctioned by them if present; but not if what is done is altogether illegal, and beyond the power of even all the stockholders. See *Re* Phœnix Life Ass. Co., 2 J. & H. 441 (1862); Irvine *v.* Union Bank of Australia, L. R. 2 App. Cas. 366 (1877). Compare Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868); Spackman *v.* Evans, L. R. 3 H. L. 171 (1868); Houldsworth *v.* Evans, L. R. 3 H. L. 263 (1868); Phosphate of Lime Co. *v.* Green, L. R. 7 C. P. 43 (1871). See also § 607, *infra.* A ratification by the stockholders of directors' acts cannot be made by a general resolution ratifying "all of the acts of the officers." Farmers' L. & T. Co. *v.* San Diego, etc. St. Ry., 45 Fed. Rep. 518 (1891).

[6] Blanchard *v.* Dow, 32 Me. 557 (1851), where it was presumed that the election was by ballot; Ashtabula, etc. R. R. *v.* Smith, 15 Ohio St. 328 (1864), where it was presumed that the requisite amount of stock was subscribed before the election took place. See also §§ 599, 600, *supra.*

[7] Harrison *v.* Morton, 83 Md. 456 (1896). See also § 714, *infra.* The failure of in-

ings of stockholders they may be proved by parol.[1] Although the record does not show that certain stock was voted, yet it may be proved by parol evidence that it was voted.[2] In a meeting called to affirm the action of a prior meeting, such action may be affirmed in part and rejected in part.[3] Stockholders may at a meeting called for that purpose amend the by-laws so as to increase the number of directors, and may elect such additional directors.[4]

§ 607. *The quorum — A majority of the stockholders attending a meeting may transact business.* — The right of the majority to rule in the management of the affairs of a private corporation is fully established.[5] They may control the company's business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services as agents.[6]

corporators or stockholders to make a record of their proceedings at that time does not invalidate their action. Benbow *v.* Cook, 20 S. E. Rep. 453 (N. C. 1894). The corporate minutes may be signed after the meeting has been held. Miles *v.* Bough, 3 Q. B. 845 (1842); Southampton, etc. Co. *v.* Richards, 1 M. & Gr. 448 (1840); Lindley, Partn. 551. Concerning the mode of proving the corporate minutes, see § 714, *infra.*

[1] Birmingham, etc. Co. *v.* Birmingham Traction Co., 128 Ala. 110 (1900). A by-law may be proved by oral evidence where there was no written entry of the same in the corporate records. Masonic, etc. Assoc. *v.* Severson, 71 Conn. 719 (1899).

[2] Franklin T. Co. *v.* Rutherford, etc. Co., 57 N. J. Eq. 42 (1898).

[3] *Re* Trench, etc. Co., Ltd., [1900] 1 Ch. 408.

[4] *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899).

[5] Durfee *v.* Old Colony, etc. R. R., 87 Mass. 230 (1862); Covington *v.* Covington, etc. Bridge Co., 10 Bush (Ky.), 69, 76 (1873); East Tennessee, etc. R. R. *v.* Gammon, 5 Sneed (Tenn.), 567 (1859); McBride *v.* Porter, 17 Iowa, 203 (1864); Faulds *v.* Yates. 57 Ill. 416 (1870); Leo *v.* Union Pacific R. R., 19 Fed. Rep. 283 (1884); S. C., 17 Fed. Rep. 273 (1883); Barnes *v.* Brown, 80 N. Y. 527 (1880); Gifford *v.* New Jersey R. R., 10 N. J. Eq. 171 (1854); Dudley *v.* Kentucky High School, 9 Bush (Ky.), 576 (1873). See also Livingstone *v.* Lynch, 4 Johns. Ch. 573 (1820), in which Chancellor Kent clearly states that the right of the majority to rule is one of the chief differences between a corporation and a partnership. The majority rule at common law. Commonwealth *v.* Nickerson, 10 Phila. (Pa.) 55 (1875); New Orleans, etc. R. R. *v.* Harris, 27 Miss. 517, 537 (1854). A majority of the stockholders control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business, even though the management may not seem to be wise. The majority rule. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892). Where a statute requires a three-fourths vote in value for a reorganization of a company, the stock not voted is not counted to make up the three-fourths, even though the trustees who represent the stock refuse to assent or dissent. *Re* Neath, etc. Ry., [1892] 1 Ch. 349. Where stockholders in an apartment-house corporation are entitled to rent apartments at a rental to be fixed by a majority vote of the stockholders, an increased rental so voted is legal. The by-laws providing for such a vote override a general statement in a prospectus to the contrary, the stockholders knowing of the by-law. Compton *v.* Chelsea, 128 N. Y. 537 (1891).

[6] Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883); S. C. *sub nom.* Winthrop

The question has arisen whether a meeting can be held and business transacted when a majority in interest of the stockholders are not present. But the law is clear that those stockholders who attend a duly-called stockholders' meeting may transact the business of that meeting, although a majority in interest or in number of the stockholders are not present.[1] Where by statute the quorum is to be a majority of the stockholders, this means a majority in interest.[2]

Of those who attend the stockholders' meeting a majority rule. Their acts are as valid as though they constituted a majority of all the stockholders, or constituted a majority at a meeting in which a majority of the stockholders were present.[3] The presumption always is that a legal majority voted for any act or proceeding that appears to have been passed.[4]

Iron Co. *v.* Meeker, 109 U. S. 180 (1883). *Cf.* § 662, *infra.*

[1] Those of the stockholders who attend the meeting constitute a quorum, although they are a minority. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893); Granger *v.* Grubb, 7 Phila. 350 (1870); Craig *v.* First, etc. Church, 88 Pa. St. 42 (1878), where the principle is laid down that this is the rule for a meeting composed of an indefinite number of persons, like stockholders, but that where a definite number is involved, as in a board of directors, then a majority must be present. Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); S. C., 4 Fed. Cas. 420; Field *v.* Field, 9 Wend. 394 (1832); Gowen's Appeal, 10 W. N. Cas. 85 (Pa. 1880); Madison Ave. Bapt. Church *v.* Oliver St. Bapt. Church, 5 Robt. (N. Y.) 649 (1867); Everett *v.* Smith, 22 Minn. 53 (1875). As to the rule concerning directors, see § 713*a*, *infra.* It has been held that one person cannot constitute a quorum; that at least two members are necessary to make a corporate meeting. Sharpe *v.* Dawes, 2 Q. B. D. 26 (1876). In this case one stockholder "met," did all necessary business, and then voted himself a vote of thanks. In *Re* Sanitary Carbon Co., 12 W. N., p. 223 (1877), where one stockholder, having also proxies of the remaining three stockholders, held a meeting, "voted himself into the chair, proposed a resolution to wind up voluntarily, declared the resolution passed, and appointed a liquidator," the court reluctantly followed the preceding case and declared the "meeting" invalid. In the case of Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court stated that it was open to question as to whether a majority of all the members in an unincorporated association was necessary in order to constitute a quorum.

[2] Weinburgh *v.* Union, etc. Co., 55 N. J. Eq. 640 (1897). A by-law that states a quorum shall be one-third of the stockholders holding one-third of the shares of stock refers to stock issued and not to the authorized capital stock. Castner *v.* Twitchell, etc. Co., 91 Me. 524 (1898).

[3] Austin Min. Co. *v.* Gemmel, 10 Ont. Rep. (Can.) 696 (1886); Columbia, etc. Co. *v.* Meier, 39 Mo. 53 (1866), and same cases as in the preceding notes; Gowen's Appeal, 10 W. N. Cas. 85 (1881). Such of the stockholders as attend a duly called stockholders' meeting constitute a quorum, and a majority of that quorum control the meeting. *Re* Rapid, etc. Co., 15 N. Y. App. Div. 530 (1897).

[4] Citizens' Mutual, etc. Ins. Co. *v.* Sortwell, 90 Mass. 217 (1864).

Two important limitations and exceptions to the above principles are to be borne carefully in mind.

First, the majority cannot bind the minority to submit to an act by the corporation where such act is beyond the express and implied powers of the corporation as given to it by its charter. Such an act is *ultra vires*. A large amount of litigation has arisen from the attempt of the majority to carry out *ultra vires* acts. The minority may object, and even a single stockholder may have the *ultra vires* act enjoined or set aside.[1] The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done.[2]

The second exception arises where the legislature amends the charter of the corporation, and the majority of the stockholders attempt to accept that amendment and act upon it. In such a case, if the amendment materially changes the scope and purpose of the enterprise, the minority may object and may prevent the acceptance of the amendment.[3]

The question of how far the majority rule when that majority are interested in a contract which the corporation has made, and which is being passed upon by a stockholders' meeting, is considered elsewhere.[4]

§ 608. *The majority of votes cast constitutes an election.*—It is the well-settled rule in corporations having a capital stock divided into shares that a majority of the votes cast at an election constitutes any election.[5] And this majority, moreover, need not be an actual numerical majority of all the votes represented at the meeting, but only a majority of the votes cast.[6] Accordingly, a majority of the votes cast will elect, even though a majority of the shares of stock are not voted at all, and even though the owners are present at the meeting and refuse to vote.[7]

[1] This subject is fully treated in Part IV, *infra*.

[2] McFadden *v.* Leeka, 48 Ohio St. 513 (1891). Where the stockholders consent to the company buying property owned by one of the directors, a stockholder who was present and did not object cannot complain. Steinway *v.* Steinway, 2 N. Y. App. Div. 301 (1896); aff'd, 157 N. Y. 710, and in 163 N. Y. 183.

[3] See ch. XXVIII, *supra*.

[4] See ch. XXXIX, *infra*.

[5] People *v.* Albany, etc. R. R., 55 Barb. 344, 368 (1869); State *v.* Fagan, 42 Conn. 32 (1875), a municipal corporation case. See also § 607, *supra*.

[6] See § 607, *supra;* Craig *v.* First Pres. Church, 88 Pa. St. 42 (1878); *Re* Union Ins. Co., 22 Wend. 591 (1840), holding also that a plurality elects. At a municipal corporation meeting only those who vote are counted. Persons not voting at all are not counted. Smith *v.* Proctor, 130 N. Y. 319 (1891). In regard to voting in church elections in New York, see People *v.* Keese, 27 Hun, 483 (1882).

[7] Gowen's Appeal, 10 W. N. Cas. 85

Although less than the full number of directors to be elected receive a majority or plurality, yet those receiving such majority or plurality are elected, and another ballot or election may be had to elect the remainder.[1] Not only in the elections, but in voting on any other subject, the majority controls, unless there is a statutory provision to the contrary.[2]

(1881), where the supreme court held that "those who voluntarily absent themselves from a meeting duly called for an election must recognize the validity of the election regularly made by those who do attend." The question was whether an election held by a meeting of railroad stockholders at which a majority of all votes was not cast could be considered valid. State *v.* Green, 37 Ohio St. 227 (1881), was a case of election of clerk by a city council, and it was held that, all being present and engaged in holding the election, half the members may not defeat an election by refusing to vote and then objecting because a quorum had not voted. Commonwealth *v.* Wickersham, 66 Pa. St. 134 (1870), involved the election of a county school superintendent, which was required to be "*viva voce* by a majority of the whole number of directors present." A person receiving exactly half that number could not be declared elected, although one director refused to vote on the last ballot. "He remained, and being present, was entitled to be counted." The legal intendment [of his action] was that he voted for neither or for the minority candidate." But, under a by-law requiring a majority of the stock to be present, it has been held that the majority must be a majority of the whole stock, and not merely of the stock subscribed for. Ellsworth, etc. Co. *v.* Faunce, 79 Me. 440 (1887). If the statute requires a majority of the directors to elect a director or president, one who is present but does not vote must be counted. People *v.* Conklin, 7 Hun, 188 (1876). See also § 713*a*, *infra*, on this point. Stockholders may vote for less than the whole number of directors to be elected. Vandeburgh *v.* Broadway Ry., 29 Hun, 348 (1883). But where a meeting was called to elect three directors and a majority of the stockholders voted for five directors, only a small minority voting for three, the latter votes were held the only valid ones, and the three voted for were declared elected. State *v.* Thompson, 27 Mo. 365, 369 (1858). Where twenty-three directors are to be elected, a vote electing twenty-two is effectual to elect those twenty-two. A new election may be held to elect the remaining one. *Re* Union Ins. Co., 22 Wend. 591 (1840). This case holds also that a plurality is sufficient to elect.

[1] *Re* Union Ins. Co., 22 Wend. 591 (1840). Less than the full board may be elected. The old board goes out, however, and none of them hold over. People *v.* Fleming, 59 Hun, 518 (1891). Where five candidates receive a plurality and three others receive a less number, but the latter are a tie, the board being seven, the five are duly elected and may act as a board, even though no second ballot has been taken to vote off the tie. Wright *v.* Commonwealth, 109 Pa. St. 560 (1885). Where at an election four persons received the necessary votes, they will be elected directors, although the whole number of directors to be elected is seven. A subsequent election cannot elect the whole seven, but can elect only the remaining three. Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893). See also § 620, *infra*.

[2] See § 684, *infra*, and ch. XXVIII, *supra*. A consolidation under the Georgia statute need not be approved by every stockholder. A majority vote is sufficient. Dady *v.* Georgia, etc. Ry., 112 Fed. Rep. 838 (1900). A committee

§ 609. *Is every share of stock entitled to one vote?* — At common law, in public or municipal corporations, each qualified elector has one vote, and only one. This was a natural rule, since each duly-qualified citizen voted as a citizen and not as the holder of stock. But the same rule should not apply to private corporations. Stockholders are interested not equally, but in proportion to the number of shares held by them. Naturally and reasonably each share should be entitied to one vote. It has been held, however, that at common law each stockholder had but one vote, irrespective of the mumber of shares held by him.[1] Where the statutes are silent on the subject, a by-law may give to each shareholder one vote for each share up to ten, and may fix the proportion of votes which he may cast in excess of that number.[2]

Generally the charter or statutes prescribe that each share of stock shall be entitled to one vote.[3] And a statutory or charter provision to this effect applies not only to elections, but also to all other questions that may come before the stockholders' meetings.[4] An election to be held by a "majority of stockholders" means a majority in interest.[5] A stock vote need not be taken unless called for.[6] And although each voter is given one vote, when in fact

of arbitration may act by a majority vote unless the agreement provides otherwise. The resignation of one member just before the award is made does not invalidate the award. Republic of Colombia *v.* Cauca Co., 106 Fed. Rep. 337 (1901).

[1] Taylor *v.* Griswold, 14 N. J. L. 222 (1834), declaring that a by-law to the contrary is void. This decision in the latter respect is wrong, and in the former respect is unfortunate. At common law stockholders voted by show of hands, and a large stockholder had no greater vote than a small one. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879). Stockholders each have one vote; not even a special provision in the articles filed under a general act can change this rule. Commonwealth *v.* Nickerson, 10 Phila. (Pa.) 55 (1873). For an interesting statement of the origin of the practice of giving each stockholder one vote only, and of the gradual changes made in the rule, see Harvard Law Rev., Nov., 1888, p. 156. See § 621, *infra.*

[2] Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A by-law may authorize one vote for each share of stock, and a provision to this effect allows such vote on all questions. Proctor, etc. Co. *v.* Finley, 98 Ky. 405 (1895), approving the text above.

[3] Hays *v.* Commonwealth, 82 Pa. St. 518 (1876). Where, by statute, two-thirds of the stockholders are authorized to do an act, this is construed to mean two-thirds of the stock — at least long acquiescence therein has that effect. Fredericks *v.* Pennsylvania Canal Co., 109 Pa. St. 50 (1885).

[4] *Re* Rochester, etc. Co., 40 Hun, 172 (1886), construing a statute which is applicable to all New York corporations.

[5] Weinburgh *v.* Union, etc. Co., 55 N. J. Eq. 640 (1897).

[6] Jones *v.* Concord, etc. R. R., 67 N. H. 234 (1892). Even if, on a poll demanded by five members, each share has one vote, yet until such poll is demanded voting is by show of hands. *Re* Horbury, etc. Co., L. R. 11 Ch. D. 109 (1879).

each share of stock is entitled to one vote, yet if for eight months the stockholders acquiesce in the election, the court will not by *mandamus* order a new election.[1]

§ 609*a*. *Cumulative voting.*— In the constitutions of several of the states there are provisions for enabling a minority in interest of the stockholders to elect a minority of the directors. This is effected by what is known as a system of cumulative voting. By it each stockholder is entitled to as many votes for directors as equal the number of shares he owns multiplied by the number of directors to be elected. Thus, if there are six directors to be elected, a stockholder who owns one hundred shares may poll six hundred votes, and these votes he may give entirely to one or two or more of the six candidates, as he may see fit. In this way any minority of the stockholders owning one-sixth of the stock, acting together, may elect one member of a board of six directors, and thus secure a representation in that body. A larger minority might secure the election of two members of such a board, the possibility of increasing the minority representation increasing as the minority increases, without it ever becoming possible for a minority, upon a full vote, to secure more than its equitable proportion of the whole board of directors. The larger the number of directors the smaller would be the minority which would be able to elect one member of the board; and the larger the minority the greater the representation possible to be secured.[2] Constitutional or statutory provisions which are designed to secure such a minority representation are found in California, Pennsylvania, Illinois, West Virginia, Missouri, Nebraska, Michigan, Kansas, Idaho, Kentucky, Mississippi, Montana, North Dakota, and South Dakota.[3] These

[1] *Re* Moore, etc. Co., 14 Q. B. Rep. (Can.) 365 (1856).

[2] Cumulative voting given by the constitution is an absolute right, and does not require notice of the intent to so vote, nor any by-laws, to give it efficacy. By this provision, "if there are six directors to be elected, the single shareholder has six votes, and, contrary to the old rule, he may cast these six votes for a single one of the candidates, or he may distribute them to two or more of such candidates, as he may think proper. He may cast two ballots for each of three of the proposed directors,— three for two, or two for one, and one each for four others; or finally, he may cast one vote for each of the six candidates." Pierce *v.* Commonwealth, 104 Pa. St. 150 (1883).

[3] The Pennsylvania provision is construed in Wright *v.* Commonwealth, 109 Pa. St. 560 (1885), holding that part of the directors so elected by a plurality and declared elected may act, although the remaining directors are not elected by reason of the vote as to them being a tie. See also Commonwealth *v.* Lintsman, 6 Pittsb. L. J. (N. S.) 122 (1875). Cumulation of votes was upheld in Commonwealth *v.* Yetter, 190 Pa. St. 488 (1899), a case where a school was incorporated as a joint-stock corporation. The Ohio statute prescribing that "each share shall entitle the owner to as many votes as there are directors

provisions, if designed to be retroactive, have been held unconstitutional and void. They can only apply to corporations chartered after their enactment. So far as they concern corporations chartered before the adoption of such a constitutional provision they impair the obligation of the contract between the corporation, the stockholders, and the state, and infringe the vested rights of the stockholders.[1] But, under its reserved power to alter, amend, or repeal a charter the legislature may allow cumulative voting.[2] A

to be elected" does not authorize cumulative voting. State *v.* Stockley, 45 Ohio St. 304 (1887). The Ohio statute of 1898 provides for cumulative voting. Schwartz *v.* State, 61 Ohio St. 497 (1900). Where cumulative voting prevails, and the statutes require three directors to be residents, and all the votes are cumulated on non-residents excepting thirty-two which are cast for three residents, the three residents are elected, and the remaining directors are those of the non-residents who received the highest number of votes. Horton *v.* Wilder, 48 Kan. 222 (1892). In Wright *v.* Central Cal. etc. Co., 67 Cal. 532 (1885), the court said that this provision conferred "upon the individual stockholder, entitled to vote at an election, the right to cast all the votes which his stock represents, multiplied by the number of directors to be elected, for a single candidate, should he think proper to do so, . . . or by distributing them, upon the same principle, among as many candidates for directors as he shall think fit." The court held also that this constitutional right as to voting could not be changed by a resolution of the directors.

[1] State *v.* Greer, 78 Mo. 188 (1883); Hays *v.* Commonwealth, 82 Pa. St. 518 (1876); Baker's Appeal, 109 Pa. St. 461 (1885). See also, on this subject, ch. XXVIII, *supra*. Upon the question of the constitutionality of statutes providing for minority representation or cumulative voting in the election of public officers, a matter germane to the present subject, see People *v.* Kenney, 96 N. Y. 294 (1884); People *v.* Crissey, 91 N. Y. 616 (1883); State *v.* Constantine, 42 Ohio St. 437 (1884). In Loewenthal *v.* Rubber Reclaiming Co., 52 N. J. Eq. 440 (1894), the court held that the original by-laws constituted a contract between the stockholders, and that a by-law providing for cumulative voting could not be repealed. In Michigan it has been decided that a statute providing for the cumulative plan of voting at public elections is unconstitutional. Maynard *v.* Board, etc., 84 Mich. 228 (1890).

[2] Under the reserved right of the legislature to alter or amend a charter, the legislature may pass a statute allowing stockholders to cumulate their votes in elections, thus enabling minority stockholders to elect a minority of the board of directors. Looker *v.* Maynard, 179 U. S. 46 (1900). Where by statute the state retains power to amend charters subsequently granted, a subsequent constitutional provision for cumulative voting applies to all such corporations, whether organized by special charter or under the general act, and does not impair the validity of a contract. So also where a corporation amends its charter under an act providing for cumulative voting, such cumulative voting applies to it. Gregg *v.* Granby, etc. Co., 164 Mo. 616 (1901). The legislature has no power to amend the charter so as to allow cumulative voting, even though in the original charter the legislature reserved the right to alter, amend, or repeal. Such reserved right is only for matters which concern the public. *In re* Election Newark Assoc., etc., 64 N. J. L. 217 (1899); Attorney-

statute giving the right to cumulate votes does not apply to corporations then existing, even though such corporations accept the benefits of subsequent statutes, such statutes not imposing any conditions.[1] There are certain dangers about this mode of voting, and an unwary majority may find that a smart minority has deprived the majority of the control.[2] And where, in cumulating votes, the voter spreads his votes over so many persons that none of those particular persons are elected, he cannot have the election set aside on the ground that by cumulating on a less number of persons he can certainly elect them, nor on the ground that there was an oral contract as to who should be elected.[3] Where a state is a stock-

General *v.* Looker, 111 Mich. 498 (1897). See § 501, *supra*. In West Virginia it is held that where the legislature has the right to amend or repeal a charter, the statute giving the right to cumulate the votes applies to a corporation already existing as well as later corporations. Cross *v.* West Virginia, etc. Ry., 35 W. Va. 174 (1891).

[1] Smith *v.* Atchison, etc. R. R., 64 Fed. Rep. 272 (1894); Commonwealth *v.* Butterworth, 160 Pa. St. 55 (1894). *Cf.* Gregg *v.* Granby, etc. Co., 164 Mo. 616 (1901), as to a constitutional change. A corporation organized prior to the constitution of 1874 of Pennsylvania, which gave the right of cumulative voting, becomes subject to such right if it afterwards asks for and acquires new franchises. Commonwealth *v.* Flannery, 52 Atl. Rep. 129 (Pa. 1902).

[2] Thus, suppose there are 1,000 shares, and ten directors to be elected, and one person holds 600 shares. Clearly he should be able to elect a majority of the ten directors. Suppose he votes his 600 votes for six of his friends (A, B, C, D, E, and F) and for four of the minority (G, H, I, and J); and suppose at the same time the 400 shares of the minority are cumulated on three other parties (K, L, and M), with ten votes for the four directors mentioned above (G, H, I, and J). The result will then be as follows:

A, B, C, D, E, and F,	have	600	votes	each
G, H, I, and J	"	610	"	"
K, L, and M	"	1,320	"	"

In other words, the minority have secured a majority of the directors. Again, suppose the holder of the 600 shares does not vote for any minority candidate at all, but casts 600 votes for each of his six candidates, A, B, C, D, E, and F. Even then he may lose the election. The minority 400 may cumulate their 4,000 votes on six candidates, and give each of the six 666⅔ votes. Under the cumulative system the majority, in order to be safe, must not only abandon the idea of electing the whole board, but must cumulate their votes on such a proportion of the board as their stock bears to the whole stock, and must not cast complimentary votes for representatives of the minority. In the case of Schwartz *v.* State, 61 Ohio St. 497 (1900), a majority of the stock was voted in favor of a full board consisting of nine members. The minority cumulated their votes on five other candidates, thus giving each of those five more votes than any of the nine for whom the majority voted. The result was that the five were elected, thus giving to the minority the control of the board, by reason of the failure of the majority to cumulate their votes.

[3] Dulin *v.* Pacific, etc. Co., 103 Cal. 357 (1894). The court said that the party "had in his own hands enough stock to have elected himself and one other director, in the face of any combination that could have been made; and the court had no power to release him from his error, or do that for him which he had power to do for himself." 67 N. E. Rep. 17.

holder, and by statute is entitled to a certain vote at elections, a subsequent statute cannot give to the state a larger vote.[1] Even though the stockholders are entitled to vote on the cumulative plan, yet they are not obliged to do so.[2]

§ 610. *Proxies.*— At common law a stockholder has no right to cast his vote by proxy.[3] This rule was evolved from the analogous rule governing municipal corporations, which requires all votes to be given in person. The right to vote by proxy is often given by the charter itself. Even if not so given the right may be created by by-law.[4] Where the statutes give the right to vote by proxy, the by-laws of the corporation cannot restrict that right by providing that only stockholders shall act as proxies.[5]

The ordinary proxy, being intended to be for an election merely, does not enable the proxy to vote to dissolve the corporation or to sell the entire corporate business and property, or to vote upon other important business, unless the proxy itself in general or special terms gives the proxy the power to vote on such questions.[6]

[1] Tucker *v.* Russell, 82 Fed. Rep. 263 (1897).

[2] Schmidt *v.* Mitchell, 101 Ky. 570 (1897).

[3] Taylor *v.* Griswold, 14 N. J. L. 223 (1834); Philips *v.* Wickham, 1 Paige, 590 (1829); Brown *v.* Commonwealth, 3 Grant (Pa.), 209 (1856), where the charter allowed only those *present* to vote; Craig *v.* First Presbyterian Church, 88 Pa. St. 42 (1878); Commonwealth *v.* Bringhurst, 103 Pa. St. 134 (1883); People *v.* Twaddell, 18 Hun, 427, 430 (1879); *Re* Dean and Chapter of Fernes, Davies, 116, 129 (1608); Attorney-General *v.* Scott, 1 Vesey, 413 (1749); Harben *v.* Phillips, L. R. 23 Ch. D. 14, 22, 36 (1882). Where the statute allows citizens to vote by proxy, an alien is not within its terms, and cannot do so. *Re* Barker, 6 Wend. 509 (1830).

[4] Quoted and approved in Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895); Worth, etc. Co. *v.* Bingham, 116 Fed. Rep. 785 (1902); People *v.* Crossley, 69 Ill. 195 (1873); Phillips *v.* Wickham, 1 Paige, 590, 598 (1829); State *v.* Tudor, 5 Day (Conn.), 329 (1812); 2 Kent, Comm., 294, 295. A contrary rule is laid down in New Jersey. Taylor *v.* Griswold, 14 N. J. L. 222 (1834). Where the charter authorizes voting by proxy at elections for directors, and also empowers directors to make by-laws not inconsistent with the laws of the commonwealth, a by-law adopted by the board of directors allowing voting by proxy at all stock elections was held valid. Wilson *v.* Academy of Music, 43 Leg. Int. 86 (1886). A by-law may allow voting by proxy. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A corporation as a stockholder may of course give a proxy where proxies are allowed. *Re* Indian, etc. Co., L. R. 26 Ch. D. 70 (1884). A by-law may authorize voting by proxy, and such a by-law may arise by long continuation and unbroken practice. Walker *v.* Johnson, 17 App. Cas. Dist. of Col. 144 (1900).

[5] People's, etc. Bank *v.* San Francisco Super. Ct., 104 Cal. 649 (1894). Where the statute gives a right to vote by proxy, a by-law to the effect that only a stockholder can act as proxy is illegal and void. *Re* Lighthall, etc. Co., 47 Hun, 258 (1888).

[6] Abbot *v.* American Hard Rubber Co., 33 Barb. 578, 584 (1861); Cumberland Coal Co. *v.* Sherman, 30 Barb. 553, 577 (1859); *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866), where the proxy, being au-

But where the stockholder does not promptly object, he may be bound.[1] A proxy authorized to vote at a corporate meeting is not authorized to vote to discharge a mortgage which secures the stockholder, who gave the proxy, as a creditor of the corporation.[2] A proxy authorizing the holder to vote "in the same manner as I should do were I there personally present" estops the stockholder giving the proxy from questioning the call of the meeting or the regularity of an increase of stock voted for at such meeting.[3] A proxy authorizing the proxy to vote as fully as a stockholder could were he personally present gives the proxy the right to vote on the question of adjournment and of opening the ballots.[4] A proxy has a right to vote on a *viva voce* vote or show of hands.[5] Where a vote is taken by show of hands each person is entitled to only one vote, even though as a proxy he represents several persons, and a person who is a proxy only may vote.[6] A proxy cannot vote when the owner of the stock is present and votes.[7] In England proxies deposited abroad have been allowed a vote by telegraph.[8] The sale of proxies is forbidden by statute in New York.[9]

Directors may be enjoined from using the funds of the company to obtain proxies for themselves or their nominees.[10]

thorized to vote for increasing the stock, voted also to issue the new stock in exchange for the stock of another company. Marie *v.* Garrison, 13 Abb. N. Cas. 210, 235 (1883). Where directors are authorized by charter to vote by proxy, the proxy cannot authorize a borrowing of money — an *ultra vires* and void act in England. Brown *v.* Byers, 16 M. & W. 252 (1847). A proxy to vote is not a proxy to demand a poll. *Re* Haven, etc. Co., L. R. 20 Ch. D. 151 (1881); Regina *v.* Government, etc. Co., L. R. 3 Q. B. D. 442 (1878). See also Decatur Bldg. etc. Co. *v.* Neal, 97 Ala. 717 (1893). A proxy for an election does not extend to an election four months later, the first election not having been held, the proxy being by a director, the directors being authorized to vote as directors by proxy. Howard *v.* Hull, 5 Ry. & Corp. L. J. 255 (Eng. 1888).

[1] Where a proxy votes in favor of making all the stock common stock, the stockholder himself, if he wishes to object, must do so promptly. Synnott *v.* Cumberland, etc. Assoc., 117 Fed. Rep. 379 (1902). See also § 599, *supra*.

[2] Moore *v.* Emsley, 112 Ala. 228 (1896).

[3] Columbia Nat. Bank *v.* Mathews, 85 Fed. Rep. 934 (1898).

[4] Forsyth *v.* Brown, 2 Pa. Dist. 765 (1893).

[5] *Re* Bidwell, [1893] 1 Ch. 603. But under the English statutes proxies are not counted where the vote is by a showing of hands. *Re* Caratal Mines, 87 L. T. Rep. 437 (1902).

[6] Ernest *v.* Loma, etc. Mines, [1896] 2 Ch. 572; aff'd, [1897] 1 Ch. 1.

[7] Commonwealth *v.* Patterson, 158 Pa. St. 476 (1893).

[8] In *Re* English, etc. Bank, [1893] 3 Ch. 385, the court allowed foreign creditors to vote abroad by proxy deposited abroad, and to telegraph such vote to the home meeting, on a scheme of reorganization, holding also that a proxy need not state the day of meeting.

[9] Laws 1892, ch. 692, § 613, and L. 1901, ch. 588. It is illegal for a stockholder to sell his right to vote. Hafer *v.* New York, etc. R. R., 14 Week. L. Bul. 68 (1885). See also § 622, *infra*.

[10] Studdert *v.* Grosvenor, L. R. 33 Ch. D. 528 (1886).

Where a will directs that of three executors two shall give proxies to the third on stock owned by the estate, a court of equity will compel the two to give the proxies, although the third intends to use the proxy to continue himself as president, and the management of the company is alleged to be improvident and ruinous.[1] Where there are several executors, and only one of them is present at the election, he may cast the vote, even though a proxy has been given by another of the executors.[2]

A proxy should be in writing, but it need not be in any particular form; it need not be acknowledged or proved, but it must be in such a shape as reasonably to satisfy the inspectors of election of its genuineness and validity.[3] And to this end the corporate officers may insist upon reasonable evidence of the regularity and genuineness of the proxy before allowing it to be voted.[4] The proxy should be dated, but the common law did not require a date.

[1] This case was affirmed on an even division of the court. Lafferty's Estate, 154 Pa. St. 430 (1893); Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892).

[2] Schmidt *v.* Mitchell, 101 Ky. 570 (1897).

[3] *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); *Re* Indian, etc. Co., L. R. 26 Ch. D. 70 (1884). No particular form of words is necessary to constitute a proxy. Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897). See the form of proxy in Marie *v.* Garrison, 13 Abb. N. Cas. 210, 234 (1883). Proxies need not be acknowledged, proved, or witnessed. *Re* Cecil, 36 How. Pr. 477 (1869). A proxy need not state the day upon which the election is to be held. *Re* Townshend, 18 N. Y. Supp. 905 (1892). A proxy is good, although the date when it is given is left blank and has not been filled in. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). Where one gave a proxy to vote at an annual election, it was held *prima facie* evidence that he was a stockholder just before such election. Harger *v.* McCullough, 2 Denio, 119, 122 (1846). A proxy which had been exercised and voted upon for many years without renewal was sustained in Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867). Although a notice of a corporate meeting, and proxies given for a corporate meeting, add to the name of the corporation the place where it is located, this is immaterial. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892). Under the Alabama statutes authorizing personal property owned by the wife to be disposed of by the husband and wife by parol, a wife's proxy to a husband to vote her stock may be oral. Hoene *v.* Pollak, 118 Ala. 617 (1898), holding also that a stockholder who knows that her stock has been voted by her husband in favor of selling all the corporate property for stock in another corporation cannot object thereto, where she afterwards disposes of part of the new stock so issued.

[4] *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). But the inspectors have no right to refuse a vote by proxy or to assume a judicial power to try its genuineness, if it is apparently executed by the stockholder and is regular in form. *Re* Cecil, 36 How. Pr. 477 (1869). Neither the stockholder nor his proxy can be compelled by a by-law to take an oath that the former is the owner of the stock. People *v.* Tibbits, 4 Cow. 358 (1825); People *v.* Kip, 4 Cow. 382 (1822). The by-laws may require the proxies to be witnessed. Harben *v.* Phillips, L. R. 23 Ch. D. 14 (1882).

In New Jersey, by statute, proxies are good for only three years from their date;[1] and in New York for only eleven months from their date, unless some other definite time is specified.[2]

Where certificates of proxies are destroyed after use, parol evidence is admissible to prove their former existence and sufficiency.[3]

A stockholder who signs a form of proxy in blank, and hands it over to another to be used in the ordinary way, impliedly authorizes that other to fill up the blank with his own name.[4] Although a proxy contains blanks as to the day and hour of the meeting, yet these may be filled in by the party using the proxy.[5]

A proxy is always revocable. Even when by its terms it is made "irrevocable," the law allows the stockholder to revoke it. Frequently an attempt is made to permanently unite the voting power of several stockholders and thus control the corporation by giving irrevocable proxies to specified persons. But the law allows the stockholder to revoke the proxy at any time.[6] Where the gen-

[1] Laws 1896, ch. 185, § 36.

[2] Laws 1892, ch. 687, § 21.

[3] Haywood & Pittsborough P. R. Co. *v.* Bryan, 6 Jones, L. (N. C.) 82 (1858). Although the record does not show that certain stock was voted, yet it may be proved that it was voted by proxy. Franklin T. Co. *v.* Rutherford, etc. Co., 57 N. J. Eq. 42 (1898).

[4] *Ex parte* Duce, L. R. 13 Ch. D. 429 (1879); *Ex parte* Lancaster, L. R. 5 Ch. D. 911 (1877). As to whether a blank proxy may be filled in by the agent, see *quære* in White *v.* New York, etc. Soc., 45 Hun, 580 (1887), citing cases.

[5] Ernest *v.* Loma, etc. Mines, [1896] 2 Ch. 572; aff'd, [1897] 1 Ch. 1.

[6] Schmidt *v.* Mitchell, 101 Ky. 570 (1897); Woodruff *v.* Dubuque, etc. R. R., 30 Fed. Rep. 91 (1887). In this case the stock certificates were turned over to trustees to transfer to themselves, with power to vote, hold, or sell the same. "Trust" certificates were issued. The court held that at any time previous to an actual sale by the trustees a certificate holder might revoke his interest in the "trust" and demand back his part of the stock. To same effect and on very similar facts, see Griffith *v.* Jewett, 15 Week. L. Bull. 419 (1886); Vanderbilt *v.* Bennett, 6 Pa. Co. Ct. Rep. 193 (1887). Such irrevocable proxies are not necessarily void as against public policy. Brown *v.* Pacific Mail Steamship Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. They simply are revocable. A proxy given for a valuable consideration may nevertheless be revoked if it is about to be used for a fraudulent purpose. Reed *v.* Bank of Newburgh, 6 Paige, 337 (1837). An agreement not to revoke a power which from its nature or by law is revocable is not binding. People *v.* Nash, 111 N. Y. 310, 315 (1888). A written contract not to vote by proxy, entered into by certain stockholders mutually for the purpose of preventing the board of directors from consummating a proposed sale of the franchises of the corporation, has been held a pernicious and unlawful compact. Fisher *v.* Bush, 35 Hun, 641 (1885). An irrevocable proxy is prohibited by statute in New York. It may be revoked even though coupled with an interest, in this case being to a pledgee. *Re* Germicide Co., 65 Hun, 606 (1892). A proxy, for five years, given so as to unite enough stock to control the corporation, the holder of the proxy agreeing that the person giving the proxy shall have an office at a salary of $2,500 a year, is void. At the instance of the latter

eral manager attempts to obtain proxies for the purpose of ousting the existing management, and uses methods calculated to deceive the persons giving the proxies, he is guilty of a breach of trust and his contract with the company may be canceled.[1] Where the directors cause a clerk, who is in the employ of the company, to send out a circular to the stockholders representing himself as a large stockholder and asking proxies, with a view to thoroughly investigating the affairs of the company, and such proxies when obtained are used to prevent such investigation by taking the property out of the hands of the court, the court may disregard the vote of such proxies.[2] A few forms of proxies are given in the notes below.[3]

§ 611. *The transfer book as evidence of a right to vote.*— The question who is entitled to vote upon a particular share of stock is,

person a court of equity will enjoin voting thereunder. Cone *v.* Russell, 48 N. J. Eq. 208 (1891).

[1] Townsley *v.* Bankers', etc. Co., 56 N. Y. App. Div. 232 (1900).

[2] *Re* Septimus Parsonage & Co., [1901] 2 Ch. 424.

[3] I, —— ——, of ——, do hereby make, constitute, and appoint William Rockefeller, and George F. Baker, of New York (or either of them), my lawful proxies and attorneys for me and in my name, place, and stead, to appear at a meeting of the stockholders of the Delaware, Lackawanna and Western Railroad Company to be held at the office of said company, at 26 Exchange Place, in the city of New York, on the nineteenth day of February, A. D. 1901, and then and there to cast the number of votes to which I, as holder of stock in said company, shall be entitled in the election of officers and managers of said company.

Witness my hand and seal this —— day of —— A. D. 1901. —— ——.

In presence of —— ——.

Know all men by these presents, that I, —— ——, of ——, hereby appoint —— —— to be my substitute and proxy for me and in my —— name and behalf to vote at any election by the stockholders of the —— Company for directors, or other purposes, occurring within —— months from the date hereof, and also to vote on any and all matters and questions which may be presented and considered at any annual or special meeting of the stockholders of said company occurring within said period, as fully and with like effect as I, —— ——, might or could have done if I had been personally present and voting thereat.

In witness whereof, I, —— ——, have hereunto set my —— hand and seal this —— day of ——, 19—. —— ——.

UNITED STATES STEEL CORPORATION.

Proxy for Meeting in February 17, 1902.

Know all men by these presents, that the undersigned, —— ——, a stockholder in United States Steel Corporation, do hereby constitute and appoint Abram S. Hewitt, William E. Dodge, Francis H. Peabody, Myles Tierney, and Henry W. De Forest, and each of them, true and lawful attorneys, agents, and proxies of the undersigned, with power of substitution, for and in the name, place, and stead of the undersigned, to vote upon all common stock and all preferred stock, or either, held or owned by the undersigned, at the first annual meeting of the stockholders of the United States Steel Corporation, to be held at the office of said corporation at Hoboken, New Jersey, on Monday, the seventeenth day of February, 1902, and at any and all adjournments thereof, for the transaction of any and all business that may come before the meeting, including considering and voting upon the approval of the by-laws as amended; considering and voting upon the approval and ratification of all contracts, acts, proceedings, elections, and appointments by the board of directors or by the executive committee or by the finance committee since the organization of the corporation, including the agreements with Messrs. J. P. Morgan & Co., syndicate managers, dated, respectively, March 1 and April 1, 1901, and January 3, 1902, the last being the agreement of final settlement and release, which are referred to in the notice of said meeting and in the preliminary report to stockholders; the election of eight directors to hold office for three years; the election of independent auditors; and upon any and all matters that may come before the meeting, according to the number of votes the undersigned would be entitled to vote if then personally present, hereby revoking any proxy or proxies heretofore given to vote upon such stock, and ratifying and confirming all

as a general rule, answered by a reference to the corporate transfer book. He who is there registered as the owner of the stock is entitled to vote upon it.[1] It is not necessary that the owner of stock produce his certificate, or even have a certificate, in order to vote.[2] Neither will indebtedness for the subscription price prevent the stockholder from voting.[3] So, also, it is immaterial that the

that said attorneys, agents, or proxies may do by virtue hereof. A majority of all or of any of said attorneys, agents, and proxies who shall be present and shall act at the meeting (or if only one shall be present and act, then that one) shall have, and may exercise, all of the powers of all of said attorneys, agents, and proxies hereunder, and they are instructed to vote in favor of the re-election of the present directors and in favor of approving the amended by-laws and in favor of the approval and ratification of each and every of said three agreements and said contracts, acts, proceedings, elections, and appointments.

Witness —— hand and seal, this —— day of ——, 1902.

Witness: —— ——, —— ——.

[1] As between pledgor and pledgee the right to vote is in the one who is registered as a stockholder on the corporate books, unless there is an agreement between them to the contrary, and this rule prevails even though the stock stands in the name of the pledgee "as trustee." Commonwealth *v.* Dalzell, 152 Pa. St. 217 (1893), the court saying: "The general rule is that as between the corporation and the person offering to vote, the right follows the legal title, of which the certificates and the stock books are the *prima facie* evidence. By-laws may establish a different rule, and there may be special circumstances to change the equities as to individuals or even as to the corporation." Where stock is transferable only on the books of the corporation, the person in whose name the stock stands on such books is entitled to vote it, and the books of the company are conclusive upon the question as to who is entitled to vote stock legally issued. Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371 (1893); *Ex parte* Willcocks, 7 Cow. 402 (1827), stating, however, that in certain cases, like that of stock held for the corporation itself, a different rule prevails; State *v.* Ferris, 42 Conn. 560, 568 (1875), sustaining a vote by a bankrupt, the court saying: "The party who appears to be the owner by the books of the corporation has the right to be treated as a stockholker and to vote on whatever stock stands in his name;" Hoppin *v.* Buffum, 9 R. I. 513, 518 (1870), the court saying: "In a case of a dispute as to a right to vote, the books of the corporation are the *prima facie* evidence; at any rate, the corporation cannot be required to decide a disputed right. . . . Upon any other rule it could never be known who were entitled to vote, until the courts had decided the dispute." Allen *v.* Hill, 16 Cal. 113 (1860); *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). The president has no power to decide what stock should be allowed to vote. The transfer book governs as to that. State *v.* Cronan, 23 Nev. 437 (1897). See also next section for various cases on the conclusiveness of the transfer book.

[2] Beckett *v.* Houston, 32 Ind. 393 (1869).

[3] Birmingham, etc. Ry. *v.* Locke, 1 Q. B. 256 (1841); Savage *v.* Ball, 17 N. J. Eq. 142 (1864); American, etc. Co. *v.* State Board, 56 N. J. L. 389 (1894); People *v.* Albany, etc. R. R., 55 Barb. 344, 386 (1869); Downing *v.* Potts, 23 N. J. L. 66 (1851). So held in this case, even though the subscriber had paid nothing on his stock. In General Electric Co. *v.* Wightman, 3 N. Y. App. Div. 118 (1896), it is stated that under the New York statutes subscribers for stock are not entitled to any voice in the management until the stock has been paid up. It has been held in Maryland that a subscriber to the increased capital stock

person in whose name the stock is registered is merely a nominal holder, and that another person really owns the stock.[1] A subscriber upon a condition not yet performed may vote upon the question whether that condition shall or shall not be performed.[2] And stock issued for construction, the work not having been performed, may nevertheless be voted.[3]

Persons who are not registered stockholders on the day an election is held cannot vote, though they were stockholders on the day the election should have been held.[4] The holders of stock issued by a stock dividend are entitled to vote.[5]

Where the corporation keeps a stock-certificate book but no transfer book, a transfer on the back of a certificate, which is then canceled and pasted back in the certificate book, and a new certificate issued to the transferee, is a sufficient transfer to constitute the transferee a stockholder.[6] Although votes are challenged, and the inspectors call for the stock books, and such books cannot be

of a company is not entitled to the certificate until he has paid for the stock in full, and such subscriber is not entitled to the rights of a stockholder until he has paid in full. The court stated that such stockholders are not entitled to dividends equally with other stockholders. The basis of the decision was the difference between original stock and increased stock. The court refused to compel the corporation to issue a certificate. Baltimore, etc. Ry. *v.* Hambleton, 77 Md. 341 (1893). Where a mortgage must be authorized by a vote of two-thirds in value of the stockholders this means a stock vote, irrespective of the fact that some of the stock is only partly paid up. Purdom *v.* Ontario, etc. Deb. Co., 22 Ont. Rep. (Can.) 597 (1892); 93 N. W. Rep. 997.

[1] State *v.* Leete, 16 Nev. 242 (1881), where a man put stock in the name of his son in order to qualify him to serve as a director. Where, however, the statute prescribes that only *bona fide* stockholders shall vote, a stockholder of record who is really a dummy for the real owner in order to enable the latter to avoid the statutory liability cannot vote. Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897). See also § 612, *infra.*

[2] Greenville, etc. R. R. *v.* Coleman, 5 Rich. L. (S. C.) 118, 135 (1851).

[3] Savage *v.* Ball, 17 N. J. Eq. 142 (1864). Where a sale of bonds having a voting power is made subject to the ratification of another party, the vendor has the right to vote such bonds until the sale is so ratified. State *v.* McDaniel, 22 Ohio St. 354 (1872). Stock issued to a contractor for money to be paid may be voted by him, at least to the extent or proportion of such part of his liability as he has fulfilled. Price *v.* Holcomb, 89 Iowa, 123 (1893).

[4] Johnston *v.* Jones, 23 N. J. Eq. 216 228 (1872).

[5] Bailey *v.* Railroad Co., 22 Wall. 604, 637 (1874), holding also that the rule is otherwise as regards the holders of a scrip dividend, where the scrip was redeemable by the company in cash or convertible into stock.

[6] He may vote at elections, and an assignment by the corporation on the direction of officers elected by such a transferee is valid. Such a transfer is valid also, although a by-law provided that before selling his stock a stockholder must offer it to other stockholders for purchase. American Nat. Bank *v.* Oriental Mills, 17 R. I. 551 (1891). See also § 382, *supra.*

obtained, yet this does not invalidate the election.[1] If the stock book is lost, the directors may substitute a new one, filled out as accurately as possible.[2] Where the corporation has kept no regular stock books, and the secretary, by order of the directors, prepares a stock book, getting the information from various sources, this book governs.[3] Where the transfer book differs from the stock ledger the former governs.[4] A by-law authorizing the administration of an oath to examine the stockholders as to their title is illegal and void where the charter regulates the right to vote.[5]

There are some exceptions, however, to the rule that the transfer book is conclusive on the question of who is entitled to vote. Thus, the inspectors of election may inquire whether the stock which is about to be voted belongs to the corporation, and if it does they may reject the vote.[6] So, also, they may allow an administrator to vote, although the stock stands in the name of the deceased person.[7]

In some courts this rule is carried still further, and it is held that the inspectors of election may allow the pledgor to vote, although the stock stands in the name of the pledgee on the books of the company;[8] and it has also been held that the purchaser of certificates of stock may vote thereon, although the stock stands on the books of the company in the name of the vendor.[9] It has been held

[1] *Re* Argus Co., 138 N. Y. 557 (1893).

[2] *Re* Schoharie, etc. R. R., 12 Abb. Pr. (N. S.) 394 (1872).

[3] *Re* Election, etc. Grove Cem. Co., 61 N. J. L. 422 (1898).

[4] Downing *v.* Potts, 23 N. J. L. 66 (1851).

[5] People *v.* Kip, 4 Cow. 382, note (1822).

[6] See § 613, *infra.*

[7] See § 612, *infra.*

[8] See § 612, *infra.*

[9] In the case of Allen *v.* Hill, 16 Cal. 113, 119 (1860), the court said: "It would seem, upon principle, that the real owner of stock should be entitled to represent it at the meetings of the corporation, and that the mere fact that he does not appear as owner upon the books of the company should not exclude him from the privilege of doing so." In Illinois it is held that the corporation must allow the real owner of the stock to vote, whether he be the registered owner or not, where the corporation has no by-law requiring a registry of transfers, and the vendee produces his certificate of stock duly transferred on the back. People *v.* Devin, 17 Ill. 84 (1855). In a stockholders' vote ratifying the acts of directors, a stockholder has no right to vote stock which he has transferred to others, even though it still stands in his name on the books. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). Where, however, the unregistered transferee did not challenge the right of his transferrer to vote and did not claim the right to vote, but attacked the election afterwards by *quo warranto*, his suit failed. People *v.* Robinson, 64 Cal. 373 (1883). State *v.* Smith, 15 Oreg. 98, 118 (1887), contains a dictum that the purchaser of a certificate of stock cannot vote on the stock until it has been transferred into his name. Where both the legal and equitable owners of stock agree as to how stock shall be voted, other stockholders cannot complain that the vote was not cast in accordance with law.

in Georgia that where a stockolder has sold his stock and delivered the certificates, he has no right to give a proxy on the stock to some other person, even though the stock still stands in his name, and the giving of such proxy may constitute a tort for which the purchaser of the stock may sue for damages.[1] The vendor and vendee of stock may agree between themselves as to who shall vote the stock. Where the vendor expressly parts with the right to vote the stock, he cannot, under the statutes of Pennsylvania, vote it, even though he appears as a stockholder on the corporate books.[2]

In New York, by statute, the corporate transfer book is made conclusive upon the question who may vote.[3] The inspectors cannot go back of it, but the court may.[4] There are various other statutory provisions in New York regulating voting, and the vote may by by-law be limited to those who are registered stockholders for a period not exceeding forty days before the election.[5]

State *v.* Ferris, 42 Conn. 560 (1875), where a bankrupt voted stock still standing in his name. State *v.* Pettineli, 10 Nev. 141 (1875). In this last case the registered holder had transferred the certificate, but obtained it again and exhibited it at the meeting. If a vote is not challenged, an objection to it afterwards may not meet with much favor. *Re* Long Island R. R., 19 Wend. 37, 44 (1837). See also § 620, *infra.* The vendor of stock may give the vendee a proxy to vote on the stock which still stands in the name of the vendor on the books. Stephenson *v.* Vokes, 27 Ont. Rep. (Can.) 691 (1896).

[1] Witham *v.* Cohen, 100 Ga. 670 (1897).

[2] Commonwealth *v.* Patterson, 158 Pa. St. 476 (1893). As between pledgor and pledgee the right to vote is in the one who is registered as a stockholder on the corporate books, unless there is an agreement between them to the contrary, and this rule prevails even though the stock stands in the name of the pledgee "as trustee." Commonwealth *v.* Dalzell, 152 Pa. St. 217 (1893). The registered stockholder may vote even though he has transferred his certificates to another. *Re* Argus Printing Co., 1 N. D. 434 (1891).

[3] Vandeburgh *v.* Broadway Ry., 29 Hun, 348, 355 (1883); *Re* Long Island R. R., 19 Wend. 37 (1837); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838). The registered stockholder is entitled to vote although he has assigned his certificate of stock. Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872).

[4] Strong *v.* Smith, 15 Hun, 222 (1878).

[5] See Laws 1901, ch. 355, § 20. Strong *v.* Smith, 15 Hun, 222 (1878), holding that the transfer book is conclusive upon the inspectors, but that the court has power to go back of the entries therein and inquire whether, as for instance in this case, a transfer of shares was an absolute sale or a pledge, and thus whether the transferrer or transferee has the right to vote them; citing *Ex parte* Holmes, 5 Cow. 426 (1826); *Re* Long Island R. R., 19 Wend. 37 (1837); and see N. Y. L. J., June 29, 1889. Although only stockholders who still own their stock are allowed to vote, a person who has given an option on his stock is nevertheless entitled to vote on it. *Re* Newcomb, 18 N. Y. Supp. 16 (1891). In New York when for any reason the corporation fails to hold an election at the stated time as provided in the charter or by-laws, and the election is held subsequently, only those stockholders are entitled to vote who were qualified electors at the time when the election ought to have been held. Van-

§ 612. *The right of trustees, pledgees, administrators, etc., to vote.*— It is the general rule that a person holding stock as trustee is entitled to vote upon the stock, not only where he is duly registered as a holder of stock in trust, but also where he is registered absolutely as a stockholder upon the books of the corporation.[1] If the trustees disagree as to how the stock shall be voted, the courts have power to direct them.[2] A trustee of stock has the right to vote thereon even for a consolidation, and even though he holds it

denburgh *v.* Broadway R. R., 29 Hun, 348 (1883); People *v.* Tibbets, 4 Cow. 358 (1825). Where the statute limits the votes to stock that for ten days has been entered on the stock book, a stockholder cannot vote who mailed a certificate for transfer the day before the ten days began, if the corporation did not receive the same until six days thereafter. The object of the statute is to enable persons to ascertain during the ten days who are entitled to vote. Under the New York statute a person who has sold his certificate of stock cannot vote. *Re* Glen Salt Co., 17 N. Y. App. Div. 234 (1897); aff'd, 153 N. Y. 688. As to closing the books, see also § 538, *supra.* Where a statute forbids the voting of stock which has been transferred within twenty days prior to an election, and in a corporation having sixty shares of stock thirty-two shares are voted, four of which were transferred on the day of election, the court will declare the election void. *Re* Vernon, 1 Pennewill (Del.), 202 (1898).

[1] Conant *v.* Millaudon, 5 La. Ann. 542 (1850); Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Hoppin *v.* Buffum, 9 R. I. 513, 519, (1870), the court saying: "If the trust was of such a nature that the trustee has the control and management of the property, and is to exercise his discretion concerning it, then he is the proper person to represent and vote upon it. And the corporation cannot be required to examine into the nature of the trust, with a view to decide as to the right to vote;" *Re* Barker, 6 Wend. 509 (1831); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); *Re* North Shore, etc. Ferry Co., 63 Barb. 556 (1872), holding also that the administrator of the trustee may vote the stock; Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877). In Clarke *v.* Central R. R., 50 Fed. Rep. 338 (1892), it was held that a trust company has no power to hold as trustee and vote the majority of the stock of a great railroad system, especially where it is also the trustee in a trust deed of the company, the court saying: "There are many situations in which stock may be so placed that it becomes inequitable or illegal for it to be voted. The law places the voting power of pledged stock in the pledgor or mortgagor, even where there is no express stipulation to that effect. And where the pledgor or mortgagor is disqualified to vote the stock, the disqualification extends as well to the pledgee or trustee." In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Even though a statute requires that certificates running to trustees shall state who is the *cestui que trust,* yet an election may be legal though stock is voted by trustees and such stock does not state who is the real owner. State *v.* Cronan, 23 Nev. 437 (1897).

[2] Wanneker *v.* Hitchcock, 38 Fed. Rep. 383 (1889). Where stock is held in trust by two trustees and they disagree, the stock cannot be voted except that the court may remove a trustee if he is guilty of bad faith. Mannhardt *v.* Illinois, etc. Co., 90 Ill. App. 315 (1899).

for another corporation.[1] A trustee holding stock and electing himself the president of a company and receiving a salary must not allow his personal interest in the salary to conflict with his duty as a stockholder to favor the sale of the corporate property at a high price.[2] Where a mortgage covers shares of stock and the trustee has the voting power, its discretion cannot be controlled by the majority of the bondholders.[3] A mortgage on shares of stock does not prevent the corporation controlled by such stock from issuing a mortgage on its property; and it is no breach of trust for the trustee of the first mortgage to be the trustee of the second mortgage where the first mortgage does not prohibit such second mortgage, the stock, by the terms of the mortgage, remaining in the name of the mortgagor.[4]

In California the real owner of stock may vote on it, although it stands on the books of the company in the name of a "dummy" as "trustee."[5]

A pledgor of stock is entitled to vote upon it in all cases where the stock continues to stand on the books of the company in the

[1] Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895).

[2] Elias *v.* Schweyer, 13 N. Y. App. Rep. 336 (1897). Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis que trust* may in a suit for his removal ask also that he account to such *cestuis que trust* for such salary. Elias *v.* Schweyer, 27 N. Y. App. Div. 69 (1898). Where a majority of the stock of the corporation passes by will to a trustee of the estate, and he makes himself president, and increases his salary, and pays little attention to the business, and tries to sell the company out to a consolidation, and does not properly divide the income between life tenant and remaindermen, and causes the company to sell its reserve, and is responsible for the company losing its most valuable contract, and is unable to agree with a *cestui que trust,* the court will remove him from the trusteeship. Lister *v.* Weeks, 60 N. J. Eq. 215 (1900). See s. c., 47 Atl. Rep. 588 (N. J. 1900). Even though a trustee of stock who has been an officer and stockholder in the corporation is voted a salary, this is no ground for removing him as trustee, there being no proof that he voted in favor of the salary. Neither is the fact that the company did not pay as large dividends as it formerly did any ground for the removal of the trustee. Dailey *v.* Wight, 51 Atl. Rep. 38 (Md. 1902).

[3] Toler *v.* East Tennessee, etc. Ry., 67 Fed. Rep. 168 (1894).

[4] Gasquet *v.* Fidelity, etc. Co., 75 Fed. Rep. 343 (1896).

[5] Under the California statute, stock placed by the secretary in the name of a "dummy," as trustee, cannot be voted by such dummy, the real owners of the stock not having assented thereto, even though for business reasons they did not wish to have the stock issued to themselves. Stewart *v.* Mahoney Min. Co., 54 Cal. 149 (1880); Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897). See also *Ex parte* Holmes, 5 Cow. 426 (1826); American Nat. Bank *v.* Oriental Mills, 17 R. I. 551 (1891), holding that the beneficial owners are entitled to say how the vote shall be cast. In the last case the stock had been surrendered and new certificates issued, but no transfer book was kept.

name of such pledgor.[1] And even where the pledgee has caused the stock to be transferred into his own name, as by law he is allowed to do,[2] it has been held that the pledgor may demand the right to vote at elections, and that upon proof of the facts the inspectors of election must allow the pledgor to vote the stock.[3]

It must be conceded, however, that the established rule is to the contrary.[4] Where the stock is transferred to the pledgee on the books of the company the corporation is not bound to allow the pledgor to vote, although a court of equity may have power to compel the pledgee to give the pledgor a proxy.[5] Under the New York statute making the transfer book conclusively binding upon the inspectors of election, the inspectors cannot exclude the vote of the

[1] *Re* Barker, 6 Wend. 509 (1831); *Ex parte* Willcocks, 7 Cow. 402 (1827); *Re* Cecil, 36 How. Pr. 477 (1869); Schofield *v.* Union Bank, 2 Cranch, C. C. 115 (1815); *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529, 540 (1882), a dictum. Although the pledgor of stock votes the stock in favor of a lease of the corporate property on such terms that no dividends on the stock are possible, yet in the absence of fraud the pledgee is bound. Gibson *v.* Richmond, etc. R. R., 37 Fed. Rep. 743 (1889).

[2] See § 466, *supra.*

[3] In Oregon it is held that at common law the real owner of stock is entitled to vote it, even though it stands on the corporate books in the name of his pledgee. It is denied that the transfer book is binding upon the inspectors of election, and the decisions to that effect in New York are stated to be based on the New York statutory law. State *v.* Smith, 15 Oreg. 98 (1887). See also Allen *v.* Hill, 16 Cal. 113 (1860), to substantially the same effect. It has been held that the pledgee of stock is not even entitled to notice of meetings. McDaniels *v.* Flower Brook Mfg. Co., 22 Vt. 274 (1850).

[4] The pledgor and pledgee of stock may agree between themselves as to who should vote the stock. If there is no agreement, the right to vote should follow the legal title; in other words, the title as it appears on the corporate books. Even under a statute authorizing inspectors of election, upon a challenge, to determine whether the party who appears to be the owner is really the owner, the pledgee is entitled to vote the stock standing in his name where there is no agreement to the contrary, and even though the stock stands in the pledgee's name "as trustee." Commonwealth *v.* Dalzell, 152 Pa. St. 217 (1893). A pledgee into whose name the stock has been transferred may vote it. He is a "*bona fide*" stockholder as required by the statute. The pledgor cannot appear at the meeting and vote the stock. *Re* Argus Printing Co., 1 N. D. 434 (1891). It is not a conversion for one who holds stock as pledgee to attend corporate meetings and vote upon the stock. Heath *v.* Silverthorn Lead Min. etc. Co., 39 Wis. 146 (1875).

[5] J. H. Wentworth Co. *v.* French, 176 Mass. 442 (1900), holding also that the Massachusetts statute that a certificate of stock issued as a pledge shall state that fact on its face, enables the pledgor to vote without such proxy. If the certificate merely states that it is given in pledge, without stating the name of the pledgor, the pledgee to whom the certificate runs may vote the stock. The court may, however, refuse to grant a *mandamus* declaring certain persons duly elected directors where they were elected by the vote of the pledgee as against the wishes of the pledgor. See 54 Atl. Rep. 783.

registered stockholder, although he holds the stock merely as pledgee; but under the New York statute allowing the courts to summarily review the election, the court has power to go back of the transfer book and set the election aside, where the statute gave the pledgor the right to vote.[1] In many of the states there are statutes which give to the pledgor the right to vote the stock.[2] And even where there is no statute to protect the pledgor's right to vote, it has been held that the courts will intervene,[3] and that by a bill in equity the pledgor may compel the pledgee to give him a proxy to vote the stock.[4] But in order to invoke the extraordinary powers of a court of equity in this respect, the pledgor must show that the interests of the company have been or will be prejudiced, or that the value of the stock has been or will be impaired, and that the intervention of the court is necessary to protect the pledgor's rights.[5] A pledgor may enjoin a pledgee from transferring stock into his name for the purpose of controlling an election, which otherwise the pledgor would control, where the statutes of the state provide for recording of such pledge without a transfer of the stock itself.[6] The pledgee of a majority of the corporate

[1] Strong *v.* Smith, 15 Hun, 222 (1878).

[2] Strong *v.* Smith, 15 Hun, 222 (1878). Concerning a similar statute in Rhode Island, see Sayles *v.* Brown, 40 Fed. Rep. 8 (1889). Under the Colorado statutes an owner who has pledged his stock may represent the stock at all meetings of the stockholders and vote accordingly. Miller *v.* Murray, 17 Colo. 408 (1892). See also as to the Colorado statute, Nat. Bank of Commerce *v.* Allen, 90 Fed. Rep. 545 (1898).

[3] Scholfield *v.* Union Bank, 2 Cranch, C. C. 115 (1815); S. C., 21 Fed. Cas. 723; State *v.* Smith, 15 Oreg. 98 (1887), where the pledgor obtained an injunction against the pledgee voting the stock, and the pledgor was allowed by the inspectors to vote.

[4] Vowell *v.* Thompson, 3 Cranch, C. C. 428 (1829); S. C., 28 Fed. Cas. 1308. See also Hoppin *v.* Buffum, 9 R. I. 513 (1870), holding that although the pledgor may by a bill in equity compel the pledgee, in whose name the stock stands, to make a retransfer or to give a proxy to the pledgor, yet where the pledgor for many years allows the pledgee to vote the stock and claims the right at an election only after the ballots are cast and are being counted, the court will not set the election aside.

[5] McHenry *v.* Jewett, 90 N. Y. 58 (1882). Where the owner of a majority of the stock has been fraudulently deprived of her stock by her pledgee, who has thereby deprived her of the control and claims the stock as his own, the court will enjoin him from voting the stock and will appoint a receiver of such stock *pendente lite.* Ayer *v.* Seymour, 5 N. Y. Supp. 650 (Com. Pl. 1889). Where a person pledges his stock as additional security to a corporate creditor who has bonds of the company in pledge for the same debt, such pledge of bonds, however, being illegal, the pledgor of the stock cannot compel the creditor to resort to the bonds first; nor, although a fictitious sale of the stock is alleged, can he compel the transferee of the stock to return the stock so that the pledgor may vote it, unless the pledgor pays the amount due. Hinckley *v.* Pfister, 83 Wis. 64 (1892); 93 N. W. Rep. 997.

[6] Spreckels *v.* Nevada Bank, 113 Cal. 272 (1896).

stock, who by voting their stock cause men of their choice to be elected directors, are not liable for the misconduct of such directors.[1]

An administrator or executor may vote on the stock of the deceased stockholder, even though such stock has not been transferred to the executor or administrator on the books of the company.[2] Stock held jointly by three executors cannot be voted unless they all agree upon the vote.[3] Where a will gives to one of three executors the power to vote the stock, and directs the other two executors to give him a proxy to that purpose, the court will order the proxy to be given, even though he intends to vote himself into office, and he may not be a good manager.[4] A partner may vote upon stock belonging to the firm and registered in the partnership name.[5] Where stock is entered on the corporate books in the name of a person as an officer of another corporation, the successor in office of that person may vote the stock without a transfer on the corporate books.[6] Where a corporation is authorized to hold stock in another corporation it is entitled to vote such stock.[7] A corporation as a stockholder may vote its stock by an agent.[8] When a municipal corporation is a stockholder in a private

[1] Higgins *v.* Lansingh, 154 Ill. 301 (1895). See also § 468, *supra.*

[2] Quoted and approved in Schmidt *v.* Mitchell, 101 Ky. 570 (1897); Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895). A foreign executor may vote stock belonging to the estate, even though the stock stands in the name of the deceased stockholder. *Re* Cape May, etc. Co., 16 Atl. Rep. 191 (N. J. 1888); *Re* North Shore, etc. Ferry Co., 63 Barb. 556 (1872), holding that an administrator may vote upon stock standing in the name of the deceased person, even though the latter held the stock as trustee. In a proceeding to dissolve a corporation the administrator is the proper representative of stock owned by the estate. Wolfe *v.* Underwood, 97 Ala. 375 (1893). The administrator and not the heirs at law have the right to vote. Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872).

[3] Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892), aff'g s. c., 1 Pa. Dist. 207 (1892). Where there are but two stockholders and one dies, and his administrator takes possession of the corporate property as though it belonged to the estate, the other stockholder may have a receiver appointed. *Re* Belton, 47 La. Ann. 1614 (1895).

[4] Lafferty's Estate, 154 Pa. St. 430 (1893). See also Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892).

[5] Kenton Furnace R. R. etc. Co. *v.* McAlpin, 5 Fed. Rep. 737 (1880). In California he may vote such stock where the stock belongs to the firm, but is registered in the name of the other partner, who is dead. Allen *v.* Hill, 16 Cal. 113 (1860).

[6] Farmers', etc. Co. *v.* Chicago, etc. Ry., 27 Fed. Rep. 146, 156 (1886); Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867). *Contra, Re* Mohawk, etc. R. R., 19 Wend. 135, 146 (1838), holding that the word "cashier" attached to a stockholder's name does not authorize a succeeding cashier to vote the stock.

[7] Davis *v.* U. S. etc. Co., 77 Md. 35 (1893). *Cf.* § 615, *infra.*

[8] State *v.* Rohlffs, 19 Atl. Rep. 1099 (N. J. 1890).

corporation, it is entitled to vote upon its stock in the same way as any other stockholder.[1] The fact that the government or a single person owns all the stock of a company does not put an end to the corporate existence.[2] Where joint owners of stock disagree as to its vote, the vote is to be rejected.[3]

A receiver, who is in possession of shares of stock, generally votes such stock without his right to do so being questioned. Sometimes the court, upon appointing a receiver of stock, expressly authorizes him to vote the stock, and sometimes directs him how to vote it.[4]

It seems that a stockholder may lease his stock. He may, for a certain sum, assign to another all dividends during the specified time, and give to the lessee the right to vote the stock during that time.[5] A gift of stock on condition that the dividends should all go to the owner and that he should vote it is a gift of a remainder with a life interest in the donor.[6]

§ 613. *The corporation cannot vote upon shares of its own stock.* Shares of stock owned by the corporation itself cannot be voted either directly by the corporate officers or indirectly by a trustee of the corporation. This is the established rule, whether the stock is registered in the name of the corporation or not.[7]

[1] See § 99, *supra.* Where stock in a railroad is owned by a part of a county, that part becomes a municipality for the purpose of owning and voting the stock. Hancock *v.* Louisville, etc. R. R., 145 U. S. 409 (1892).

[2] The United States government, though the owner of all the stock of a canal company, may continue as a stockholder and keep up the corporate existence by allowing the directors to retain one share each as a qualification share. U. S. *v.* Louisville, etc. Canal Co., 4 Dill. 601 (1873); s. c., 26 Fed. Cas. 1002. See also § 709, *infra.*

[3] *Re* Pioneer Paper Co., 36 How. Pr. 111 (1865); Tunis *v.* Hestonville, etc. Ry., 1 Pa. Dist. 207 (1892), *Cf.* s. c., 149 Pa. St. 70.

[4] A court may appoint a receiver to hold an election, etc., where the entire interests in the corporation, including the stock, belong to parties who have been defrauded. King *v.* Barnes, 51 Hun, 550 (1889); aff'd, 113 N. Y. 655. See also dictum in Wanneker *v.* Hitchcock, 38 Fed. Rep. 383 (1889), where the trustees of stock disagreed as to voting; People *v.* Albany, etc. R. R., 55 Barb. 344, 371 (1869), where a receiver's vote was set aside, fraud being involved and the appointment being invalid; American Inv. Co. *v.* Yost, 25 Abb. N. Cas. 274 (1890), where a receiver of stock was instructed how to vote, the action being to enforce an agreement to place stock in the hands of trustees until the debts of the company and chief stockholder were paid.

[5] Zachry *v.* Nolan, 66 Fed. Rep. 467 (1895).

[6] Matter of Brandreth, 169 N. Y. 437 (1902).

[7] *Ex parte* Holmes, 5 Cow. 426 (1826); McNeely *v.* Woodruff, 13 N. J. L. 352 (1833); American Ry. Frog Co. *v.* Haven, 101 Mass. 398 (1869); Commonwealth *v.* Boston, etc. R. R., 142 Mass. 146 (1886); State *v.* Smith, 48 Vt. 266 (1876); Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867); U. S. *v.* Columbian Ins. Co., 2 Cranch, C. C. 266 (1821); New England,

Where the directors, just before the election, issue or sell stock owned by the corporation, the purpose of such issue or sale being to control the election, the courts will interfere at the instance of other stockholders where an actual fraud is involved.[1]

§ 614. *Issuing stock in order to carry an election.*— Where the directors cause treasury stock to be sold to themselves at less than its real value and for the purpose of carrying an election, the court will set the sale aside as fraudulent.[2] In a proper case the court will enjoin the issue of the new stock.[3] So also where directors issue new stock to their friends at less than par and without offering it to the existing stockholders, the object being to control

etc. Ins. Co. *v.* Phillips, 141 Mass. 535 (1880), where income bonds entitled to vote were held to have lost that right when they were paid; Brewster *v.* Hartley, 37 Cal. 15 (1869), where the company had pledged its stock. If all the stockholders consent, the stock owned by the corporation may be voted. Farwell *v.* Houghton, etc. Works, 8 Fed. Rep. 66 (1881). Where a mortgage can be given only upon the vote of the stockholders, stock owned by the corporation cannot be voted, but the pledgee of such stock from the corporation was allowed to vote. Vail *v.* Hamilton, 85 N. Y. 453 (1881). Directors elected by votes upon stock owned by the corporation are illegally elected. *Ex parte* Desdoity, 1 Wend. 98 (1828). Where the statute requires the vote of the holders of a certain amount of the stock, only the outstanding stock is considered. The unissued stock and treasury stock are not counted. Market Street Ry. *v.* Hellman, 109 Cal. 571 (1895).

[1] See § 614, *infra*, on this subject.

[2] Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). Where the stock of a cemetery company of the par value of $50 is worth but $5, the directors may issue it for land which is liable to come into competition with the company, even though one motive of the directors is thereby to control an election. Rural, etc. Co. *v.* Wildes, 54 N. J. Eq. 668 (1896), rev'g 53 N. J. Eq. 452 (1895). A stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original capital stock to the directors themselves, who were illegally elected, but who thereby acquire control of the company. Morris *v.* Stevens, 178 Pa. St. 563 (1897). Where *de facto* directors, immediately after the election, order an issue of a large amount of the original unissued capital stock of the company, and most of it is taken by one of their number, who thereby acquires a majority of the stock of the company, and subsequently the election is declared illegal, such directors may be enjoined from voting the stock so issued, and, if they have sold it, may be enjoined from voting other stock equal in amount to the stock so sold by them. The existing stockholders are entitled to subscribe for their proportion of the unissued original capital stock. Morris *v.* Stevens, 178 Pa. St. 563 (1897). See also *post*, p. 1333, note 1.

[3] The court will enjoin the board of directors from issuing new stock on the verge of an election and for the sole purpose of carrying that election, where the directors really represent a minority of the stock, and where the power to issue the new stock is very doubtful. Such an injunction was granted, even though the charge was made that the complainant was interested in rival companies and was exercising control in their behalf. Fraser *v.* Whalley, 2 Hem. & M. 10 (1864).

a coming election, the election will be enjoined and the issue set aside.[1] Dissenting stockholders may file a bill to obtain a cancellation of stock issued in payment for patents to engage in business outside of the territory described in the charter, the real purpose being to obtain the vote on the stock.[2]

But an election is valid, although it is carried by treasury stock of the corporation, which is sold by the directors just before the election in order to carry the election, so long as the sale is not attacked and set aside for fraud.[3] Where the stock is not treasury stock, but is new increased capital stock, all the existing stockholders have a right to subscribe for their proportion of the new stock, and may protect that right by injunction.[4] A court of equity may set aside an election of directors carried by a trick, whereby an irresponsible person was allowed to subscribe for a large amount of stock, which he then voted, nothing being paid on the stock. Such a suit may be brought by some of the stockholders in behalf of all.[5] Even though stock has been issued irregularly to a director, yet where he has held it for a year the board of directors cannot just before an election arbitrarily cancel such stock in order to carry the election.[6] It is of course legal to purchase stock from stockholders in order to control an election.[7]

§ 615. *Where a corporation owns a majority of the stock of a rival company, may it vote the stock and control the latter company?* — It has been held in several cases that where one corporation owns a majority of the stock of a rival company, the temptation to manage the latter company for the benefit of the former company will be so great that a minority stockholder of the latter company may enjoin the former company from voting the stock.[8]

[1] Way *v.* American, etc. Co., 60 N. J. Eq. 263 (1900); 94 N. W. Rep. 69.

[2] Kimball *v.* New England, etc. Co., 69 N. H. 485 (1899).

[3] State *v.* Smith, 48 Vt. 266 (1876). In the case of Taylor *v.* Miami Exporting Co., 6 Ohio, 176, 223 (1833), a bill by a stockholder to compel a person to take back from the corporation certain stock which he had purchased of it just before the election, and had voted at the election and then immediately sold again to the corporation, failed. The vote on these shares, however, did not affect the result. But see §§ 65, 70, 286 (notes), *supra*, and § 653, *infra*. Where the stockholders are present and no one objects to the issue of unissued stock to a director whereby he acquires control, such issue is legal. Christopher *v.* Noxon, 4 Ont. Rep. (Can.) 672 (1883).

[4] § 286, *supra*.

[5] Davidson *v.* Grange, 4 Grant's Ch. Rep. (Can.) 377 (1854).

[6] Hall *v.* Lay, 27 N. Y. Misc. Rep. 602 (1899).

[7] Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882).

[8] Where one railroad company acquires a majority of the stock of another having so substantially similar a field of operations that there is a necessary conflict of interests between the two, the former may be enjoined from voting its stock on the question of an-

In New York, however, the more logical rule is laid down that a court of equity has no power to restrain a railroad corporation, which has legally purchased a majority of the stock of another railroad corporation, "from voting on the stock so purchased, upon the allegation, or proof, that it intends to cause a board of directors to be elected, who, by their action or non-action, may injure or prejudice the interests of the minority stockholders of the corporation whose stock has been so purchased."[1] Such also is the law in New Jersey.[2] It has been held in Ohio that one railroad corpora-

nulling a lease from one to the other, even though both companies are in the hands of a receiver. George *v.* Central R. R. etc. Co., 101 Ala. 607 (1894). In Memphis, etc. R. R. *v.* Woods, 88 Ala. 630 (1889), it was held that where one railroad company has acquired a majority of the stock of another railroad company, and has elected the board of directors, and oppressed and defrauded such latter company by buying unnecessary rolling stock, making unnecessary repairs at exorbitant prices, unduly apportioning the earnings as between the two roads, and in other ways increasing its own profits at the expense of the latter company, a minority stockholder in such latter company may enjoin the former company from voting such stock at an election. A request to the company to bring the action was first made by the stockholder who brought the suit. A transportation company owning a majority of the stock of an ice company may be enjoined from voting the stock, if the former company intends to purchase ice from the latter company, but otherwise no such injunction will issue. American, etc. Co. *v.* Linn, 93 Ala. 610 (1890). A stockholder in one mining and manufacturing company may enjoin another rival company from voting the majority of stock in the former company, such majority being owned by the latter company. Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890). Where an electric light company purchases a majority of the stock of a competing electric light company in the same city, and elects the board of directors, and fraudulently uses its power to make the latter subservient to and as a feeder to the former, and intends to destroy the latter, the court, at the instance of a minority stockholder of the latter, will appoint a receiver of the company; but the proof of such intent must be clear. The fact that the directors so elected are stockholders in the controlling company is not sufficient. Davis *v.* U. S. etc. Co., 77 Md. 35 (1893). It is illegal for an Ohio corporation to purchase a majority of the stock of a Tennessee corporation for the purpose of controlling the latter, even though they are engaged in a similar business, the object being to form a monopoly. Hence the purchasing company cannot enforce the contract as to certain things which were to be done by the vendor of the stock. Marble Co. *v.* Harvey, 92 Tenn. 115 (1892). See also Alexander *v.* Searcy, 81 Ga. 536 (1889). A stockholder's suit to restrain another corporation from voting stock in his corporation does not lie where such other corporation is not made a party defendant. Hollifield *v.* Wrightsville, etc. R. R., 99 Ga. 362 (1896).

[1] Oelbermann *v.* New York, etc. R. R., 77 Hun, 332 (1894).

[2] A stockholder will not be enjoined from voting on the ground that he is not a *bona fide* stockholder, but that his stock was paid for by rival companies, and that he intends to control the company for the advantage of those companies. Camden, etc. R. R *v.* Elkins, 37 N. J. Eq. 273 (1883). The New

tion has no power to acquire the bonds of another railroad corporation in order to control the elections of the latter, such bonds having a voting power.[1] Where a railroad company acquires control of the bonds and stock of a competing company, and allows a foreclosure to take place, the minority stockholders may defend against such foreclosure on the ground that the earnings had been kept down and also diverted.[2]

The reasonable rule would seem to be that where one company, having no power to purchase the stock of a rival company,[3] illegally purchases a controlling interest in such stock,[4] or where one company, having legally purchased the majority of the stock of a rival company, has managed the latter company fraudulently in

Jersey courts will at the instance of a stockholder enjoin a New Jersey corporation from owning and voting stock in a Washington corporation where the Washington courts hold that a Washington corporation has no power to own stock in another Washington corporation, and may be enjoined from voting such stock. Coler *v.* Tacoma, etc. Co., 54 Atl. Rep. 413 (N. J. 1903). A federal court has held that where a corporation is organized to own and vote the stock of two competing railroads, the courts will enjoin the voting of the stock, the combination itself being forbidden by law. Clarke *v.* Central R. R. etc., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894).

[1] State *v.* McDaniel, 22 Ohio St. 354, 368 (1872). Where the state has brought suit to forfeit the charter of a railroad company on the ground that a majority of its stock is held contrary to the statutes and constitution of the state by another railroad company, the case may be removed to the federal court if the latter company is an instrument of interstate commerce, and purchased the stock for interstate commerce purposes. It is also removable where the latter company claims that its charter existed before such constitution and statutes, and gives it a right to own such stock. South Carolina *v.* Port Royal, etc. Ry., 56 Fed. Rep. 333 (1893).

[2] Farmers' L. & T. Co. *v.* New York, etc. Ry., 150 N. Y. 410 (1896).

[3] See §§ 314–317, *supra.*

[4] Milbank *v.* New York, etc. R. R., 64 How. Pr. 20 (1882), where the court, at the instance of a minority stockholder, enjoined another railroad company from voting a majority of the stock in his company, although fraud and partiality in the management for the benefit of the majority stockholder was a fear of the future instead of a fact in the past. The court said: "It is against public policy to have or permit one corporation to embarrass and control another and perhaps competing corporation in the management of its affairs, as may be done if it is permitted to purchase and vote upon the stock." In Louisiana it is held that where one corporation acquires stock in another corporation without authority so to do, the former may collect the dividends on such stock and may sell it, but cannot vote it, and hence that directors elected by such vote may be ousted by *quo warranto* proceedings. State *v.* Newman, 51 La. Ann. 833 (1899). A smelting company has no inherent power to purchase stock in another smelting company, and hence may be enjoined by a stockholder of the latter company from voting such stock. Parsons *v.* Tacoma, etc. Co., 25 Wash. 492 (1901).

its own interest, a court of equity should enjoin it from voting the stock at the next election. But if the purchase of the stock was legal and there has as yet been no fraud in the management, such an injunction should not be granted.[1] Moreover, even though a railroad purchases the stock of another railroad, in violation of the charter of the former, yet, if subsequently the legislature passes a law authorizing any corporation to purchase and own the stock of other corporations, the illegality of the above-mentioned purchase is cured, and the disability to hold such stock is removed, there being no longer any statute, rule of law, or principle of public policy forbidding such purchase.[2] A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit.[3] An individual may of course own a controlling interest in two corporations, although they compete in business,[4] but the courts will carefully scrutinize any contracts between two such corporations so controlled.[5] A corporation that owns stock in another corporation may vote such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists.[6] An able New Jersey court has recently held that a scheme

[1] The right of one railroad corporation to own stock in another railroad corporation carries with it the right to vote for the directors and on all other questions, unless such vote is for the purpose of perpetrating an actual fraud. Rogers *v.* Nashville, etc. Ry., 91 Fed. Rep. 299 (1898). In this case the court held that where one railroad owns a majority of the stock and controls the board of directors of another railroad and causes the latter to lease its road to the former, a stockholder of the former may file a bill in equity to set aside such lease on the ground that its terms were so inequitable as to constitute a fraud, and that in such case no demand need be made to the board of directors to bring the suit, if the facts alleged in the bill show that the board of directors is controlled by the guilty party. See also § 6, *supra*.

[2] *In re* Buffalo, etc. R. R., 37 N. Y. Supp. 1048 (1896), involving the same transaction as was involved in Milbank *v.* N. Y. etc. R. R., 64 How. Pr. 20. See also §§ 314–317, *supra*.

[3] Ingraham *v.* National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 N. Y. App. Div. 582. See 122 Fed. Rep. 147.

[4] See p. 681, note, *supra*. *Cf.* § 317, *supra*.

[5] See § 662, *infra*.

[6] Windmuller *v.* Standard, etc. Co., 114 Fed. Rep. 491 (1902). In the case of Robotham *v.* Prudential Ins. Co., 53 Atl. Rep. 842 (N. J. 1903), the court approved the decision in Windmuller *v.* Standard, etc. Co., 114 Fed. Rep. 491, but said that if the complaint had been framed on a different theory, and "if the complainants had attacked the action of the directors in instituting the proceedings for dissolution as the product of bribery or improper influence of any kind, or of favoritism to the majority stockholder, who had appointed the directors, a very different case would have been presented. If the complainants had also charged that the directors, their trustees, had not only com-

whereby an insurance company purchases a majority of the stock of a trust company, and the trust company purchases a majority of the stock of an insurance company, is illegal, and will be set aside at the instance of a dissenting stockholder, inasmuch as it results in self-perpetuating boards of directors, without the responsibility which would exist if those directors represented their own stock, and the court pointed out that the "Voting Trust Cases" in New Jersey had established the principle of law that agreements which sever the ownership of stock from the voting power are, in many instances, a violation of another principle of law, that "every stockholder is entitled to the benefit of the judgment of every other stockholder in the management of the affairs of the corporation."[1]

§ 616. *Illegal or fraudulent elections — The remedy of injunction against elections and against voting particular stock.*— A court of equity has power to enjoin the holding of an election by a corporation during the pendency of a suit.[2]

mitted a gross and flagrant breach of duty, but that the majority stockholder had instigated them to do it, a strong case, apparently, would have been made out in which to hold the majority stockholder liable for damages."

[1] Robotham *v.* Prudential Ins. Co., 53 Atl. Rep. 842 (N. J. 1903). The counsel in this case claimed that the following situation was legal: "One man controls a company of $10,000,000 capital. He may form a new company, with a capital of $5,100.000, to hold a majority of the stock. He may then sell all but $2,600,000 of the stock in company No. 2, and transfer his remaining stock to a new company with a capital of $2,600,000. He may then sell to company No. 3 all but $1,400,000 and transfer that to a new company. This process may go on until the power of the whole chain of corporations is vested in the holder of a few thousand dollars of stock in the ultimate company, and the same chain can be used for an unlimited number of companies." In reply to this the court said that such a situation, if it should arise, might lead to the following questions: "First. Whether the holders of the $4,900,000 of stock could not disfranchise the new irresponsible adventurers who assumed to wield the voting power of the $5,100,000 of stock,— disfranchise this stock until the beneficial owners of it should take control of their own property and use its voting power. Second. Whether the actual, beneficial owners of the $5,100,000 of stock could not break through the chain of corporate fictions which separated them from their property, and dictate how its voting power should be exercised. Third. Whether it would not be the duty of the attorney-general of the state to take proceedings to dissolve the holding companies, as an abuse of corporate franchises,— as a fraud upon the extremely liberal provisions of our corporate act, which, however, permit the incorporation of companies only for a 'lawful purpose.'"

[2] In Walker *v.* Devereaux, 4 Paige, 229, 247 (1833), Chancellor Walworth said: "This court unquestionably has the power to prevent this election by an injunction operating upon the commissioners, restraining them from acting as inspectors of the election." In Haight *v.* Day, 1 Johns. Ch. 18 (1814), Chancellor Kent dissolved the injunction, but did not question the power of the court to grant it. High on Injunctions, § 1230, says: "While the pro-

A court of equity may enjoin the majority stockholders from holding a new election, even though they claim that the former election was invalid.[1]

priety of equitable interference by injunction with the election of officers of private corporations has been frequently criticised, and with no inconsiderable show of justice, the jurisdiction itself, although sparingly exercised, is too firmly established to be readily shaken without the intervention of legislative authority. The jurisdiction is, however, almost entirely of American growth, the English authorities affording few instances of its exercise." A court of equity has jurisdiction on a bill in equity to enjoin an election, although the statute provides for a summary remedy by application to the court, where the relief asked for by the bill involves also the transfer of stock. Archer *v.* American, etc. Co., 50 N. J. Eq. 33 (1892). The holding of an election may be enjoined pending a suit which has been commenced to restrain the voting the stock which has been illegally issued at less than par to friends of the directors in order to control the election. Way *v.* American, etc. Co., 60 N. J. Eq. 263 (1900). Where a corporation has brought suit against its president for an accounting for money misappropriated by him, and where the president owns a majority of the stock, the court may enjoin the holding of an election, it being shown that the president has power to elect a board of directors who may defeat the purpose of the suit. Coxe *v.* Huntsville, etc. Co., 129 Ala. 496 (1900).

The court may enjoin the company from receiving any votes at an election unless the votes of the plaintiff are received. Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. In the latter case Judge Blatchford said: "As to the character of the injunction asked for, it is laid down in Judge Redfield's Treatise on the Law of Railways (vol. 2, sec. 221) that 'it has been common to produce a positive effect, through an injunction out of chancery, by means of a prohibitory order,' and that a mandatory order is, in courts of equity, seldom denied, unless the remedy at law is perfectly adequate." In this case Judge Blatchford enjoined the election inspectors from holding any election until the further order of the court, unless certain persons should first be permitted to vote certain stock; and also enjoined certain persons from voting any stock until after certain other persons had been afforded an opportunity to vote their stock. In Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila. Com. Pl., January, 1890), the court did not deny its power to enjoin the election, but said: "The case is not sufficiently clear to warrant a preliminary injunction that would prevent an election on the day named in the charter, and might cause the irreparable injury which such remedies are given to prevent." If the election is held in violation of an injunction, this fact will be considered in *quo warranto* proceedings. People *v.* Albany, etc. R. R., 55 Barb. 344, 384 (1869). The injunction generally runs against the inspectors, president, directors, officers, agents, servants, etc. Campbell *v.* Poultney, 6 Gill & J. (Md.) 94 (1834). It has been held that an injunction permanently forbidding the holding of any election whatever is an interference with the management of corporate affairs, to which the courts will decline to be a party; and such an injunction would, if granted, be void. People *v.* Albany, etc. R. R., 55 Barb. 344 (1869), holding also that while an injunction forbidding inspectors to

[1] Chiera *v.* Brevoort, 97 Mich. 638 (1893).

A court of equity may also enjoin the voting of particular stock. In order to obtain such an injunction, however, the complainant must show that the defendant intends to vote the stock; that he has no equitable right to do so; that the effect of the vote will be to control the election; and that irreparable and permanent injury will come to the corporation or to the stockholders unless the injunction is granted.[1]

Thus, an injunction has been granted where there was a conspiracy to obtain, on the eve of the election, an injunction against the complainants from voting their stock;[2] also where the directors

hold an election at all, or to receive and count the votes thereof, is entirely void, since a court of equity has no power to restrain permanently an officer of a corporation from performing the ordinary duties of his office, yet they may be enjoined from holding an election until the further order of the court, or from receiving the votes of certain stockholders until the votes of others are deposited. An injunction may be granted staying an election. Scholfield *v.* Union Bank, 2 Cranch, C. C. 115 (1815); s. c., 21 Fed. Cas. 723, where the inspectors denied the right of pledgors to vote. If directors convene a meeting, to pass resolutions favorable to themselves on questions in which the interests of the directors are opposed to those of the shareholders, by a circular which is misleading, and which contains statements calculated to obtain proxies in their favor without giving the shareholders the information necessary to enable them to form a just judgment as to who are the proper persons to whom to intrust their votes, the court will grant an injunction to restrain the holding of the meeting, and to restrain the directors from laying such resolutions before the meeting. Jackson *v.* Munster Bank, 13 L. R. Ir. 118 (1884). For other instances in which a court of equity interfered, see § 593, *supra*, and § 618, *infra*.

[1] Reed *v.* Jones, 6 Wis. 680 (1858), holding that a preliminary injunction against a stockholder voting his stock cannot be granted on the ground that he had no title to the land which he conveyed in payment of the stock. The stock had not been canceled by the company, and no action was pending to cancel it. In McHenry *v.* Jewett, 90 N. Y. 58 (1882), a preliminary injunction was denied, inasmuch as the complaint showed no equitable cause of action. Where the owner of a majority of the stock has been fraudulently deprived of her stock by her pledgee, who has thereby deprived her of the control and claims the stock as his own, the court will enjoin him from voting the stock and will appoint a receiver of such stock *pendente lite*. Ayer *v.* Seymour, 5 N. Y. Supp. 650 (Com. Pl. 1889). An injunction against a stockholder's voting certain stock is not an injunction to "suspend the general and ordinary business of a corporation." An election is not such business. Reed *v.* Jones, 6 Wis. 680 (1858).

[2] Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420, in which the allegation was that the defendants contemplated, through improper means, to obtain an injunction preventing plaintiffs, who were large stockholders in a corporation, from voting at an approaching election, and that defendants were improperly obtaining proxies from other stockholders in order to control the election for their private purposes. The complainant alleged that defendants intended to obtain control for the benefit of rival companies, and intended

propose to postpone the election in order to prolong their term of office;[1] also, in certain cases, where a stockholder has transferred part of his stock in order to increase the voting power of the stock, the charter limiting the number of votes one stockholder may cast;[2] also where a majority of stock is owned by a competing company which has acquired control for the purpose of diverting business to itself;[3] also where "trustees," who are mere agents, refuse to transfer the stock to their principals or to give proxies.[4]

Where the owner of a majority of the stock sells it, the purchase price being only paid in part, and retains the stock in his name until the full price is paid, he cannot be compelled to deliver the stock or to refrain from ousting the vendee from the presidency of the corporation, where the vendee fails to meet the other payments, even though the vendee has proceeded to improve the property.[5]

Equity has jurisdiction to compel the transfer of stock as between parties. Hence where stock is issued in payment for property, and the party to whom the certificate is issued refuses to divide it among the owners of the property, as provided by contract, a court of equity may compel the division and may enjoin any election of the corporation until such division is made.[6]

The general rule is that one stockholder has nothing to do with the motive of another stockholder. The injunction must be based on damage reasonably certain to ensue.[7] Accordingly, an injunction will not be granted upon the ground that the stockholders against whom the injunction is sought are likely to obtain control of the affairs of the company, and that then they will probably

fraudulently to prevent the complainants from voting. The court enjoined defendants from participating in any election unless plaintiffs' votes were received thereat, and from restraining plaintiffs in their right to vote.

1 A stockholder may enjoin directors from postponing an annual election which comes in February, but which the directors by by-law have changed to October, thereby endeavoring to extend their term. Elkins *v.* Camden, etc. R. R., 36 N. J. Eq. 467 (1883). See also Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883).

2 See § 621, *infra.*

3 See § 615, *supra.*

4 See § 622, *infra.* An injunction *pendente lite* against the voting of certain stock in connection with the formation of an alleged illegal pool will not be continued where it failed to accomplish its purpose at one annual meeting and will fail in the next meeting. Ryan *v.* Seaboard, etc. R. R., 89 Fed. Rep. 385 (1898).

5 Stockton *v.* Russell, 54 Fed. Rep. 224 (1892).

6 Archer *v.* American, etc. Co., 50 N. J. Eq. 33 (1892). Where by reason of an order of the court stock is issued to a party and the certificate deposited in court to abide an appeal, the party to whom such stock runs cannot vote the same pending the appeal. Durfee *v.* Harper, 22 Mont. 373 (1899).

7 Ryder *v.* Alton, etc. R. R., 13 Ill. 516 (1851), where a subscriber failed in his defense against a subscription by attacking the policy of the majority in control.

misuse their power.[1] The form of the injunction order varies, of course, with the circumstances of the case. The federal courts have sanctioned a form which, while drastic in its terms, is effective in reaching the desired result, and is none too severe when the difficulties are considered.[2]

Where a party is enjoined from voting, the court will enjoin his proxy from voting.[3]

The proxy may be enjoined although his principal is not made a party and is not served.[4] But stockholders who are not made parties will not be enjoined.[5] The injunction against certain persons voting certain stock does not prevent the election from taking place. On the contrary, the election goes on and is valid, even though it happen that what would have been a minority of the votes, had not the injunction issued, becomes, by reason thereof, a majority, and elects.[6] Where the injunction is applied for at a time so near the election that the opposition will have no reasonable opportunity to be heard, the court may refuse the application on that ground.[7] The practice of serving an injunction after the meeting has assembled is not looked upon with favor by the courts.[8]

[1] Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883). *Cf.* Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420.

[2] See the form of injunction granted in Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. Approved in People *v.* Albany, etc. R. R., 55 Barb. 344, 383 (1869). An injunction against a corporation recognizing a transfer of stock was held not to prevent the transferee's voting, in Commonwealth *v.* Stevens, 168 Pa. St. 582 (1895).

[3] Clarke *v.* Central R. R. etc. Co., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894).

[4] Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420.

[5] Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420.

[6] Brown *v.* Pacific Mail, etc. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420. Where by reason of an injunction against voting certain stock the meeting is not held at the time specified in the notice, but later in the day a minority meet and adjourn to the next day and conceal such adjournment from the majority and elect directors, the court will oust them from office. State *v.* Bonnell, 35 Ohio St. 10 (1878).

[7] Where a bill was filed to restrain certain stockholders from selling or assigning their stock, or from voting upon it at an ensuing election, which was to be held within three days from the date of the filing of the bill, the court held that inasmuch as the probable effect of the injunction would be to change the result of the election, and the consequent control of the affairs of the company, without allowing the stockholders sought to be restrained to be heard in their own defense, the injunction ought to be denied. Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). It appears, however, that counsel stipulated for a new election in case the complainant succeeded, and the court so ordered.

[8] The practice of procuring an injunction and serving it after the meeting had assembled is not to be commended, and should only be tolerated in cases

Where an injunction has been obtained on false affidavits and bill to control an election, and the proceedings in court are discontinued immediately after the election, the court will summarily vacate and set aside the election by reason of the abuse of the process of the court and the fraud on the rights of the stockholders.[1] An appeal from an injunction against voting certain stock will be dismissed where the parties may, under a statute, apply to the court to review the election on affidavits.[2] Where the statutes require a corporation to keep a book containing the names of the stockholders and the stock held by each, and it fails to do so, a stockholder cannot obtain a mandatory injunction to the effect that voting at the annual election shall be in accordance with a list of stockholders, as certified by the transfer agent and registrar of the corporation.[3] The federal court has no jurisdiction of a suit by a stockholder to enjoin a corporation from allowing certain stock to be voted on various grounds, where there is no allegation that the complainant's holdings of stock are worth upwards of two thousand dollars.[4]

§ 617. *Illegal or fraudulent elections — The remedies of quo warranto and mandamus.*— There are various ways in which an illegal or fraudulent election of directors or managers of an incorporated company may be investigated and remedied. The natural and proper remedy in all cases is the old remedy of *quo warranto* to test the title to office. In England *quo warranto* does not lie to test the legality of the election of officers of a private corporation, but in this country a contrary rule prevails.[5] An information in

where the right thereto is clearly established." *Re* Rochester, etc. Co., 40 Hun, 172, 175 (1886).

[1] Putnam *v.* Sweet, 1 Chand. (Wis.) 286, 334 (1849).

[2] Where an injunction against postponing an election is granted, and the election is held, and the next day an appeal is taken from the injunction order, the appeal will be dismissed, inasmuch as the parties have the remedy under the statute of applying to the court to review the election. Camden, etc. R. R. *v.* Elkins, 37 N. J. Eq. 273 (1883). Where an injunction against voting particular stock has been refused, and the election held, an appeal will be dismissed. Foster *v.* Smith, 115 Cal. 611 (1897).

[3] Mitchell *v.* Colorado, etc. Co., 117 Fed. Rep. 723 (1902). But where the directors and officers, in order to continue in office, do not give notice of an annual meeting, but enact by-laws to aid them in this purpose, and cause a stockholder to have the annual meeting enjoined, other stockholders may file a cross-bill in such injunction suit, and it appearing to the court that a fair election could not otherwise be held, the court will modify the injunction so as to allow the election to be held at a time fixed by the court and under the supervision of a master in chancery appointed by the court. Bartlett *v.* Gates, 118 Fed. Rep. 66 (1902).

[4] Harvey *v.* Raleigh & G. R. R., 89 Fed. Rep. 115 (1898).

[5] Commonwealth *v.* Arrison, 15 Serg. & R. (Pa.) 127 (1827), a case of church trustees; Commonwealth *v.* Graham, 64 Pa. St. 339 (1870), the same; People *v.* Tibbits, 4 Cow. 358 (1825), an insurance company; State *v.* Farris, 45 Mo. 183 (1869), college trustees; Creek *v.* State,

the nature of a *quo warranto* is not allowed of course, but is a subject for the exercise of a sound discretion.[1] *Mandamus*, instead of *quo warranto*, lies when the title *de jure* has been adjudicated.[2] In West Virginia *mandamus* is held to be the proper remedy to place a *de jure* director in the place of the *de facto* director, and service on the latter may be by publication;[3] and *mandamus* lies at the instance of a corporation to compel illegally elected directors to turn over the books to the legally elected directors.[4] Under the

77 Ind. 180 (1881), church trustees; State *v.* Kupferle, 44 Mo. 154 (1869), an insurance company; State *v.* McDaniel, 22 Ohio St. 354 (1872), directors of a railroad; Commonwealth *v.* Smith, 45 Pa. St. 59 (1863); High, Extraord. Remedies, § 653, etc.; Shortt, Informations, 129 (Eng. 1887); Commonwealth *v.* Gill, 3 Whart. (Pa.) 228 (1837), giving the pleadings herein: People *v.* Albany, etc. R. R., 55 Barb. 344, 354 (1869). *Quo warranto* is a proper remedy to determine the right of a relator claiming to have been elected a director of a corporation. Attorney-General *v.* Looker, 111 Mich. 498 (1897). For a clear statement of the nature of an information in the nature of a *quo warranto* filed by a claimant for an office in the name of the attorney-general, see Gibbs *v.* Somers Point, 49 N. J. L. 515 (1887). A stockholder may institute *quo warranto* proceedings. Commonwealth *v.* Stevens, 168 Pa. St. 582 (1895). See also § 713, *infra*, concerning *de facto* officers. The validity of the charter of a school incorporated as a joint-stock incorporation cannot be tested in *quo warranto* proceedings brought to determine the rights of parties claiming to be trustees. Commonwealth *v.* Yetter, 190 Pa. St. 488 (1899). Where there is a contest as to who are the legal officers, the attorney for the defeated party cannot hold the corporation liable for his services. Commonwealth *v.* Order, etc., 192 Pa. St. 487 (1899). See s. c., 193 Pa. St. 240 (1899).

1 State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854). The court in its discretion may, in Minnesota, decline to allow a private person to file an information in the nature of *quo warranto* to test the title to office of directors. Whitcomb *v.* Lockerby, 59 N. W. Rep. 495 (Minn. 1894). *Quo warranto* does not lie against a superintendent who may be removed at any time by the directors. State *v.* Cronan, 23 Nev. 437 (1897). A newly elected president may file a petition to be allowed to file an information in the nature of a *quo warranto* to compel a *de facto* president to surrender the office where the basis of the petition is that the meeting of the board of directors which elected the *de facto* president was held out of the state in violation of the statutes of Illinois. Place *v.* People, 192 Ill. 160 (1901).

2 Leeds *v.* Atlantic City, 52 N. J. L. 332 (1890). The Massachusetts statute that a certificate of stock issued as a pledge shall state that fact on its face enables the pledgor to vote without such proxy. If the certificate merely states that it is given in pledge, without stating the name of the pledgor, the pledgee to whom the certificate runs may vote the stock. The court may, however, refuse to grant a *mandamus* declaring certain persons duly elected directors, where they were elected by the vote of the pledgee as against the wishes of the pledgor. J. H. Wentworth Co. *v.* French, 176 Mass. 442 (1900).

3 Cross *v.* West Va. etc. Ry., 35 W. Va. 174 (1891). Compare s. c., 34 W. Va. 742, and People *v.* New York, etc. Asylum, 122 N. Y. 190 (1890).

4 American Ry. Frog Co. *v.* Haven, 101 Mass. 398 (1869). After the courts have decided that certain persons are direct-

Nevada statute *mandamus* lies at the instance of a superintendent to oust a person who is illegally holding that office.[1] The courts of one state will consider the board of directors as legally elected until the courts of the state wherein the company was organized decide to the contrary.[2] Hence *mandamus* does not lie in one state at the instance of persons, claiming to be directors in a foreign corporation, commanding other persons from refraining to act as directors, even though all the persons are residents.[3] Where the corporate property is being wasted by reason of a contest between two rival boards of directors, one board having been declared illegal by the court and the other refusing to act, the court will, at the instance of a minority stockholder, appoint a receiver to protect the property until a recognized board is elected, and the stockholder need not request the directors to bring suit before he himself brings suit.[4]

§ 618. *Illegal or fraudulent elections — The remedy by injunction against directors acting, and the remedy of a suit in equity where the validity of the election arises incidentally.*— A court of equity may, prior to the holding of an election, enjoin such election.[5] But a different rule prevails after the election has actually taken place. A court of equity has no inherent power or jurisdiction to entertain a bill for the purpose of reviewing a corporate election and ousting the parties who claim to have been elected.[6]

ors, *mandamus* will be granted that the defeated parties turn over the books and papers to the former. Matter of Journal Pub. Club, 30 N. Y. Misc. Rep. 326 (1900). Where a director was not qualified and a new director has been elected in his place, he cannot have *mandamus* to allow him to inspect the company's books and exercise other rights of a director, even though for a time he was permitted to act as director. People *v.* N. Y. etc. Co., 34 N. Y. Misc. Rep. 326 (1901).

[1] State *v.* Cronan, 23 Nev. 437 (1897).

[2] State *v.* Cronan, 23 Nev. 437 (1897). The summary statutory remedy in New York to review elections does not apply to foreign corporations. Matter of North Am. Rice Co., N. Y. L. J., April 23, 1902. It is doubtful whether a Maine corporation may institute a suit in New York to enjoin certain persons from representing themselves as officers in such Maine corporation and from interfering with its business, where the controversy turns upon the validity of an election. Washington, etc. Co. *v.* Dimmick, etc., 41 N. Y. App. Div. 596 (1899). See also § 734, *infra.*

[3] Wason *v.* Buzzell, 63 N. E. Rep. 909 (Mass. 1902).

[4] Jasper, etc. Co. *v.* Wallis, 123 Ala. 652 (1899). See also §§ 629, 746, *infra.*

[5] See § 616, *supra.*

[6] The title of *de facto* officers to their office cannot be tested by an injunction or bill in equity. *Quo warranto* or a proceeding under the statute is necessary. People *v.* Albany, etc. R. R., 57 N. Y. 161, 171 (1874). A court of equity has no power to decide which set of officers was duly elected, unless that question arises incidentally in connection with some other equitable matter. St. Patrick's, etc. *v.* Byrne, 59 N. J. Eq. 26 (1899). A court of equity has no jurisdiction to decide which board of directors was elected. Kean *v.* Union Water-

Nevertheless, where there has been a palpable fraud practiced in the election, and usurpers are about to take possession of the property in violation of all justice, a court of equity will enjoin them from doing so.[1]

Co., 52 N. J. Eq. 813 (1895), rev'g Union Water Co. *v.* Kean, 52 N. J. Eq. 111. An *ex parte* injunction against a director continuing his duties as a director is void in New York as being contrary to the statute. Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892). Where there are two rival boards of directors, each claiming to have been legally elected, the remedy of one against the other is not an injunction, but a *quo warranto* proceeding. Carmel, etc. Co. *v.* Small, 150 Ind. 427 (1897). No injunction lies against officers acting as such, on the ground of illegal election. *Quo warranto* lies. Hartt *v.* Harvey, 32 Barb. 55 (1860). Equity has no power, except as incidental to other relief, to review an election. Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891); Hullman *v.* Honcomp, 5 Ohio St. 237 (1855); New England, etc. Co. *v.* Phillips, 141 Mass. 535 (1886), where an injunction was sought to restrain persons from acting as directors who had been illegally elected. Allen, J.: "This course is open to the objection that suits to remove or to institute corporation officers do not belong to the original jurisdiction in chancery; and that the right to be such officer cannot, in general, and in the absence of special legislation allowing this remedy, be tested by means of an injunction." 1 Pomeroy, Eq., § 171; 3 Pomeroy, Eq., § 1345. See also, to same effect, Owen *v.* Whitaker, 20 N. J. Eq. 122 (1869), where the legality of the first election was the only thing involved; Hughes *v.* Parker, 20 N. H. 58 (1849); Johnston *v.* Jones, 23 N. J. Eq. 216 (1872); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); Mechanics' Nat. Bank *v.* Burnet Mfg. Co., 32 N. J. Eq. 236 (1880), where a third person suing the corporation sought to have its answer stricken out because the officers were not duly elected; Fadness *v.* Braunborg, 73 Wis. 257 (1889), a religious corporation case; Wandsworth, etc. Co. *v.* Wright, 18 W. R. 728 (1870), where fraud was charged on the part of the inspectors; Davidson *v.* Grange, 4 Grant, Ch. (U. C.) 377 (1854), where the court refused an injunction, but said in a dictum that the election might be set aside on account of fraudulent voting of shares subscribed for by "dummies" to get control of the election on the promise that the subscriptions would afterwards be canceled. Self-constituted directors without a regularly organized meeting have not a good title to their office; and where subsequently the incorporators elected other directors, the latter may cause to be stayed an action brought in the name of the company by the self-constituted directors. John Morley Bldg. Co. *v.* Barras, [1891] 2 Ch. 386. The Pennsylvania statute giving the court power to control and supervise elections where fraud, violence, or unlawful conduct prevents a fair and honest election does not sustain an injunction obtained by majority stockholders — who withdrew from the annual meeting and held a separate election because a stock vote was not allowed on the election of chairman — against the board elected by the minority. *Quo warranto* is the only remedy. Jenkins *v.* Baxter, 160 Pa. St. 199 (1894).

[1] Where the owners of the whole stock sell it, and part of them resign and place the representatives of the vendee in possession, and those who remain in the board do so at his request, but transfer to him their certificates of stock, and then subsequently, when the time for the annual meeting has gone by, they publish a notice of a meeting and conceal the notice from him, and elect a

The *de facto* directors may enjoin the claimants to office from attempting to take forcible possession or exercising the duties of the office.[1] If the validity of a corporate election arises incidentally in connection with a suit in equity, the court will pass upon the election. This may occur where a bill is filed to enjoin a forfeit-

board, and attempt to take possession, a court of equity will enjoin them. Equity is not obliged "to leave the corporation and its lawful directors to the remedy at law, always taking at least months, and in the meantime suffer the road to be operated and perhaps ruined by the depredators, because they claim to be directors *de facto* or *de jure*." Johnston *v.* Jones, 23 N. J. Eq. 216, 229 (1872). Where the pledgee of stock sells it out and buys it in himself, and at the annual election votes the stock by proxy, even though the stock still stands on the corporation books in the name of the pledgor, and the pledgor claims that the sale is illegal and that the directors elected by the pledgee's vote intend to take action detrimental to the corporation, such pledgor is entitled to an injunction against such directors acting as directors. Reynolds *v.* Bridenthal, 57 Neb. 280 (1898). In Clarke *v.* Central, etc. Co., 54 Fed. Rep. 556 (1893), it appeared that, the board of directors having been illegally elected, "the voting power of the stock was enjoined, a new election ordered, and the court appointed receivers, not for the purpose of subjecting the properties to the claims of creditors, but to protect and to preserve them until they could be turned over to a legally elected board of directors, as proper trustees, who would have the right under the law to take and operate the railroad in the interest of all concerned. The court further directed that, when this new election should have taken place, said new board of directors might apply to the court to have the property returned to the control of the properly constituted officers of the corporation." In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Where a corporation has an authorized capital of $5,000, but only $2,500 are directed by the stockholders to be issued, it is illegal and fraudulent to issue the remaining authorized capital without giving the existing stockholders a prior right to subscribe to such increased capital *pro rata*. Directors elected by reason of such illegal issue will be enjoined from acting, where they are about to change the whole policy of the company. Humboldt, etc. Assoc. *v.* Stevens, 34 Neb. 528 (1892). A suit in Kentucky between rival claimants to office to have an adjudication as to the same and to have a receiver does not prevent one of the parties from foreclosing a mortgage on the corporate property in another state and having a receiver thereof appointed. Kelly *v.* Mitchell, 98 Ky. 218 (1895). A suit by a state to enjoin the defendant railroad company from being managed by directors elected by the votes of stock of the company owned by a foreign railroad corporation *ultra vires*, and also to declare such votes and elections void, and also for a receiver, or in lieu of all this for a forfeiture of the charter, is not demurrable. State *v.* Port Royal, etc. Ry., 45 S. C. 470 (1895). For other instances in which a court of equity interfered, see §§ 593 and 616, *supra*.

[1] Reis *v.* Rohde, 34 Hun, 161 (1884). Although there is a controversy as to the legality of an election, yet the newly-elected president, who takes peaceable possession of the property, may enjoin the old president, who claims to hold over and who has forcibly taken possession. Toronto, etc. Co. *v.* Blake, 2 Ont. Rep. (Can.) 175 (1882).

ure of stock[1] or a consolidation of corporations,[2] or to set aside an illegal assessment;[3] but not in a suit to enjoin the sale of stock,[4] nor in a suit to compel the directors to turn over the property.[5]

A court of equity may appoint a master to hold an election of a corporation when by reason of fraud, violence, or unlawful conduct on the part of some stockholder a fair election cannot otherwise be held.[6] Where a claimant to the office of the director has with violence illegally taken possession of the corporate property, the court may appoint a custodian of the property, and direct the custodian to deliver it to the proper officers.[7] But generally an

[1] In an injunction suit, brought by a stockholder to prevent the corporate officers from forfeiting stock, the court will pass upon the legality of an election of directors, but of course will not and cannot remove them. Moses *v.* Tompkins, 84 Ala. 613 (1888); Garden, etc. Co. *v.* McLister, L. R. 1 App. Cas. 39 (1875); 93 N. W. Rep. 997.

[2] Where the directors are about to make an illegal consolidation, and a stockholder files a bill to enjoin it, the court will pass also upon the legality of the election of the *de facto* directors. Nathan *v.* Tompkins, 82 Ala. 437 (1887).

[3] An assessment upon stock levied by a board of directors illegally elected, and a sale of the stock thereunder, does not put an end to the stockholders' suit to oust such board of directors and to set aside such assessment and to set aside contracts made by such board. The complaint is not multifarious. Whitehead *v.* Sweet, 126 Cal. 67 (1899).

[4] In an action to enjoin the sale of stock by a corporation under a lien which the corporation has upon the stock, a court of equity will not inquire into the regularity of the election of the directors. Elliott *v.* Sibley, 101 Ala. 344 (1893).

[5] The legality of the election of directors cannot be tested by a suit in equity, even though the suit is ostensibly brought to compel the directors to turn over the property. Bedford Springs Co. *v.* McMeen, 161 Pa. St. 639 (1894). Where newly-elected directors bring suit in the name of the company for the corporate books, the legality of the election cannot be questioned by way of defense. The question of such legality can be raised only by a direct proceeding for that purpose. Austin, etc. Co. *v.* Gemmell, 10 Ont. Rep. (Can.) 696 (1886); 71 Pac. Rep. 766.

[6] Tunis *v.* Hestonville, etc. R. R., 149 Pa. St. 70 (1892). Where the directors and officers, in order to continue in office, do not give notice of an annual meeting, but enact by-laws to aid them in this purpose, and cause a stockholder to have the annual meeting enjoined, other stockholders may file a cross-bill in such injunction suit, and it appearing to the court that a fair election could not otherwise be held, the court will modify the injunction so as to allow the election to be held at a time fixed by the court and under the supervision of a master in chancery appointed by the court. Bartlett *v.* Gates, 118 Fed. Rep. 66 (1902). A decree to the effect that stockholders entitled to vote were forcibly prevented from voting, and to the effect that a commissioner should conduct another election and report to the court the vote and the objections, is not a final decree. National, etc. Co. *v.* United, etc. Co., 180 Pa. St. 224 (1897). See also § 612, *supra.*

[7] Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892).

injunction and a receiver are not the proper remedies for a claim that the directors were illegally elected.[1]

§ 619. *Illegal or fraudulent elections — Statutory remedy by petition to a court of equity.*— In consequence of the delays and difficulties attending the remedy of *quo warranto*, statutes have been enacted in many of the states which give courts of equity the power to review corporate elections at the instance of the parties aggrieved. Such statutes are found in New York, New Jersey, California, and other states. By these statutes the court, sitting as a court of chancery, is empowered to review corporate elections, and to grant such relief as the particular circumstances and justice of the case seem to require.[2]

These statutes have proven to be among the wisest and best that legislatures ever enacted in regard to corporations. They furnish a speedy, simple, just, and effective remedy for all complaints, and are free from useless technicalities and expense. Various decisions under these statutes are given in the notes below.[3] Although by

[1] Ulmer *v.* Maine, etc. Co., 93 Me. 324 (1899).

[2] Under a statute authorizing a court to review elections, the proceeding may be in equity. Whitehead *v.* Sweet, 126 Cal. 67 (1899). See also the cases in the next note.

[3] For various cases in New York, showing the wide powers exercised by the court under this statute, see *Ex parte* Holmes, 5 Cow. 426 (1826); Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872); *Ex parte* Desdoity, 1 Wend. 98 (1828); Vandeburgh *v.* Broadway, etc. R. R., 29 Hun, 348 (1883); Strong *v.* Smith, 15 Hun, 222 (1878); *Ex parte* Wilcocks, 7 Cow. 402 (1827); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); *Re* Long Island R. R., 19 Wend. 37 (1837). In this case an election was set aside because the directors had illegally declared certain shares forfeited for non-payment of instalments, and refused to record an assignment thereof so as to entitle the assignee to vote. In a proceeding under the New York statute the strict rules as to the reception of evidence in civil actions do not apply. *Re* Argus Co., 138 N. Y. 557 (1893), holding also that the application will be heard by the court under the New York statute, although another party is joined as petitioner without authority. Under these statutes an election may be declared void by reason of the conspiracy, frauds, or trickery of a part of the stockholders. People *v.* Albany, etc. R. R., 55 Barb. 344 (1869). A statute repealing the statutory remedy in chancery to review elections operates retrospectively as well as prospectively. *Re* New York, etc. Co., 23 Hun, 615 (1881). The statute authorizing a court of chancery to review elections and order new ones does not authorize the courts to issue a *mandamus* to the inspectors of election in regard to counting votes by proxy and amending the return. People *v.* Simonson, 61 Hun, 338 (1891). "Surprise and fraud upon part of the electors is ground for avoiding an election." People *v.* Albany, etc. R. R., 55 Barb. 344, 363 (1869). In this case the place of an election was filled by one party with roughs as proxies brought there for purposes of intimidation, and for voting on *viva voce* votes, and for crowding out the regular voters. People *v.* Albany, etc. R. R., 55 Barb. 379 (1869). In this case also, under the New York statute, in an equitable suit

the award of arbitrators stock is transferred to a certain party, and such party votes the stock at the next election, and thereafter the award is set aside and the stock retransferred, yet the party so

brought by the state, the court appointed a receiver and issued an injunction pending the suit, and finally declared elected persons who would have received the most votes of all votes that had been legally cast, although there had been two elections held at the same time by the two parties at different places in the same town. Under the New York statute making the transfer book conclusively binding upon the inspectors of election, the inspectors cannot exclude the vote of the registered stockholder although he holds the stock merely as pledgee; but under the New York statute allowing the courts to summarily review the election, the court has power to go back of the transfer book and set the election aside, where the statute gave the pledgor the right to vote. Strong *v.* Smith, 15 Hun, 222 (1878). The above remedy does not apply to foreign corporations. See § 617, *supra.* "Where no allegation of fraud or deceit is made, the court cannot interfere under the power vested in it by the Revised Statutes to nullify or set aside the will of the shareholders as expressed by their votes." *Re* Wellman, etc. *v.* Ciancimino, etc. Co., N. Y. L. J., May 13, 1890. The corporation itself may apply under the statute for an order to the effect that the persons declared elected were legally elected. *Re* Pioneer Paper Co., 36 How. Pr. 111 (1865). Although officers in possession of the corporate property and management may, in proceedings to have defendant's election declared illegal, obtain an injunction against the defendant's interfering with the management of property, yet where the plaintiff obtained the property and management by violence on the day of the commencement of the suit notwithstanding an injunction against such violence, his injunction will be dissolved. Ciancimino *v.* Man, 20 N. Y. Supp. 702 (1892). The above remedy does not apply to the legality of an election of the president by the directors. *Re* Caguey, N. Y. L. J., Sept. 15, 1891. As to the California statute see Brewster *v.* Hartley, 37 Cal. 15 (1869); Wright *v.* Central California, etc. Water Co., 67 Cal. 532 (1885). The statutory power of the court to inquire into the legality of corporate elections does not apply to the "appointment" of a director by the board to fill a vacancy due to a resignation. Wickersham *v.* Brittan, 93 Cal. 34 (1892). Nor does such a statute enable the director so "appointed" to settle the question of the legality of the election by applying to the court. Wickersham *v.* Murphy, 93 Cal. 41 (1892). Where two groups of stockholders are contesting for control, the expenses of the litigation should not be borne by the company. Wickersham *v.* Crittenden, 106 Cal. 329 (1895). The statute in New Jersey giving the chancery court power to adjudicate elections is unconstitutional, inasmuch as the constitution vests that power in the supreme court only. Goldstein *v.* Ewing, 62 N. J. Eq. 69 (1901). Where the stockholders disagree, and two elections are held in adjoining rooms at the same time, the court may consider the ballots cast at both meetings in order to arrive at the proper result of the election. *Re* Election, etc. Grove Cem. Co., 61 N. J. L. 422 (1898). See also, in general, *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882), a case where proxies were illegally rejected. Although the inspectors admitted votes on insufficient evidence, yet if additional and sufficient evidence is presented to the court the election will stand. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). In attacking the validity of a vote the burden of proof is on him

deprived of the stock during the election cannot have the election set aside.[1]

§ 620. *Who may complain of an illegal election — A new election is not granted if the result will be the same.*— Only a stockholder whose rights have been infringed, and who is equitably entitled to complain, may institute the proceedings. Persons contracting with the corporation and creditors of the corporation cannot interfere; neither can the corporation ordinarily defend against its contracts on the ground that its officers were not duly elected. If they are *de facto* officers, third persons may deal with them as such.[2] Nor is it every stockholder who may complain. A transferee of one of the stockholders who participated in the fraud will not be heard to impeach the result of that fraud.[3] And in general the plaintiff, a relator seeking to set aside a corporate election, is barred of relief if he himself was guilty of misconduct or neglect, or if it appears that he has subsequently acquiesced with knowledge of the facts.[4] It is a principle of law, also, that the legality of an election will not be inquired into upon the ground that illegal votes were cast, unless those votes were challenged at the election at the time when they were cast.[5] The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done.[6] The court will, however,

who attacks it. *Re* Indian, etc. Co., L. R. 26 Ch. D. 70 (1884).

[1] *Re* Leslie, 58 N. J. L. 609 (1896).

[2] See § 713, *infra*.

[3] *Re* Syracuse, etc. R. R., 91 N. Y. 1 (1883).

[4] Wiltz *v.* Peters, 4 La. Ann. 339 (1849), where a commissioner of election attacked the legality of votes which he himself had admitted as commissioner.

[5] *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839), wherein the court said: "It is quite clear, generally speaking, that an illegal vote not challenged will not invalidate an election, nor will even be inquired into." See also Schoharie Valley R. R. Case, 12 Abb. Pr. (N. S.) 394 (1872). A stockholder who attends the election and votes, and does not object to others voting, although he knows they are doing so in violation of a by-law, cannot himself afterwards object to the legality of the election. State *v.* Lehre, 7 Rich. L. (S. C.) 234 (1854). See also People *v.* Robinson, 64 Cal. 373 (1883); *Re* Long Island, etc. R. R., 19 Wend. 37, 44 (1837), and §§ 599, 594, *supra*.

[6] McFadden *v.* Leeka, 48 Ohio St. 513 (1891). Under a statute authorizing one company to sell out to another for any consideration that may be agreed upon between them, it is legal that the consideration be a right extended by the new company to the old stockholders to demand partly paid up stock of the new company within a limited time, a dissenting stockholder being given the right to have the fairness of the proposed sale passed upon by the court. It is the duty of the stockholder in such a case to attend the meeting and vote against it if he objects. It was no excuse that he was ill or abroad or negligent in dissenting, under the English statute. Burdett Coutts *v.* True Blood, etc. Ltd., [1899] 2 Ch. 616. *Cf.* 54 Atl. Rep. 883.

refuse to set aside an election where every share of stock was represented at the election, even though the minority refuse to vote on the ground that the meeting had been called on less than ten days' notice required by statute.[1]

Where a candidate at a corporate election receives a majority of the votes cast, the receipt of illegal votes in his favor does not defeat his election.[2] An election will not be set aside if it be shown that after throwing out the invalid votes the officers declared elected would still have, according to the return, a valid majority of the votes cast;[3] and a new election will not be ordered if, after rejecting all the illegal votes, and after admitting the opposition legal votes which were rejected, it still appears that the directors returned as elected had a majority of the votes.[4]

The court may declare a candidate elected who received only a minority of the votes actually cast, when such candidate plainly received a majority of all the legal votes cast.[5] But where the

[1] *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899).

[2] *Re* Argus Co., 138 N. Y. 557 (1893).

[3] People *v.* Tuthill, 31 N. Y. 550 (1864); *Ex parte* Murphy, 7 Cow. 153 (1827); *Re* Chenango, etc. Ins. Co., 19 Wend. 635 (1839); State *v.* Lehre, 7 Rich. L. (S. C.) 234, 325 (1854); McNeeley *v.* Woodruff, 13 N. J. L. 352 (1833); First Parish *v.* Stearns, 38 Mass. 148 (1838); School District *v.* Gibbs, 56 Mass. 39 (1848); Christ Church *v.* Pope, 74 Mass. 140 (1857). Even though certain stock is illegally issued and voted, yet, if, after deducting that stock, the prevailing party would still prevail, the election will not be set aside. Kimball *v.* New England, etc. Co., 69 N. H. 485 (1899). The court will not consider the legality or illegality of votes, where those votes will not change the result, whatever the decision might be. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). Where the officers declared elected received a majority of the original stock as well as a majority of the alleged illegal increased stock, they will not be ousted. Byers *v.* Rollins, 13 Colo. 22 (1889). Where, after rejecting all votes illegally cast by proxy, there is still a majority for the persons who were declared elected, the court will not disturb the election. Craig *v.* First Pres. Church, 88 Pa. St. 42 (1878).

[4] McNeeley *v.* Woodruff, 13 N. J. L. 352 (1833); *Ex parte* Desdoity, 1 Wend. 98 (1828).

[5] Where the whole number of votes is five hundred and ninety-three, and there were present five hundred and thirty-seven, and the candidates declared not elected received three hundred votes, one hundred and fifty of which were illegally rejected by the inspectors, the court, under the New Jersey statute, declared those candidates elected and did not order a new election. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867); *Ex parte* Desdoity, 1 Wend. 98 (1828); Vandeburgh *v.* Broadway Ry., 29 Hun, 348 (1883); Downing *v.* Potts, 23 N. J. L. 66, 84 (1851), where an election was set aside and a new one ordered because votes were illegally rejected on one side and illegally accepted on the other, which changed the result, but two directors who were on both tickets and received all the votes cast were held elected. The court said that unless the legal votes rejected and the illegal votes received were sufficient to change the result of the election, the election

person declared elected received a minority of the votes, he will be ousted even though the other candidate was not qualified to act as a director.[1] Where *quo warranto* proceedings are pursued, the can only oust the party who is in office. It cannot declare another person elected.[2]

§ 621. *"Corners" in stock.*— The courts will not aid either party in carrying out an agreement for advancing the price of stock by

would not be set aside. Hence where of two thousand three hundred and ninety-two votes for certain candidates seven hundred and ninety-nine were illegal, and there were illegally rejected one thousand eight hundred and ninety-four votes for the defeated candidate, who received forty-six votes, the court ordered a new election. In *Re* Long Island R. R., 19 Wend. 37 (1837), where the votes illegally rejected would have elected other persons, the court set the election aside, and did not declare elected those who would have been elected if the rejected votes had been counted, there being one thousand seven hundred votes not represented, and eleven thousand that were disqualified under the statute. The court may declare part of the directors illegally elected, and order a new election as to them, without affecting the title of the others to their offices. People *v.* Fleming, 59 Hun, 518 (1891). In Monsseaux *v.* Urquhart, 19 La. Ann. 482 (1867), the court ousted a director and declared elected another person in his stead. Where the presiding officer illegally rejects certain votes, declares certain persons elected, and adjourns the meeting, and the dissatisfied party continue the meeting and hold another election, the court will consider merely the question as to who received a majority of the votes which were legally offered to be cast. State *v.* Smith, 15 Oreg. 98 (1887). A court will not force upon the company directors who are technically entitled to be declared elected, certain proxies being irregularly executed, but will order a new election. Harben *v.* Phillips, L. R. 23 Ch. D. 14 (1883). In New Jersey it has been held that, if the illegally rejected votes would have given the defeated candidate a majority of all the stock, the court will declare him elected, and will oust the one that was declared elected. *Re* Cape May, etc. Co., 16 Atl. Rep. 191 (N. J. 1888).

[1] "Votes cast for a candidate who is disqualified for the office will not be thrown away so as to make the election fall on a candidate having a minority of votes, unless the electors casting such votes had knowledge of the fact on which the disqualification of the candidate for whom they voted rested, and also knew that the latter was, for that reason, disabled by law from holding the office." *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882), citing cases. See also People *v.* Clute, 50 N. Y. 451 (1872). Unless the stockholders know that they are voting for an ineligible candidate, a candidate who receives a minority of the stock cannot be declared elected; in other words, the votes cast for the ineligible person are not to be ignored, but a new election must be held. Schmidt *v.* Mitchell, 101 Ky. 570 (1897).

[2] State *v.* McDaniel, 22 Ohio St. 354 (1872), where a number of legal votes were rejected which would have sufficed to elect certain directors who without such votes had only a minority of the votes cast. The court held that persons cannot be declared elected and inducted into office upon *quo warranto* information; People *v.* Phillips, 1 Denio, 388 (1845), making the same ruling as to a church corporation.

means of fictitious dealings designed to deceive others concerning the real value of such stock.[1] Where both the vendor and vendee of stock know that the purpose of the vendee is to control the corporation and illegally issue corporate paper, the sale is illegal and void.[2] An agreement to make a "corner" in stock, by buying it up so as to control the market and then purchasing for future deliveries, is illegal.[3] It is not necessarily unlawful to form a "pool" for the purpose of dealing in a particular stock,[4] and the person who does the buying and selling must account to the others.[5]

[1] Livermore *v.* Bushnell, 5 Hun, 285 (1875). See also, in general, § 445, note, *supra*, and § 622, *infra*.

[2] Newark *v.* Elliott, 5 Ohio St. 113 (1855).

[3] Sampson *v.* Shaw, 101 Mass. 145 (1869); Raymond *v.* Leavitt, 46 Mich. 447 (1881); Morris Run Coal Co. *v.* Barclay Coal Co., 68 Pa. St. 173 (1871); Arnot *v.* Pittston, etc. Coal Co., 68 N. Y. 558 (1877); Keene *v.* Kent, N. Y. D. Reg., March 15, 1887. *Cf.* Petrie *v.* Hannay, 3 T. R. 418 (1789). No suit lies against a broker for fraud in carrying out a pool or combination to "corner" and advance the price of lard. Leonard *v.* Poole, 114 N. Y. 371 (1889). See also § 445, *supra*. A person making a "corner" in wheat is not subject to a criminal prosecution therefor. Raymond *v.* Leavitt, 46 Mich. 447 (1881). It is not fraud for the owner of the larger part of the capital stock of a corporation to "corner" the market, that is, to enter into contracts with various parties to purchase stock of the corporation, although he knew that such contracts could not be fulfilled by such parties by reason of the fact that he himself held such stock, and it could not be obtained elsewhere. The same rule prevails although such person offered the stock for public subscription and purchased the greater part of it himself. Salaman *v.* Warner, 64 L. T. Rep. 598 (1891); aff'd, 65 L. T. Rep. 132 (1891). *Cf.* Barry *v.* Croskey, 2 Jones & H. 1 (1861), holding that the victim of the "corner" may file a bill in equity to recover back the money lost. For an interesting statement of the *modus operandi* of a "corner," see "An Investor's Notes on American Railroads," by Swann, ch. XII (1886).

[4] Quincey *v.* White, 63 N. Y. 370, 383 (1875), modifying Quincey *v.* Young, 5 Daly, 327 (1874).

[5] Where several parties buy a certificate of stock in fixed proportions and the certificate is taken by one for the the benefit of all, he is a bailee for the others and not a vendor. Coquard *v.* Wernse, 100 Mo. 137 (1889). The general rule that an action affecting a joint enterprise for the purchase, upon speculation, of certain mining stocks, must join all the parties who enter the "pool," does not necessitate the joinder of one who is out of the jurisdiction. Angell *v.* Lawton, 76 N. Y. 540 (1879). The representative of a syndicate after selling the stock cannot modify the contract. He is liable to the others if he does so. Kountz *v.* Gates, 78 Wis. 415 (1891). Where there is a joint operation in stocks, a "pool," the transactions being carried on in the name of one only, the others may have specific performance leading to a division of the stocks. Johnson *v.* Brooks, 46 N. Y. Super. 13 (1880); Thornton *v.* St. Paul, etc. Ry., 45 How. Pr. 416 (1873); s. c., dismissed, 6 N. Y. Week. Dig. 309 (1878). A vendor of stock may collect the price even though the agreement contains a provision for pooling the stock which is illegal. Edgerton *v.* Power, 18 Mont. 350 (1896). See also § 320, *supra*. An agreement with brokers by which a person is to cause a legislative investigation, and in case certain stock de-

§ 622. *Voting trusts and pooling agreements — Restrictions on right to vote or sell stock — Contracts as to voting, elections, directors, and control.*— The control of a corporation generally determines its success or failure. The control also gives power, patronage, perquisites, salaries, and position. Hence it is sought for. In a large corporation the absolute control generally requires more money than one man is able or willing to invest. Consequently, for many reasons, various stockholders unite to obtain and retain the control. There is always danger, however, that some of these stockholders may die, or sell their stock, or unite with some other parties to obtain control. Hence, for twenty years last past, the business community and the lawyers have been trying to find some legal way of so tying up a majority of the stock of a corporation as to prevent its being lost. Various plans have been tried, some of which have failed, some have been partially successful, and some almost a complete success. This whole subject may be divided as follows:

(*a*) Contracts between stockholders to vote together. Contracts involving changes of officers, and payment of salaries.

(*b*) Restrictions on the right to vote.

(*c*) Contracts between stockholders not to sell their stock except to each other.

(*d*) Charter provisions and by-laws restricting the right to sell the stock. Unincorporated associations.

(*e*) Irrevocable proxies.

(*f*) Deposit of certificates of stock with trustees, either with or without a transfer of same to the trustees.

(*g*) One corporation owning and holding the stock of other corporations.

Taking up those various modes of uniting the majority of the stock, the first is

§ 622*a*. *Contracts between stockholders to vote together — Contracts involving changes of officers, and payment of salaries.*— It is elementary law that stockholders owning a majority of the stock have a right to combine and control the election of the board of directors.[1]

clined such person was to share in the profits of short sales, is illegal and not enforcible. Veazey *v.* Allen, 173 N. Y. 359 (1903).

[1] Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506, 513 (1878); s. c., 45 N. Y. Super. Ct. 464 (1879); aff'd, 86 N. Y. 618 (1881); Faulds *v.* Yates, 57 Ill. 416 (1870), where it was held that persons holding the majority of stock in a corporation could lawfully agree among themselves to vote as a unit to control an election; and that their agreement that their votes should be cast as should be decided by the majority of their own votes was not void as being against public policy. See also Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877), where the court said: "There is, if I may say so, no obligation on a shareholder of a com-

Several parties in purchasing stock may agree that each one's share shall be transferred to him, but that all the stock shall be voted for five years in one way, that way to be determined by a majority of the stock so included in the agreement. Such an agreement is legal, especially as it provides that during that time the parties shall retain the power to vote such stock.[1]

Thus, executors holding a majority of the stock of a corporation may, in order to sell a portion thereof, agree with the purchaser that they will vote for two persons named by the purchaser to act as directors so long as the executors hold the remainder of the stock, and the court will grant an injunction against the executors voting in violation thereof.[2] An executory contract, however, between stockholders that they will vote in a certain way or elect certain persons as directors will rarely be enforced specifically by the courts, and an action at law for damages for breach of contract is unsatisfactory in that, as a rule, no substantial damages can be proven.[3]

pany to give his vote merely with a view to what other persons may consider the interests of the company at large. He has a right, if he thinks fit, to give his vote from motives or promptings of what he considers his own individual interest." A stockholder who signs an agreement with others to vote their stock as a unit cannot afterwards complain of acts of the board of directors, which acts were in accordance with the policy of the pooling agreement. Ziegler *v.* Lake St. El. R. R., 69 Fed. Rep. 176 (1895), giving portions of the agreement. "It is not *per se* unlawful for a number of persons, by previous agreement, to buy shares of the stock of a corporation for the purpose of controlling its policy, electing its officers, etc." Beitman *v.* Steiner, 98 Ala. 241 (1893). Where two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division of control. Baumgarten *v.* Nichols, 69 Hun, 216 (1893). Although a contract of certain stockholders to vote together is legal, yet a conspiracy to obtain an illegal injunction against others voting will not be countenanced by the court. People *v.* Albany, etc. R. R., 55 Barb. 344, 368 (1869).

1 The court consequently held that a member of the syndicate who refused to vote in accordance with a decision of the majority had no right to vote (by reason of the California statute prescribing that only *bona fide* holders of stock should vote), the court holding that the original purchase of the block of stock bound that stock in its vote. Smith *v.* San Francisco, etc. Ry., 115 Cal. 584 (1897).

2 Greenwell *v.* Porter, [1902] 1 Ch. 530. Where by contract between two stockholders owning an equal share in the corporation, future stock acquired by either of them is to belong one-half to each, such contract may be specifically enforced. Stewart *v.* Pierce, 89 N. W. Rep. 234 (Iowa, 1902). See on this point §§ 320, 338, *supra*.

3 An agreement that a certain person shall be president for two years will not be specifically enforced by the courts. Dulin *v.* Specific, etc. Co., 103

A contract by which the directors who own a majority of the stock sell such stock and agree to substitute the vendees as directors of the company is legal.[1]

Cal. 357 (1894), holding also that an election in which the party is not even elected a director will not be set aside, even under the statutory power of the courts to set aside elections on equitable grounds. A court of equity will not grant specific performance of a contract to vote stock as the complainant stockholder wishes, with a view to controlling the corporation. Hence where the promisee of such a contract knows the promisor will not fulfill his contract, and consequently the promisee buys the promisor's stock at a high price, he, the promisee, cannot rescind such purchase, but must pay the stipulated price. Gage *v.* Fisher, 5 N. D. 297 (1895).

An agreement to elect a certain person president is waived if he participates in electing others. American, etc. T. Co. *v.* Toledo, etc. Ry., 47 Fed. Rep. 343 (1890). A contract between a stockholder and a third person by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors it was illegal. Kountze *v.* Flannagan, 19 N. Y. Supp. 33 (1892). An agreement that certain persons should have control of the corporation until certain debts were paid must be clearly proved before it will be sustained by the courts. Proctor, etc. Co. *v.* Finley, 98 Ky. 405 (1895). A contract between two companies by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contract, and pay dividends on its stock) is illegal. James *v.* Eve, L. R. 6 H. L. 335 (1873).

Even though a partnership transfers its assets to a corporation, each partner taking an equal proportion of the stock, except that a third party was given the balance of power, and such third party afterwards acts with one of the partners and controls the corporation, yet this is not sufficient to set aside a transfer of the assets to the corporation at the instance of the other partner. Baumgarten *v.* Nichols, 69 Hun, 216 (1893).

[1] A contract to sell one's stock in a corporation and to resign a directorship and the presidency, and, having done so, to endeavor to induce other directors to resign, in order that the purchasers of the stock may come in and take their places and so control the management of the company, there being no evidence of fraud, has been held a contract not void as against public policy. Barnes *v.* Brown, 80 N. Y. 527 (1880). A contract whereby a manufacturing corporation and all of its stockholders agreed to sell a certain proportion of the capital stock of said company and to substitute two persons nominated by the vendee as directors in such corporation is not presumed to be *ultra vires*, and a provision in such contract that the purchaser will carry on the business and divide profits every six months may be enforced by the corporation. Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884). An agreement by which the directors of a company sell their stock and resign their offices and substitute the purchasers in their places is not illegal or objectionable if all the stockholders assent and if the corporation is not injured. The assent of a few minor

Such a transaction, however, is closely scrutinized by the courts, and if fraudulent, as a matter of fact, the retiring directors are personally responsible for any losses.[1]

A sale of his vote by a stockholder is illegal.[2]

A contract in regard to elections in private corporations is not legal if it provides that a lucrative corporate position shall be

stockholders whose stock was given to them will be presumed, in case they have not objected. Raymond *v.* Colton, 104 Fed. Rep. 219 (1900). Where a director, who is also treasurer, sells his stock to the other directors, it being a part of the sale that he give up his offices, the corporation may treat his offices as vacant. Anderson, etc. Co. *v.* Pungs, 127 Mich. 543 (1901). In the case of Ryan *v.* McLane, 91 Md. 175 (1900), the court seemed to doubt somewhat this statement that it is legal for the board of directors who own a majority of the stock to agree to sell it and substitute the vendees as directors of the company. It would seem, however, as if such a contract would in its effect be no different from the common provision which appears in the statutes of many of the states and in the by-laws of many corporations, that a majority in interest of the stock may at any time remove any of the directors and elect others in their place. A sale of the majority of the stock, together with a statutory power to remove the directors, is the same as a sale of the majority of the stock with a voluntary agreement to have the directors resign and new ones substituted.

[1]Where the officers and directors, in a conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first named directors are personally responsible for their action and a receiver of the corporation may hold them liable. Bosworth *v.* Allen, 168 N. Y. 157 (1901). A director of an assessment life insurance company who receives money for causing a person and his friends to be elected directors, thereby giving them the control of the company, together with its property, may be held liable by the receiver of the company for the money so received. McClure *v.* Law, 161 N. Y. 78 (1899). See also Gilbert *v.* Finch, 173 N. Y. 455 (1903). Money received by a director of a co-operative insurance company for substituting other directors and transferring its business to another company can be recovered back on the ground of fraud, and such director is chargeable with notice of the facts which he knew or might have learned by the exercise of reasonable care. McClure *v.* Wilson, 70 N. Y. App. Div. 149 (1902). Where a trustee retires from office in consideration that his successor pay him a sum of money, the money so paid belongs to the trust estate. Perry on Trusts (3d ed.), § 427. Specific performance will not be granted of an agreement of the vendors of stock that they will resign as directors and substitute the vendee's representatives instead. Fremont *v.* Stone, 42 Barb. 169 (1864), the court stating that such a contract is unfair towards the minority stockholders. See also Jacobs *v.* Miller, 15 Alb. L. J. 188 (1877). Directors have no power to contract with an outsider that he shall, upon purchasing certain stock, be made a director in the company, but a sale of stock with an agreement that the vendee should be elected superintendent may be rescinded if the latter part of the agreement is not carried out. Seymour *v.* Detroit Copper, etc. Mills, 56 Mich. 117 (1885).

[2] Hafer *v.* New York, etc. R. R., 14 W. L. Bull. 68 (1886). See also Yale Law Journal, vol. 1, p. 7, and § 610, *supra.*

given to one or more of the parties to the contract.[1] Thus, an agreement of a large stockholder holding a majority of the stock, that upon the purchase and absorption of plaintiff's business by the corporation the plaintiff should be engaged for a term of years as vice-president and general manager of the corporation at a specified salary, is contrary to public policy and is void.[2] An agreement of

[1] Quoted and approved in Withers *v.* Edwards, 62 S. W. Rep. 795 (Tex. 1901), where the court held that a contract between the president and the teller of a bank, providing means to secure the re-election of the same board and their own re-election as officers, is illegal as involving their election to lucrative positions.

[2] West *v.* Camden, 135 U. S. 507 (1890). A contract made by a stockholder for a consideration to vote for a particular person for manager of the company, and in the event of his election to vote for an increase of the salary attaching to that position, is illegal and cannot be enforced. Woodruff *v.* Wentworth, 133 Mass. 309 (1882). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur *v.* Stoepel, 82 Mich. 344 (1890). A proxy for five years, given so as to unite enough stock to control the corporation, the holder of the proxy agreeing that the person giving the proxy shall have an office at a salary of $2,500 a year, is void. At the instance of the latter person a court of equity will enjoin voting thereúnder. Cone *v.* Russell, 48 N. J. Eq. 208 (1891). Where a stockholder in a railroad company is induced to take part in the formation of a land company, and is to receive a certain sum of money when a depot is located on such land, he cannot enforce the agreement. It is practically a sale of his vote. Fuller *v.* Dame, 35 Mass. 472 (1836). A contract of the vendor of bank stock that he would make the vendee the cashier is illegal and void. Noel *v.* Drake, 28 Kan. 265 (1882). Where the president of a corporation brings about a sale of all its stock and a change of its officers, under a contract by which the corporation is to pay him a certain sum, he cannot collect that sum from the corporation itself. Wood *v.* Manchester, etc. Co., 54 N. Y. App. Div. 522 (1900). A contract between promoters, by which one of them is to be employed by a proposed insurance company on a salary and a percentage of premium, is too indefinite to be enforced, even though some of the promoters proceeded to form the company. It seems also that such a contract is contrary to public policy. Flaherty *v.* Cary, 62 N. Y. App. Div. 116 (1901). A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation for two years is enforcible against the person so purchasing the stock, even though the corporation passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. Kinsman *v.* Fisk, 37 N. Y. App. Div. 443 (1899). An agreement to vote in a particular way, in consideration of some personal benefit, is illegal; for a vote ought to be an impartial and honest exercise of judgment. Elliott *v.* Richardson, L. R. 5 C. P. 744 (1870). See also Moffatt *v.* Farquharson, 2 Bro. C. C. 338 (1788); Card *v.* Hope, 2 B. & Cr. 661 (1824). Compare Bolton *v.* Madden, L. R. 9 Q. B. 55 (1873), where an agreement between

persons as a condition of their election that the bank should extend to a certain party credit for loans at a specified rate of interest is illegal.[1] But a stockholder in a bank in selling some of his stock may agree that the purchaser shall be cashier five years, and may agree to take back the stock at the end of that time at the same price, where such agreement is in good faith and for the purpose of

two subscribers to a charity to vote for each other's nominees was held not to be illegal. A contract by which a stockholder in a corporation agrees to secure to the purchaser of his stock a corporate office at a stated salary, and in case of his removal to repurchase the stock, is void as against public policy and as a fraud on other stockholders, unless it is proved that the transaction is not for the private benefit of the vendor, or that it was consented to by the other stockholders. Guernsey *v.* Cook, 120 Mass. 501 (1876); Noyes *v.* Marsh, 123 Mass. 286 (1877). A contract to preserve the control and *status quo* was involved in Harris *v.* Scott, 67 N. H. 437 (1893). The contract provided for voting on all subjects, for salaries, and for sales of stock before and after death. The court refused to grant specific performance for sale after death. Where three persons, being the owners of a majority of the stock, agree that they will vote their stock to elect as directors three persons to be named by one of them, and two persons to be named by the others, and that one of them, who received a salary of $2,500, should receive a salary of $5,000, and that two of such directors should receive a salary of $500 each, the agreement is illegal. Snow *v.* Church, 13 N. Y. App. Div. 108 (1897). A contract by which a purchaser of a majority of the stock of three corporations agrees that the corporations should employ the seller of the stock at a fixed salary for a certain time, and after a certain time the seller to have a salary and one-half of the directors, is illegal, and cannot be enforced by the vendor as against the vendee, even though the stock has been delivered and paid for under such agreement. Fennessy *v.* Ross, 5 N. Y. App. Div. 342 (1896). A contract of sale of stock whereby the vendee is to be voted a certain salary and an equal representation in the board, and in case either party wishes to sell stock it is first to be offered to the other party at a fixed price, is void as an attempt to barter away the offices. Fennessy *v.* Ross, 90 Hun, 298 (1895). Where a part of the consideration of a contract in regard to voting stock in a certain way is that one of the parties shall be given an official position in the corporation at a salary, the contract is void and unenforceable. Gage *v.* Fisher, 5 N. D. 297 (1895). In the case of Witham *v.* Cohen, 100 Ga. 670 (1897), a stockholder who had obtained proxies from most of the other stockholders, on an agreement by which he was to become president on a certain salary, was held to have a right of damages against a stockholder whose stock he had purchased, but who, nevertheless, had given a proxy to some other person. A person who contracts to purchase stock may defend against an action for the price by setting up that the vendor falsely represented that the vendee was about to be deprived of the presidency of the company; and that thereby the vendee was induced to make the contract of purchase at an unconscionable price. Delano *v.* Rice, 23 N. Y. App. Div. 327 (1897). Where the agreement was to keep the vendor in a professorship, the court will not aid the parties. The agreement is against public policy. Jones *v.* Scudder, 2 Cin. Super. Ct. 178 (1872).

[1] Blue *v.* Capital Nat. Bank, 145 Ind. 518 (1896).

benefiting the bank and does benefit it.[1] Where part of the consideration in the sale of stock is that the vendor resign an office in the company, and the vendee be elected in his place, and this has been carried out, the vendee cannot rescind for fraud unless he resigns the position or does something towards restoring the vendor to his former position.[2] An agreement by a stockholder to give a person part of his stock if such person accept the position of a director is not necessarily against public policy.[3] A contract by which stock is contributed for the purpose of developing the business of the company is legal.[4] But the common undertaking must be a legal one.[5] The vendor of stock may of course agree to vote as the vendee wishes.[6]

Closely connected with the above principles of law is the question whether a director or stockholder may vote his stock in favor of a sale of corporate property to, or a purchase of property for the corporation from, another corporation in which such director or stockholder is interested as a stockholder. The general rule is that a contract between two corporations having certain stockholders or directors in common will be sustained by the courts if the contract is fair towards the minority stockholders. If it is so unfair as to amount to a fraud, the courts will set it aside upon the complaint of the minority stockholders.[7]

§ 622b. *Restrictions on the right to vote.*— At common law it is legal for a corporation, upon issuing preferred stock, to impose a condition that such stock shall not have any right to vote.[8] It is legal also for the corporation, with the assent of all stockholders, to give to bonds a voting power,[9] although a contrary rule has been reached in Illinois under a statute to the effect that elections

[1] Bonta *v.* Gridley, 77 N. Y. App. Div. 33 (1902).

[2] Gassett *v.* Glazier, 165 Mass. 473 (1896).

[3] Almy *v.* Orne, 165 Mass. 126 (1896).

[4] See §§ 76, 334, *supra.*

[5] If the purpose is to rob a railroad and bribe a judge, the court will aid no one. Tobey *v.* Robinson, 99 Ill. 222 (1881). *Cf.* § 39, *supra.*

[6] An agreement by a vendor of stock, which is to be delivered after an election, that he will vote as the vendee desires, is legal. Mobley *v.* Morgan, 6 Atl. Rep. 694 (Pa. 1886). One corporation issuing its stock as security to another may agree that the latter shall hold and vote the stock of and in the former. Tonawanda, etc. R. R. *v.* New York, etc. R. R., 42 Hun, 496 (1886).

[7] See § 662, *infra.*

[8] It is legal, upon the issue of preferred stock, to provide that it shall not vote at corporate elections. Such a provision will be upheld. Miller *v.* Ratterman, 47 Ohio St. 141 (1890). See also § 269, *supra.* *Cf.* 67 N. E. Rep. 207.

[9] In State *v.* McDaniel, 22 Ohio St. 354 (1872), the bondholders on a reorganization were given by contract the power to vote, and the court upheld such contract right. In Phillips *v.* Eastern R. R., 138 Mass. 122 (1884), the court passed upon a statutory scheme in which the creditors of a railroad company, by the terms of a mortgage, chose two-thirds

shall be by the stockholders and not otherwise.[1] There is no rule of public policy which forbids a corporation and its stockholders from making any contract they please in regard to restrictions on the voting power. If the agreement is made by unanimous consent it is legal. Such restrictions, however, generally are, and always should be, printed on the certificates of stock, so that a purchaser may take with full notice. A by-law passed at the time of the organization of the company may limit the number of votes which a single stockholder may cast;[2] unless, of course, the statutes provide to the contrary.[3] Under the partnership association statute of Pennsylvania, a by-law may be enacted taking away the voting power from any stock which is sold, even though it is purchased by an existing member.[4] All this is a matter of private contract. Where the charter limits the number of votes which one stockholder may cast, the provision cannot be evaded by transfers to various persons. The courts will enjoin the voting of the stock.[5] Under the reserved right to amend, the legislature may

of the directors and the stockholders chose one-third until the debt was reduced to a certain figure.

[1] A contract and by-law giving a voting power to bondholders at corporate elections is void as against public policy and the statutes, where the statutes prescribe that the directors shall be elected by the stockholders and shall not be elected in any other manner. Durkee *v.* People, 155 Ill. 354 (1895), aff'g s. c., 53 Ill. App. 396 (1893).

[2] A by-law may provide that stockholders shall have one vote for each share held by them up to ten shares, and may fix the proportion which their votes shall bear to their shares above that number. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). *Cf.* notes below.

[3] A by-law restricting the right of members of a church to vote as authorized by statute is void. People *v.* Phillips, 1 Denio, 388 (1845). A by-law restricting the right of electors in a town to vote is not good. Rex *v.* Spencer, 3 Burr. 1827 (1766); Rex *v.* Head, 4 Burr. 2515, 2521 (1770). See also § 4*a*, *supra;* People *v.* Kip, 4 Cow. 382, note (1822), holding that a corporation has no power, by a by-law, to demand an oath of a stockholder in order to test his qualifications as a voter. Where the charter authorizes the depositors and stockholders to elect new members, the directors cannot by by-law exclude the former from elections and give a vote to stockholders only. Commonwealth *v.* Gill, 3 Whart. (Pa.) 228 (1837).

[4] Carter *v.* Producers' Oil Co., 182 Pa. St. 551 (1897).

[5] Mack *v.* De Bardeleben, etc. Co., 90 Ala. 396 (1890). Where stock has been transferred in order to give it a vote, the transferrer having already all the stock that the charter allows one stockholder to vote, the transfer being merely nominal and for voting purposes only, an injunction will issue against its being voted. Webb *v.* Ridgely, 38 Md. 364 (1873), where stock had been colorably transferred without consideration for the purpose of controlling an election, there being a provision in the charter prohibiting a single stockholder from voting on more than twenty shares. Where valuable privileges other than voting attach to stock, a nominal transfer to obtain these privileges will not be sustained as regards them. Baker's Appeal, 108 Pa. St. 510 (1885), where free admission

change the charter of a library corporation, so that each share shall have one vote, instead of restricting the vote of those who held more than five shares.[1] A by-law that all purchasers of stock shall agree that the stock shall be voted in favor of increasing the capital stock is void as in restraint of trade and as an unreasonable limitation on the voting power of a stockholder.[2]

A statute prohibiting a stockholder from voting "whose liability is past due and unpaid" refers to a subscription liability and not to a commercial liability.[3] Even though the purchaser of forfeited stock may not be liable for unpaid calls, yet, under the charter, he may be unable to vote such stock, unless he pays such unpaid calls.[4] The right to vote is generally restricted by the charter to those who are registered stockholders.[5] In some states the right to vote is limited to those who have been stockholders of record for a certain number of days before the election.[6] Where a company attaches conditions to its acceptance of a subscription, the subscriber is not entitled to vote until the conditions are complied with.[7]

§ 622c. *Contracts between stockholders not to sell their stock except to each other.*— A stockholder has a right to sell his stock at any

to a theatre was given to stockholders. Although a person transfers stock to another in order to evade a statute which prohibits any one stockholder from voting on any more than one-eighth of the capital stock, yet the person to whom it is transferred may make a valid agreement to retransfer the same and the court will enforce this agreement. Scott *v.* Scott, 68 N. H. 7 (1894). Although the charter limits each person to one hundred votes, yet a person voting a hundred votes in his own name may vote another hundred as proxy for his wife, if it is *bona fide* her property. Conant *v.* Millaudon, 5 La. Ann. 542 (1850). A statute which confines the right to vote to stockholders who are citizens of the state by which the corporation is chartered cannot be evaded by colorable transfers of shares to residents of the state merely for the purpose of having them voted upon. State *v.* Hunton, 28 Vt. 594 (1856). Such a statute would now, however, probably be held to be unconstitutional. See § 813, *infra*, relative to statutes prohibiting citizens of other states from being trustees. But see Campbell *v.* Poultney, 6 G. & J. 94 (1834). In England it is not illegal to transfer or procure shares before a meeting so as to multiply votes at it; nor can votes so obtained be disregarded. They may be cast. Pender *v.* Lushington, L. R. 6 Ch. D. 70 (1877); *Re* Stranton Iron, etc. Co., L. R. 16 Eq. 559 (1873); Cannon *v.* Trask, L. R. 20 Eq. 669 (1875); Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1877); and see North-West Transp. Co. *v.* Beatty, L. R. 12 App. Cas. 589 (1887).

[1] Rankin *v.* Newark, etc. Assoc., 64 N. J. L. 625 (1900).

[2] McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897).

[3] U. S. *v.* Barry, 36 Fed. Rep. 246 (1888).

[4] Randt, etc. Co. *v.* Wainwright, [1901] 1 Ch. 184.

[5] See § 611, *supra*.

[6] See § 611, *supra*.

[7] Spitzel *v.* Chinese Corporation, 80 L. T. Rep. 347 (1899).

time and to whomsoever he pleases without regard to other stockholders. Even though he owns a majority of the stock there is no principle of law obliging him to provide for the sale of others' stock when he sells his own.[1] Hence, contracts are often entered into between a portion or all of the stockholders of a corporation to the effect that they will hold and sell their stock together. Such a contract is legal.[2] The difficulty with such a contract, however, is that upon a breach thereof only the actual loss suffered and not the full value of the stock of the injured party is recoverable in damages.[3] Hence, such a contract should contain a provision obligating the selling stockholder to buy the stock of the others.[4]

Another form of contract is to the effect that before any of the stockholders sell their stock they shall first offer it to the other

[1] "We do not understand that one stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit out of negotiations then pending. . . . We do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to enable another stockholder to make gains and profits." Farmers' L. & T. Co. *v.* Chicago, etc. Ry., 163 U. S. 31, 44 (1896).

[2] In Havemeyer *v.* Havemeyer, 43 N. Y. Super. Ct. 506 (1878); s. c., 45 N. Y. Super. Ct. 464 (1879); aff'd, 86 N. Y. 618 (1881), it was held that an agreement of several stockholders not to sell their own stock except in connection with that of the other parties to the contract was not in restraint of trade and was not contrary to public policy, as restricting the right of alienation, but the measure of damages for breach of such a contract is only the actual loss suffered by a decline in the value of the stock by reason of the breach. See also Griffith *v.* Jewett, 15 W. L. Bull. 419 (1886).

[3] See p. 1353, *infra*.

[4] The following is a form of contract on this subject:

Whereas, —— ——, party of the first part, is the owner of —— shares of the capital stock of the —— Company, and —— ——, party of the second part, is the owner of —— shares of said capital stock; and

Whereas, said party of the first part has agreed that in case he hereafter sell any or all of the said stock owned by him, he will at the same time make it a part of such contract of sale that the party purchasing shall extend to said party of the second part the option to sell his said —— shares of stock, or any part thereof, to said purchaser at the same price and on the same terms:

Now, therefore, it is hereby agreed between said parties for a valuable consideration, receipt of which is hereby acknowledged by said party of the first part, that in case said party of the first part sell or cause to be sold his said shares of stock or any part thereof, he will at the same time make it a part of such contract of sale that the party purchasing shall purchase from said party of the second part at the same price and on the same terms such part of said shares of stock belonging to said party of the second part as the party of the second part may care to sell at that time at that price and on those terms. In case said party of the first part fails to make such provision in any sale or transfer made by said party of the first part, said party of the second part may tender to the party of the first part the certificates for any or all of said —— shares of stock owned by the party of the second part, and thereupon may demand and collect therefor from the party of the first part, by suit, a sum per share, for the stock so tendered, equal to the highest price per share at which said party of the first part may have prior thereto sold the shares of stock, or any part thereof, belonging to the party of the first part. This agreement shall bind the heirs, representatives, agents, and assigns of the party of the first part, and shall continue in force for the period of —— years from the date hereof.

Dated, New York, —— —, 1904.

stockholders. This kind of a contract also is legal and will be enforced by the courts.[1]

An agreement, however, between the stockholders of a corporation that no one of them will sell, assign or dispose of his stock

[1] In the case of Jones *v.* Brown, 171 Mass. 318 (1898), in a close corporation, the stockholders made a contract, the essential parts of which are set forth in the opinion of the court, providing for the purchase of the stock of a certain stockholder in case of his death, and for the purchase of the stock of any other stockholder who ceased to be connected with the corporation. The former stockholder having died, the court granted specific performance of the contract and compelled his estate to deliver the stock upon payment of the specified price. 54 Atl. Rep. 488.

Where one person advances money to another to purchase a certain stock on an agreement that they will co-operate, and in case the latter wishes to sell he will not sell to unfriendly parties without giving the former the first chance to purchase, and the stock is in the possession of the former as security for the loan, a sale by the latter to an unfriendly party with notice of the facts is not sufficient to sustain a bill in equity to compel the first-named party to transfer the stock to such purchaser. The court said: "One or more stockholders in a corporation may agree to stand together in carrying out an honest business policy consistent with what they believe to be to the best interests of all the stockholders. This was not a pooling agreement, to vest the government of the corporation for a time in certain members of it, or to yield the control to a few who might dominate, regardless of the interests of the many. It was intended to maintain a status of independence for the railway company that it might be operated under the purposes of its charter." Rigg *v.* Reading, etc. Ry., 191 Pa. St. 298 (1899).

Where, in order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that, even though the stock were appraised, the corporation would not buy it. Whiton *v.* Batchelder, etc. Corp., 179 Mass. 169 (1901). A court will enjoin a party from voting upon or disposing of his stock in the corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should apply to the former, and it appearing further that the defendant had given the stock to his sister without consideration. Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899). Where the majority stockholders agree in writing that for three years they will give each other proxies on their stock to vote at elections, and during that time will not sell their stock unless all agree thereto, and further, that if any one desires to sell he will first offer his stock to the others, specific performance by way of injunction against a sale without the consent of the others will not be granted where at the time of trial the three years have already elapsed. The remedy, if there is any, is at law. Brown *v.* Britton, 41 N. Y. App. Div. 57 (1899). Where a partnership is transformed into a corporation and the two partners agree that one shall have 1,000 shares

without having first given the other parties to the agreement an opportunity to purchase, does not disable a party from transferring a legal title to the stock without the consent of the other parties and in violation of the agreement, and this although the transferee was cognizant of the agreement at the time of the transfer.[1] It is a breach of contract, but the remedy is usually at law for damages. Such also is the rule as to a contract that a stockholder, before selling his stock to others, shall first offer the stock to the corporation itself. A personal agreement between the incorporators, promoters, and proposed subscribers to the stock of a proposed corporation, by which agreement the corporation is to have the first right to buy the stock of any one who wishes to sell, does not prevent a sale by a stockholder without offering the stock to the corporation. Hence the corporation cannot refuse to transfer the stock.[2]

of the stock and the other 998 shares and a third person two shares, and the first partner agrees that in case he sells his 998 shares he will transfer the other two shares to his partner, such agreement does not prevent the first partner from transferring single shares to qualify new trustees, inasmuch as the agreement does not prohibit his selling less than 998 shares. Burden *v.* Burden, 159 N. Y. 287 (1899). Where a corporation having treasury stock in its treasury sells all its assets to another corporation, excepting its patent rights, such sale is not a sale of the treasury stock within the meaning of a prior stock-pooling contract of the old corporation that certain other stock should be sold before such treasury stock was sold. Myers *v.* Buell, 67 N. Y. App. Div. 290 (1901). Even though stockholders agree not to offer their stock to others without first offering it to each other, yet, if subsequently some of them authorize the others to do as they think best in regard to the matter, and the latter dispose of some of the joint stock, they are protected in so doing. Smith *v.* Bierce, 104 La. 96 (1900).

[1] The enforcement of specific performance of such an agreement by a court of equity rests in the discretion of the court; it may not be demanded as a right. The fact that the transferee holds the stock subject to the enforcement of the equitable remedy does not in any way interfere with his legal title, nor does it preclude the corporation from treating him as, and according to him all the rights of, a stockholder, including the right to vote upon the stock at a stockholders' meeting. *Re* Argus Co., 138 N. Y. 557 (1893). An agreement of the holder of a majority of the stock that he will retain control is no defense by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. Weller *v.* Pace Tobacco Co., 25 N. Y. Week. Dig. 531 (1886). A contract of a stockholder not to transfer or sell his stock does not bind a *bona fide* purchaser. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893).

[2] Ireland *v.* Globe, etc. Co., 20 R. I. 190 (1897); s. c., 21 R. I. 9 (1898). Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 170 Mass. 315 (1898). Where, in order "to enable the com-

Specific performance of such a contract, however, will be granted by the courts, where there are special reasons therefor and performance is possible.[1]

It has been held by a lower New York court that an agreement of several stockholders not to sell their stock, except upon the concurrent consent of all the signers to the agreement, is illegal and void as in restraint of trade and against public policy.[2]

The New York court of appeals, however, reached a different conclusion.[3]

A contract whereby a stockholder desiring to sell must first offer his stock to the other stockholders is not contrary to public policy.[4]

pany to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that, even though the stock were appraised, the corporation would not buy it. Whiton *v.* Batchelder, etc. Corp., 179 Mass. 169 (1901). See 78 N. Y. App. 607.

[1] Where a stockholder agrees to transfer his stock to the company at an appraisal to be made by the directors, the decision of the directors cannot be impeached by showing that they committed errors of judgment in the appraisal. A stockholder may be forced to specifically perform a contract to convey his stock to the corporation, according to an appraisal made by the directors, to be disposed of by them as they may see fit, where the evidence shows that none of the stock of said corporation has ever been sold on the market or otherwise than by transfer to the directors, and no fraud in the appraisal is charged, and the remedy by an action for damages would be inadequate. New England Trust Co. *v.* Abbott, 162 Mass. 148 (1894).

[2] Fisher *v.* Bush, 35 Hun, 641 (1885). See also § 320, *supra.*

[3] Williams *v.* Montgomery, 148 N. Y. 519 (1896), practically reversing 68 Hun, 416, and 74 Hun, 427. See also p. 1360, *infra.* Thus, where two patentees agree to own their patents in common, and then contract with a corporation to convey the patents to it for stock to be issued to them jointly, each to have one-half, and each to have one-half the dividends thereof, the certificates not to be changed, sold, or pledged for ten years, except upon their joint consent, the instrument may also provide that one of them shall vote the stock as proxy for the ten years, unless both agree otherwise. The court held that such a contract is legal, being practically a contract to become partners in the ownership of stock for ten years. Hey *v.* Dolphin, 92 Hun, 230 (1895).

[4] The various stockholders of a company may give interchangeably a first option of thirty days to purchase their shares of stock whenever any one desires to sell, each contracting for himself, the contract further providing that such thirty days were to commence in case of the death of a stockholder, so far as his stock was concerned; and they may further contract that another person is to have a similar option in case the first option is not exercised. A party entitled to such option may have specific performance of it. The mutual covenants of the contract are a sufficient consideration to support it. The court said: "It is contended that the contract is void as

It is to be borne in mind that an oral contract on this subject may be void by the statute of frauds,[1] and that a unilateral contract, amounting to an option without consideration already paid, may not be legally binding.[2]

§ 622*d*. *Charter provisions and by-laws restricting the right to sell stock — Unincorporated associations.*— The by-laws of a corporation cannot legally prohibit or limit the right of a stockholder to sell his stock.[3]

prohibiting the right to alienate this stock. Such is not the fact. The right to sell it was not fettered for an instant. Indeed, by the terms of the contract provision is made for the exercise of such right. The only limitation, if there was a determination to sell, was the privilege by the other party to buy upon certain conditions, and such conditions have never been held invalid. This case does not fall within the principle announced in Fisher *v.* Bush (35 Hun, 641) and similar cases. Therein there was an express agreement not to sell for any purpose, and it was held void as against public policy. Here there was no limitation of the right to sell; it was only subject for a limited period to the right of the other party to buy. And an agreement which seeks to control the stock of a corporation for purposes of management, lawful in itself, is not subject to any infirmity, but is the exercise of a legal right." Scruggs *v.* Cotterill, 67 N. Y. App. Div. 583 (1902).

[1] An oral agreement whereby one party makes a loan to the corporation in consideration of the other party keeping the former in control and giving him an option on the latter's stock does not sustain a suit for damages, even if broken by the latter, inasmuch as it is void, under the statute of frauds, as not to be performed within a year. Gazzam *v.* Simpson, 114 Fed. Rep. 71 (1902).

[2] A unilateral contract is not binding. A consideration must exist or the covenants be mutual. Jordan *v.* Indianapolis, etc. Co., 61 N. E. Rep. 12 (Ind. 1901). As to options, see § 334, *supra*. An option to sell mining stock with no definite time fixed as to the duration of the option may be revoked three months later, no sale having been made in the meantime, and a subsequent sale by the owner of the stock at an advanced price to a party whom the party receiving the option had been negotiating with, does not entitle such party receiving the option to any interest in the sale. Rees *v.* Pellow, 97 Fed. Rep. 167 (1899), the court holding that such an option may be terminated at any time in good faith.

[3] Morgan *v.* Struthers, 131 U. S. 246, 252 (1889); Feckheimer *v.* National Exch. Bank, 79 Va. 80 (1884), where a by-law prohibiting transfers except with the consent of the directors was declared void; Bank of Attica *v.* Manufacturers', etc. Bank, 20 N. Y. 501 (1859); Orr *v.* Bigelow, 14 N. Y. 556 (1856), aff'g s. c., 20 Barb. 21 (1854); Sargent *v.* Franklin Ins. Co., 25 Mass. 90 (1829); Moore *v.* Bank of Commerce, 52 Mo. 377 (1873). A by-law to the effect that a transfer of stock shall be allowed only upon consent of all the other stockholders is void as in restraint of trade. *Re* Klaus, 67 Wis. 401 (1886). As regards corporate liens herein, see ch. XXXI, *supra*. See also, as to the general policy of the law to discountenance restrictions on right to sell, Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1877). In this case the directors were compelled to allow a transfer, although the purpose of the transfer was to multiply votes. A secretary cannot refuse to register a transfer on account of the motive of the transferrer. *Re*

It has been held in Massachusetts, however, that a by-law, recited on the face of a certificate of stock, to the effect that a stockholder will not sell his stock without first offering it to the directors at the same price, prevents the stockholder transferring the stock to

Klaus, 67 Wis. 401 (1886). A by-law providing that, if any stockholder shall desire to dispose of his stock, he shall give written notice of his intention to sell, and that the other stockholders shall thereupon have the option to purchase the stock at the price named, is an invalid restraint on alienation. Victor, etc. Co. *v.* Bloede, 84 Md. 129 (1896). A by-law that no stockholder shall sell his stock or have a transfer of it unless he shall first have offered it for sale to the directors is illegal and void. Brinkerhoff-Farris, etc. Co. *v.* Home Lumber Co., 118 Mo. 447 (1893). A by-law that all purchasers of stock shall agree that the stock shall be voted in favor of increasing the capital stock is void as in restraint of trade and as attempting to limit the voting power of a stockholder. McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897). Where a stockholder purchases certificates of stock which provide that they are transferable only to the company, and at an appraisal to be made by its directors, as provided in the by-laws printed on the back of the certificates, and signs a receipt therefor, "subject to the conditions and restrictions therein referred to, and to the by-laws of the company, to which I agree to conform," he is bound by the provisions of the certificates, though, when considered as by-laws, they may be void. In such case the records of a directors' meeting showing that, by vote of the directors present, a stockholder's shares were appraised at a certain price and taken for the use of the company, sufficiently show an appraisal, although no notice of hearing was given the stockholder. New England Trust Co. *v.* Abbott, 162 Mass. 148 (1894). Where by the by-laws any stockholder wishing to sell his stock must first offer it to the other stockholders, and a stockholder dies and one of his heirs brings suit against the executors for his proportion of the stock, and another heir claims that the stock should be sold, the corporation itself and all the other stockholders are necessary parties. Champollion *v.* Corbin, 51 Atl. Rep. 674 (N. H. 1901). The fact that the by-laws require a stockholder, in case he wishes to sell, to first offer the stock to the corporation or other stockholders before selling to others, does not affect the validity of another by-law authorizing assessments on the stock. Farmers', etc. Co. *v.* Smith, 51 Atl. Rep. 609 (Conn. 1902). A by-law requiring stockholders to offer their stock to the corporation itself before selling such stock elsewhere is illegal, and a purchaser of a certificate of stock is entitled to a transfer on the books, even though his transferrer agreed to the by-law and did not comply therewith. Ireland *v.* Globe, etc. Co., 21 R. I. 9 (1898). Where a stockholder in a national bank indorses his certificate in blank, and causes it to be sold at public auction, and the auctioneer sells it to the cashier of the bank, and takes it to the bank, and presents it to such cashier for transfer, and for four years dividends thereon are paid to the cashier, the vendor is no longer liable, even though the stock was not transferred on the bank books, and even though a by-law of the bank prohibited any officer from holding stock in the bank except by permission of the board of directors. Earle *v.* Coyle, 97 Fed. Rep. 410 (1899). A by-law that the stock shall not be transferable except to the corporation itself is illegal, even though it is expressed on the face of the stock certificates; and hence a stockholder cannot compel a corporation to purchase his stock, even though

his principal, he not having disclosed that he was acting as agent. Such a by-law is legal, and the corporation may refuse to transfer the stock in violation of the by-law.[1] A resolution of the stockholders that the company should not allow any further transfers of stock until the company is out of financial difficulties does not bind a stockholder who did not take part in the meeting.[2]

The right of transfer is sometimes limited by statute, as where stock cannot be transferred until all calls thereon shall have been fully paid. Where the charter or a statute forbids transfers before the full capital stock is paid in, any transfer before such payment has been held to be void.[3] The Illinois statute against options does not apply to a contract by which the vendor of stock agrees to buy it back at the end of five years if the vendor so desires, the vendee on his part agreeing not to sell the stock to any one in the meantime, without first offering it to the vendor.[4]

In England sometimes express authority is given to the directors, by the articles of association, to refuse to permit a transfer unless the same is satisfactory to them.[5] They have this power, however, only by express authority, and it is not extended by implication.[6]

the corporation has purchased the stock of other members, and even though the corporation is essentially a community of property affair, having a capital stock. Herring *v.* Ruskin, etc. Assoc., 52 S. W. Rep. 327 (Tenn. 1899).

[1] Barrett *v.* King, 63 N. E. Rep. 934 (Mass. 1902).

[2] Smith *v.* Bank, etc. Scotia, 8 S. C. Rep. (Can.) 558 (1883).

[3] Merrill *v.* Call, 15 Me. 428 (1839). The case of Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476 (1813), holds that, nevertheless, such a transfer vests in the transferee all the transferrer's interest in the stock. *Cf.* Kahn *v.* Bank of St. Joseph, 70 Mo. 262 (1879). The statutes of a state cannot restrict or interfere with the transferability of certificates of stock in national banks. Doty *v.* First Nat. Bank, 3 N. Dak. 9 (1892).

[4] Ubben *v.* Binnian, 182 Ill. 508 (1899).

[5] Shortridge *v.* Bosanquet, 16 Beav. 84 (1852); Bargate *v.* Shortridge, 5 H. L. Cas. 297 (1855); *Re* Joint-stock Discount Co., Shepherd's Case, L. R. 2 Eq. 564 (1866).

[6] Weston's Case, L. R. 4 Ch. App. 20 (1868); Gilbert's Case, L. R. 5 Ch. App. 559 (1870); Chappell's Case, L. R. 6 Ch. App. 902 (1871); *Re* Stranton Iron, etc. Co., L. R. 16 Eq. 559 (1873); Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878); Slee *v.* International Bank, 17 L. T. Rep. 425 (1867). Judge Dillon, in Johnson *v.* Laflin, 5 Dill. 65, 78; s. c., 13 Fed. Cas. 758, 763; aff'd, 103 U. S. 800 (1880), said: "Such a power is so capable of abuse, and so foreign to all received notions, and the universal practice and mode of dealing in these stocks, that it cannot, in the absence of legislative expression, be held to exist." See also Farmers', etc. Bank *v.* Wasson, 48 Iowa, 336 (1878), the court holding that a by-law that transfers of stock shall not be valid unless approved by the board of directors cannot restrain transfers. "Its enforcement would operate as an infringement upon the property rights of others, which the law will not permit. It would, besides, operate as a restraint upon the disposition of property in the stock of the corporation, in the nature of restraint of trade, which the courts will not tolerate."

The power must be reasonably exercised, and its exercise must be free from fraud, caprice, and arbitrary power.[1] The corporation cannot refuse to allow a registry on the ground that there was no consideration for the transfer;[2] nor because a claimant of the stock notified it not to make the registry.[3]

Similar to a charter restriction on the sale of stock is a provision in the articles of association of an unincorporated joint-stock association to the effect that no stockholder shall sell his stock except on specified conditions or that he shall not sell it at all, except to a party satisfactory to the other stockholders. Such provisions are legal, being merely matters of private contract.[4]

[1] They cannot refuse to allow any transfers. Robinson *v.* Chartered Bank, L. R. 1 Eq. 32 (1865). And an objection, not to the transferee, but to the purpose of the transferrer in respect to the voting, is not sufficient. Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591 (1878). But the board may refuse to give its reasons for refusing to allow the transfer, and in that case it will be presumed to have had sufficient reason for the refusal. *Ex parte* Penney, L. R. 8 Ch. App. 446 (1872). Where the by-laws limit the right of transfer of stock, and give the directors the power to pass upon the same, the court will presume that their action in refusing a transfer was based on good reasons, even though no reason was given. *Re* Coalport China Co., [1895] 2 Ch. 404. If misrepresentations are made in inducing the directors to allow transfer, they, having discretion, may avoid the same. Payne's Case, L. R. 9 Eq. 223 (1869); Master's Case, L. R. 7 Ch. 292 (1872); Bishop's Case, L. R. 7 Ch. 296 (1869). Although a transfer is rejected by the directors, the transferee is nevertheless entitled to dividends and the title to the stock. Poole *v.* Middleton, 29 Beav. 646 (1861). Where the company may accept or reject a transferee, and rejects him, the transferee cannot recover back from the transferrer the consideration of the transfer. London Founders' Assoc. *v.* Clarke, 20 Q. B. 576 (1888). See Healey, Companies Law (3d ed.), p. 90. Where the directors are authorized by the articles of incorporation to reject a transfer of stock on the ground that they do not approve of the transferee, "the discretionary power is of a fiduciary nature and must be exercised in good faith; that is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly, or fraudulently, or arbitrarily, or capriciously, or wantonly. It may not be exercised for a collateral purpose. In exercising it the directors must act in good faith in the interest of the company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a board meeting." It is not a sufficient reason that the transferee is not a member of a particular family, and the directors will be ordered to make the transfer. *Re* Bell, 65 L. T. Rep. 245 (1891).

[2] Helm *v.* Swiggert, 12 Ind. 194 (1859).

[3] *Ex parte* Sargent, L. R. 17 Eq. 273 (1874). *Cf.* § 387, *supra*.

[4] Thus where the articles prohibited sales of the stock, a purchaser has no right to vote or participate in the association, but is merely entitled to the dividends. Harper *v.* Raymond, 3 Bosw. (N. Y.) 29 (1858). See Kingman *v.* Spurr, 24 Mass. 235 (1828). See also Taft *v.* Harrison, 10 Hare, 489 (1853), as to liability after an offer to sell to the company. Under the Pennsylvania statutes relative to joint-stock companies to the effect that a purchaser of stock who is not thereafter elected to partnership

§ 622e. *Irrevocable proxies.*— The plan of trying to tie up the contract of a corporation by obtaining irrevocable proxies from the holders of a majority of the stock had to be abandoned, because the so-called "irrevocable" proxies, although irrevocable by their terms, were held by the courts to be revocable at any time.[1] This plan of depositing the certificates of stock with trustees, without a transfer on the books of the corporation, and then giving irrevocable proxies to the trustees, was one of the first plans tried. The courts, however, held that inasmuch as the proxies were revocable, the plan of the trust itself had failed, and hence the certificates might be demanded back.[2]

shall be paid the value of his stock, the company, by admitting him as to some of the stock, admits him as to all, but the fact that he is already a holder of some stock does not entitle him to be admitted as to new stock purchased by him. Carter *v.* Producers' Oil Co., 200 Pa. St. 579 (1901). Where an unincorporated partnership issues so-called certificates of stock representing a specified interest in such partnership, and one of the partners assigns his certificates as collateral security and afterwards sells them, the purchaser is entitled to his share of the partnership property and to demand an accounting, even though the certificates provided that they were not transferable. The transfer of such certificates as security need not be recorded as a chattel mortgage. Rommerdahl *v.* Jackson, 103 Wis. 444 (1899). Although an unincorporated association's articles provide that transfers of stock shall be made only with consent of the directors, yet, where such provision is for many years disregarded, a stockholder who so transferred his stock at a time when the assets equaled the liabilities cannot be held liable as a stockholder. Wadsworth *v.* Duncan, 164 Ill. 360 (1896); Wadsworth *v.* Laurie, 164 Ill. 42 (1896). The foreclosure and sale of a pledge of stock in the Western Associated Press has been refused where it was shown that the stock merely entitled the holder to receive news; that no transfer was allowed except by consent of the association, and such consent had never been given, and the association was not made a party to the suit. Metropolitan Nat. Bank *v.* St. Louis Dispatch Co., 36 Fed. Rep. 722 (1888). In this case it is to be noticed that no profits or dividends could arise from the stock.

[1] See § 610, *supra.* "It is against the settled rules governing the control of corporations that an irrevocable power of voting or directing votes on stock should be vested in a person who is neither interested in the stock nor a representative of persons interested." Clowes *v.* Miller, 60 N. J. Eq. 179 (1900). A stockholder may transfer his certificate to his children who at the same time may give him an irrevocable power to vote the stock during his life and to receive and keep the dividends on the stock. Such an agreement is enforcible, even though the stock is transferred into the name of the children, the certificates, however, not being actually delivered to them. Matter of Brandreth, 58 N. Y. App. Div. 575 (1901), rev'd on another point in 169 N. Y. 437.

[2] Woodruff *v.* Dubuque, etc. R. R., 30 Fed. Rep. 91 (1887); Hafer *v.* New York, etc. R. R., 14 W. L. Bull. 68 (1885). See Griffith *v.* Jewett, 15 W. L. Bull. 419 (1886); Vanderbilt *v.* Bennett, 6 Pa. Co. Ct. Rep. 193 (1887); Starbuck *v.* Mercantile Trust Co., 60 Conn. 553 (1891). See also an excellent article and careful review of the cases by Professor Baldwin in 1 Yale L. J. 1 (1891).

§ 622*f*. *Deposit of certificate of stock with trustees, either with or without a transfer of same to the trustees.*— This is the usual and most important method of tying up the control of a majority of the stock of a corporation. It has given rise to much litigation and more or less conflicting decisions. Each case turns largely on the peculiar form of the particular contract under consideration, and yet there are certain general features and principles of law applicable to this form of contract, which are gradually defining the limit between legal and illegal contracts of this nature. It has been objected that this mode of tying up the stock of a corporation violates the statute against restraint on the alienation of personal property; that it is contrary to public policy, which favors a free transfer of property; that it is unfair towards minority stockholders, and that it separates the voting power from the ownership of the stock. The leading cases on this subject are as follows:

The New York court of appeals has held that an agreement of several holders of stock to deposit their stock in a trust company for a term of six months and not to sell it during that time is legal, there being no provision depriving any party of his right to vote on the stock. The court held also that where compensation in damages for a breach would be inadequate, a court of equity might grant specific performance of such a contract by enjoining a breach thereof. Such a contract is not void as suspending the power of alienation, nor is it against public policy as being a restraint upon trade, the purpose of the contract being to prevent a sacrifice of the stock.[1]

[1] Williams *v.* Montgomery, 148 N. Y. 519 (1896), practically reversing 68 Hun, 416, and 74 Hun, 425. See § 812, *infra*.

The following decisions have also been rendered in New York state. In the case of Sullivan *v.* Parkes, 69 N. Y. App. Div. 221 (1902), the holders of a majority of the stock of a Delaware corporation entered into a written agreement, by which the certificates were deposited with a trust company for fifteen years, together with irrevocable proxies to two specified persons to vote the stock during that time, and in case they disagreed they were to select a third party who was to decide between them, the proxies to be renewed every three years, the owners retaining the right to sell or pledge their stock, subject always, however, to the agreement, and the purchaser to come into the agreement and execute similar proxies, and the agreement further providing that before any party sold his stock he should first offer it to the others at the same price at which he intended to sell. The two proxies failed to agree and could not agree on an arbitrator, and one of them filed a bill for an injunction to prevent the other from voting his own stock in violation of the agreement. The court held that the injunction would not lie because the contract had become impossible of performance, by reason of the arbitrator not being provided for, and on the further ground that the agreement did not prohibit each stockholder voting his own stock, in case the proxies could not agree, and the court doubted the validity of the irrevocable proxies, and doubted the valid-

In 1901 the legislature of the state of New York declared the public policy of that state, as to the "pooling" of stock, by enacting a statute under which stockholders may pool their stock by transferring the same to a person to vest in him the right to vote

ity of a provision against the stockholder voting his stock, even if there had been such a provision. The court intimated also that an agreement preventing the sale of stock for fifteen years would be void under the Personal Property Law of New York (L. 1897, ch. 417, § 2), and that the spirit of the statute militated against an agreement to give proxies for that length of time.

A court will enjoin a party from voting upon or disposing of his stock in a corporation *pendente lite* where the plaintiffs show that they transferred the stock to the defendant on the latter's agreement not to sell the same, except with the consent of the former, and that when he did sell the stock three-fourths of the proceeds should belong to the former, and it appearing further that the defendant had given the stock to his sister without consideration. Weston *v.* Goldstein, 39 N. Y. App. Div. 661 (1899). In the case of United, etc. Co. *v.* Omaha, etc. Co., 164 N. Y. 41 (1900), where a reorganization committee, in carrying out the reorganization agreement, tied up the stock by giving to the committee the power to vote the same until certain dividends were paid, the court held that the committee had no such power under the original reorganization agreement. Trustees under a reorganization who are to hold a majority of the stock and vote the same for five years, unless they decide to distribute the same before that time, are not precluded from selling stock owned by themselves individually, and the fact that they sell their own stock is no ground for compelling a distribution of the remaining stock. Haines *v.* Kinderhook, etc. Ry., 33 N. Y. App. Div. 154 (1898). An agreement of stockholders not to sell their stock except by concurrent consent of all the signers to the agreement is void as in restraint of trade and against public policy. Fisher *v.* Bush, 35 Hun, 641 (1885).

The trustees are not purchasers and owners of the stock. People *v.* North River Sugar Ref. Co., 121 N. Y. 582 (1890). An outside stockholder cannot object to other stockholders uniting their interests in a "trust," and thereby obtaining control of the corporation. Zimmerman *v.* Jewett, 19 Abb. N. Cas. 459 (1886). An agreement of the holder of a majority of the stock that he will retain control is no defense by the corporation to an action by the receiver of such stockholder to transfer the stock on the corporate books. Weller *v.* Pace Tobacco Co., 25 N. Y. Week. Dig. 531 (1886). Where stock is deposited with a trustee for purposes of reorganization, and transferable certificates are issued therefor by the trustee, a claimant of stock which another person has deposited, and for which such other person has the trustee's certificate, cannot compel the trustee to deliver up the stock until the trustee's certificate is returned, even though the party holding it is a party defendant. Bean *v.* American Loan, etc. Co., 122 N. Y. 622 (1890). As to the nature of trustees' certificates in general, see § 888, *infra*.

Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis que trust* may in a suit for his removal ask also that he account to such *cestuis que trust* for such salary. Elias *v.* Schweyer, 27 N. Y. App. Div. 69 (1898). Where the stockholders transfer a portion of their stock to one of their number to be disposed of by him for the interests of the company, and to raise money to carry on business, he may use a portion of the same to reimburse one of the stock-

the stock for a time not exceeding five years, on such terms and conditions as therein set forth, provided other stockholders are allowed to come into the agreement. The stock may be transferred for that purpose on the books of the company, the new certificates and the corporate books to refer to such agreement, and the agreement itself to be filed with the corporation and to be open to the inspection of other stockholders.[1]

The supreme court of Massachusetts has rendered a logical and clear decision on this question. It holds that an agreement of various persons to purchase a majority of the stock of a corporation, the stock when purchased to be voted by a committee of five of the subscribers for at least three years, is not illegal even though the title to the stock is given to a trustee during that time. The court said: "We know nothing in the policy of our law to prevent a majority of stockholders from transferring their stock to a trustee with unrestricted power to vote upon it. . . . A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he cannot terminate it at will; and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other states show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt they must unite. There is no reason why a majority should not agree to keep together."[2]

holders for stock which the latter used in the interest of the company. Playa, etc. Co. v. Gage, 60 N. Y. App. Div. 1 (1901). Where a trustee or agent with whom bonds are deposited issues his certificate to the effect that he holds bonds specified in such certificate to be delivered to a person specified in such certificate, all coupons on such bonds belong to the person named in the certificate, although the certificate itself is not actually delivered until several years after the date of the certificate. If such coupons have been canceled and returned to the corporation issuing the bonds, and the trustee is held liable for such coupons, the trustee may hold the corporation liable. Kelly v. Forty-Second Street, etc. R. R., 37 N. Y. App. Div. 500 (1899).

[1] L. 1901, ch. 355.

[2] Brightman v. Bates, 175 Mass. 105 (1900), enforcing a contract for commissions for services in purchasing such stock.

An unincorporated joint-stock association to buy, lease, and sell land is legal, even though the title to the land is held in the name of trustees who cannot act except upon a three-fourths vote of the stockholders. A stockholder cannot have a receiver appointed and the business wound up on the ground of its being illegal. Howe v. Morse, 174 Mass. 491 (1899). The contract of an agent to sell stock does not give the

In New Jersey, also, the highest court has upheld a pooling agreement of stock of a terminal corporation, whereby for two and one-half years the stockholders turned over their certificates to certain persons, together with proxies, with power to vote on any question, including the sale of the property, and to exchange the stock for stock in other corporations or to hypothecate it, the stockholders agreeing in the meantime not to sell their stock, the object being to finance and complete the enterprise, and hence a bill filed by one of the depositing stockholders to reclaim his stock was held not to lie.[1]

It has also been held in New Jersey that an agreement between two stockholders by which certain stock is issued to a trustee to

principal a right to damages for failure to sell, where the principal delivered trustees' receipts instead of the stock itself, the stock having been "pooled." Simmons *v.* Brooks, 159 Mass. 219 (1893). The fact is that Massachusetts has developed and elaborated this plan of pooling stock much more than in other states. In that state the trustees often issue trustees' certificates of stock in the usual form of stock certificates. That practically amounts to an unincorporated joint-stock association, owning stock in one or more corporations, a subject already considered. See pp. 1061, 1358, *supra*. In fact it is difficult to draw the line where such an unincorporated association ends and a "pooling" trusteeship begins. The courts are beginning to consider them as much the same, and both are legal modes of tying up stock.

[1] The court said: "This instrument, which gave the defendants control over the complainant's stock, appears to have been for a common interest, it is consistent with the purposes for which the corporation was created, and its continuance appears to be necessary for the advantage of all who are interested in the development of the property. A power of attorney may become irrevocable whenever the object is to create an interest; and this is so, even if it is not stated in the instrument itself to be irrevocable. . . . The statute does not in terms prevent a stockholder from giving an irrevocable power of attorney to vote at stockholders' meetings, subject to the time limit as to elections, nor can we see any reason why a stockholder may not give such a proxy if he chooses, and be bound by it. He can easily avoid the effect of it by appearing and voting in person at all meetings. There is no statutory provision, nor can we perceive any reason offensive to public policy, preventing a stockholder from giving another powers over, or rights in, his shares in a corporation to the same extent that he might give in any property." The court also said: "No illegal purpose is manifest upon the face of this agreement, nor has any been alleged in the bill. It appears to be consistent with the purposes for which the company was created, and which continuance appears to be necessary for the advantage of all who are interested in the development of the property. It is expressly declared to be for the benefit of all who join in it. No stockholder is prevented from joining in this agreement, and no stockholder who has not availed himself of the opportunity to join in it is excluded from the benefit of it. No one appears to have been injured by it. The complainant does not allege in what way he is damaged by its continuance." Chapman *v.* Bates, 47 Atl. Rep. 638 (N. J. 1900), aff'g 60 N. J. Eq. 17 (1900).

be held by the trustee for eighteen months, unless sooner disposed of by consent of the parties, the stock in the meantime to be voted as directed by one of the parties, the stock at the termination of that period to be divided between them in a certain way, is legal.[1]

On the other hand it has been held by the lower court in New Jersey that a stock-pooling agreement by which for five years the holders of a majority of the stock transfer it to trustees in exchange for certificates of the trustees themselves, and the trustees are given power to formulate a plan for financing the company and submit the same to such stockholders, who shall be bound thereby unless they object in a certain way, and the trustees are then given power to carry out such plan, and stockholders who do not come into the agreement should not be entitled to any rights or benefits thereunder, the trustees to elect such directors as they see fit, is illegal, and a stockholder who has not come into the agreement may enjoin the trustee from voting such stock, even though some of the trustees are beyond the jurisdiction of the court.[2]

[1] If one of the parties, who had a right to prescribe how the stock should be voted, subsequently, but prior to the expiration of the agreement, sells his interest in the stock, such sale being made subject to the agreement, his right in regard to the voting of the stock does not pass to the purchaser, but vests in the trustee. "It is against the settled rules governing the control of corporations that an irrevocable power of voting or directing the votes on stock should be vested in a person who is neither interested in the stock nor a representative of persons interested." The court said in regard to the duty of the trustee in holding the stock, "it must exercise this right and power honestly and in its best judgment as trustee, giving such weight as in its judgment it is entitled to, to the fact that the complainant, the owner beneficially interested in the majority of the stock held in trust, is opposed to the change." The court said: "It must be observed that the trust agreement is not simply a deposit for the purpose of voting, but is a trust to hold the stock for a limited period, to await the result of certain options of purchase, which affect the ultimate disposal of the stock." Clowes *v.* Miller, 60 N. J. Eq. 179 (1900).

[2] The court said: "If, however, the stockholder undertakes to make irrevocable his grant of power, and to denude himself for a fixed period of the power to judge and determine and vote as to the proper management and control of the affairs of the corporation, then whether the grant of power is good or not must depend on the purposes for which it is given. When the scheme devised does not embrace a grant of irrevocable powers by proxy, but seeks a similar object by the creation of a trust and the appointment of a trustee, to whom the title of the stock is conveyed, a like doctrine must be applied. If no provision is made for the conduct of the trustee, at least he would be bound to vote on the stock held in trust in accordance with the expressed wishes of the *cestui que trust;* but if the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to direct the trustee, and all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then, whether the transaction is open to the

It has been held in Missouri that where a person sells stock to two others, and the three agree to pool their stock so that all benefits should be shared equally, including the sales thereof and including any dividends received within a specified time on certain other stock owned by one of the parties, the agreement is valid and a suit for an accounting may be maintained thereon;[1] and in California, that where the holder of a majority of the stock had contracted to transfer it to a specified person with proxy irrevocable, authorizing the latter to vote the stock for five years for the benefit and protection of the corporation, and the party so contracting refused to fulfill and voted the stock himself and elected a board of directors, the court, having taken jurisdiction under the California statute authorizing the court to review elections, had jurisdiction to grant specific performance of such contract;[2] and in Maryland, that specific performance will not be granted at the instance of the purchaser of stock where the purchase is from the committee of a pool of such stock, and it is shown that the pooling agreement required a vote of three-fourths of the stock in the pool before a sale could be made, and it is also shown that the contract of purchase was partly an option, in that the purchaser was to for-

objection of other stockholders, as depriving them of the right they have to the aid of their co-stockholders, must be dependent upon the purposes for which the trust was created, and the powers that were conferred. If stockholders, upon consideration, determine and adjudge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may, by powers of attorney, or the creation of a trust, or the conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. But if stockholders combine by either mode to intrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such plan, to the exclusion of other stockholders who do not come into the combination, then, in my judgment, such combination, and the acts done to effectuate it, are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation." The court also said: "The agreement discloses an intent to exclude stockholders who do not enter into it from whatever benefits could be claimed thereunder. This, in my judgment, shows a combination contrary to public policy, and one to which any non-assenting stockholder may object." Kreissl *v.* Distilling Co., etc., 61 N. J. Eq. 5 (1900). An agreement whereby $83,000 of stock is pooled in a trustee's hands, the latter issuing trustee's certificates therefor, and electing such directors as the certificate holders may direct, according to the trust agreement, may be annulled and set aside at the instance of purchasers of the remaining $17,000 of stock and of a majority of the trustee's certificates. White *v.* Thomas, etc. Co., 52 N. J. Eq. 178 (1893).

[1] Green *v.* Higham, 161 Mo. 333 (1901).

[2] Whitehead *v.* Sweet, 126 Cal. 67 (1899).

feit a deposit he had already made in case he did not fulfill, and it being further shown that in another suit the complainant had stated the value of the stock, and it being further shown that the purpose of the contract was to obtain control of a large system of railroads, including the board of directors.[1]

In Ohio it is held that it is legal for the stockholders to deposit their stock with a depositary, to be transferred to such depositary and voted by him as directed by a committee of the stockholders, such committee being named, the object of the deposit being to effect an adjustment of differences between the common and preferred stockholders;[2] and in Alabama that where, in order to prevent the foreclosure and sale of a railroad, a reorganization agreement is entered into by the creditors and stockholders, whereby the claims of the creditors and the voting power of the stockholders are vested in trustees, the voting power to be exercised by the trustees until certain debts were paid, the stockholders cannot withdraw from the agreement and claim the right to vote upon their stock.[3] This decision was entirely correct, and in fact many of the voting trusts have been created as a part of the plans of reorganization of insolvent railroad systems.[4]

[1] Ryan *v.* McLane, 91 Md. 175 (1900). Where an agreement for the pooling and voting of stock provides that any holder of trustee's certificates may on six months' notice demand from the trustee repayment of the price which he paid for the stock, such demand may be enforced by a suit and the money collected from the trustee. Waggaman *v.* Nutt, 88 Md. 265 (1898).

[2] The agreement did not prevent any stockholder from demanding back his stock whenever he saw fit. The court held that this was not a "voting trust," and that it was merely "a convenient method by which distant and widely-separated shareholders became enabled, indirectly, to participate in the control and management of the company, and from which each could recede at any time and demand return of his stock without violating any term of the agreement. The depositary is a proxy required to vote the stock as directed by the committee." The contract of deposit is given in the report. The suit arose on *quo warranto* proceedings to oust the board of directors who were elected by the vote of the depositary, but whose title to office was denied by the company. Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892); State *v.* O. & M. Ry., 6 Ohio Circ. Ct. 415 (1892). *Cf.* Hafer *v.* N. Y. etc. R. R., 14 W. L. Bull. 68 (1886).

[3] Not even a subsequent change in the agreement so as to issue first-mortgage bonds to take up some of the debt will enable the stockholders to claim the right to vote upon their stock before the debts specified above have been paid. Mobile, etc. Co. *v.* Nicholas, 98 Ala. 92 (1893). See also Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila. Com. Pl. 1890).

[4] The following from "Bradstreets" of September 6, 1902, is in point:

VOTING TRUSTS.

Recent events in the financial world have given rise to a good deal of discussion about the nature and bearings of what is known as voting trusts in connection with the stocks of railroads and other corporations. The definition of the term is a delegation of the right to elect directors and officers of such companies to certain

On the other hand, it has been held in Alabama that although many stockholders transfer their stock to a trustee to hold and vote for it three years, and agree not to sell until they have offered to sell to each other, yet any one may sell to an outsider, and the latter may demand back his stock from the trustee.[1]

In Maine it is held that a transfer of a controlling interest of stock of a railroad company to trustees to hold until the road is completed, and then to return the same to the transferrers, the object being to secure the co-operation of municipalities in obtaining an extension of the charter and the granting of municipal aid, is legal, the transaction being a fair one, and being known to the public, and insisted upon by the public before aid would be given.[2]

The federal court as early as 1867 held that an agreement by which various owners of stock place their stock in the hands of one person as trustee or agent to hold for a certain period of time, the parties agreeing not to sell their stock without having first offered to sell it to the rest of their associates at a price not above the then current market value, and, in case of their declining to take it, without next offering it to the trustee, but any one of the parties to be at liberty to withdraw at any time on those terms, is not "contrary to public policy, or any wise open to objection;"[3] and there have been many recent decisions in the federal courts on various "pooling" agreements.[4] Most of the decis-

trustees, either for a specified period or a length of time contingent upon other events, commonly the payment of dividends on the stocks held in trust. Arrangements of this kind are the outcome for the most part of the railroad reorganizations which have been so frequent during the past decade. When modern and correct principles began to be applied to the reconstruction of bankrupt corporations, it was found that one of the primary requirements was that bankers and capitalists should provide very large sums of money for the purpose of buying up claims against the company, for extinguishing the rights of non-assenting holders of stocks and bonds, and for the purchase of the equipment and completion of the improvements needed to put the plants in condition for profitable operation. The natural sequence of this was that the bankers or syndicates who supplied the capital desired to retain the management of the company in their own hands for a certain length of time, so that they might have the assurance that their plans would be carried out by a management nominated by themselves and in sympathy with their views. In matters of that kind continuity of management and an absence of liability to sudden changes in the control or policy are very important. Consequently, in nearly all of the large railroad reorganizations, like those of the Northern Pacific, Erie, Reading, and so forth, the plans under which the finances of the companies were readjusted included provisions by which the stocks of the reorganized road were to be deposited with three or more voting trustees, who would issue against the stock their certificates, carrying a beneficial interest to the holders of such certificates in the stocks so deposited. In most cases the voting trust was arranged to last for from three to five years, or until dividends had been paid on at least the preferred stock, either for a year or longer, at a specified rate. It was also generally set forth that the voting trustees themselves might terminate the voting trust of their own volition, and in at least two notable cases, those of the Northern Pacific and the Baltimore & Ohio, the voting trustees did actually end their trusteeship and deliver the stock itself to the holders of the voting trustees' certificates prior to the time when the arrangement would have been terminated.

[1] Moses *v.* Scott, 84 Ala. 608 (1888).

[2] Greene *v.* Nash, 85 Me. 148 (1892).

[3] Brown *v.* Pacific Mail S. Co., 5 Blatchf. 525 (1867); s. c., 4 Fed. Cas. 420.

[4] In the case of Levi *v.* Evans, 57 Fed.

ions on this subject, however, have been in the state courts, and, as shown above, those decisions have quite uniformly sustained this mode of tying up for a term of years the control of a majority

Rep. 677 (1893), three stockholders, by an instrument similar to a bill of sale, sold their stock to a fourth stockholder "for and during the period of six months, . . . in trust for the use and benefit of the grantors," with power to sell the same on certain terms, yet the court held that this instrument was not a sale or trust agreement, but merely a power of attorney. It did not prevent the fourth stockholder from selling his own stock on such terms as he chose, even though he did not sell the stock of the others, it not appearing that the sale of his stock prevented his selling the stock of the others. The instrument conveyed merely at most "only a dry legal title for the mere purpose of sale, and with the power of sale carefully circumscribed."

In the case of Ryan *v.* Seaboard & R. R. R., 89 Fed. Rep. 397 (1898), there was involved a pooling agreement by which the signers agreed for five years, or until thirty days after the agreement should be abrogated, not to sell nor dispose of their stock nor to delegate the voting power thereof to any person other than three specified persons and without the written consent of three-fourths of the aggregate shares of the signers to the agreement, and the agreement also authorized these three persons to vote as proxy for all signers of the agreement who should not be personally present at any meeting of the stockholders. The essential features of the agreement were that no stockholder would sell his stock for five years except upon the consent of three-fourths of the stock in pool, and in the meantime he would vote in person or through specified proxies. One of the signers, after sending in his certificate indorsed in blank, sold the same to the complainant in this suit without delivery of the certificate itself, such certificate having been canceled and a new certificate issued to the chairman of the pooling committee. This suit was instituted to compel the delivery of the stock called for by such certificate and sale and for other relief. The court held that the suit would lie, but that all the parties signing the agreement were necessary parties defendant in this suit to determine the validity of the agreement, excepting such of them as had sold their stock. The court held also that the suit was not multifarious, although it joined the company as a party defendant in order to obtain a transfer of the stock.

An injunction *pendente lite* against the voting of certain stock in connection with the formation of an alleged illegal pool will not be continued where it failed to accomplish its purpose at one annual meeting and will fail at the next meeting. Ryan *v.* Seaboard & R. R. R., 89 Fed. Rep. 385 (1898). The fact that one of the trustees of a voting trust is an officer in a certain railroad does not render illegal the voting of the stock in favor of consolidating with that railroad, there being no proof of wrong-doing or unfair terms. Dady *v.* Georgia, etc. Ry., 112 Fed. Rep. 838 (1900).

Where two stockholders make a contract by which the stock is placed in the name of one of them to be held in trust and voted by him as they agree, and in case of disagreement an arbitrator is to decide, and the stock is not to be sold until they agree to sell, the one so placing stock in the name of the other as trustee cannot sue the latter for refusal to deliver to the former his part of the stock. Louisville Trust Co. *v.* Stockton, 75 Fed. Rep. 62 (1896). Where stock is transferred to a trustee to sell with the stock of other persons, the trustee's power of sale is not revoked

of the stock of a corporation. There are a few decisions to the contrary.[1]

The above decisions seem to lead to the conclusion that a deposit of certificates of stock with trustees for a specified period of time,

by the death of the transferrer. Hiller *v.* Ladd, 80 Fed. Rep. 794 (1897).

A contract to combine to control the majority of the stock of a railroad company may be violated by a party to it, although by its terms it is irrevocable. Clarke *v.* Central R. R. etc., 50 Fed. Rep. 338 (1892). In this case, however, on the final hearing, the bill was dismissed. See 62 Fed. Rep. 328 (1894). Where stock is placed in a trustee's hands, and a trustee's certificate is taken therefor, a pledge of the trustee's certificate is not a pledge of the stock sufficient to cut off subsequent attachments of the stock. Bidstrup *v.* Thompson, 45 Fed. Rep. 452 (1891). A "trust" of stock was involved in Farmers' Loan, etc. Co. *v.* Chicago, etc. Ry., 27 Fed. Rep. 146 (1886), where Hugh J. Jewett, president of the Erie Railway, held as trustee the stock of the Chicago & Atlantic Railroad, the western connection of the former company. The court did not pass on the permanency of the trust.

Where a depository of stock to vote the same for five years agrees to return the stock at the end of that time, or an equal amount of stock, together with dividends, any future assessments on the stock to be paid by the person making the deposit, and, if not paid, then the depository, in case he pays the assessment, to be entitled to repayment from the dividends, with interest, and the assessments are not paid and the stock is sold, and at the end of five years the depository tenders back other stock with assessments paid, the depository is entitled to repayment of such assessments. Moore *v.* Bank of British Columbia, 106 Fed. Rep. 574 (1901). A syndicate operation was involved in Hogg *v.* Hoag, 107 Fed. Rep. 807 (1901), where certain stocks and property were transferred to a trustee, who issued certificates therefor to the members of the syndicate. A part of the subscribers did not pay, and the vendor of the property took the trustee's certificates of such non-paying subscribers, and on the death of the trustee a bill was filed to have the court substitute a new trustee and one of the subscribers filed a cross-bill for an accounting. The court decreed a winding up of the syndicate and appointed a receiver. The court held that a partial payment made to the vendor of the stocks was legal, even though all the property was not conveyed to the trustee, as contemplated, and that the vendor's acceptance of the certificates of non-paying subscribers obligated him to pay therefor, although such trustee's certificates had become worthless, the transaction being in connection with the Oregon Pacific Railroad Company. The court said that the syndicate was in substance, though not technically, a joint-stock company.

[1] An agreement between stockholders holding a majority of the shares to pool their stock by transferring it to trustees, and authorizing them to vote all such stock at corporate meetings, and to pledge it as collateral for loans, is void, as against public policy. Hence the holder of one of the trustee's certificates may demand his stock and may enjoin the trustee from voting his stock or disposing of it. Harvey *v.* Linville Imp. Co., 118 N. C. 693 (1896). A vendor of stock may collect the price even though the agreement contains a provision for pooling the stock which is illegal. Edgerton *v.* Power, 18 Mont. 350 (1896). A trust of stock for the benefit of both the bondholders and the stockholders cannot be broken up by one of the stockholders only. Shelmerdine *v.* Welsh, 47 Leg. Int. 26 (Phila.

either with or without a transfer of the same to the trustees, is legal, and is not in violation of the usual statute against restraints on the alienation of personal property;[1] and is not opposed to public policy as a restraint upon trade;[2] and is not an implied fraud upon stockholders who are not allowed to participate; and is not an illegal separation of the voting power from the ownership of the stock; provided always that no actual fraud is involved in the

Com. Pl. 1890). A pool of stock does not prevent a creditor of one of the participants causing to be sold on execution his debtor's interest in the stock, such sale to be subject to the pooling contract if it is lawful. Hardin *v.* White, etc. Co., 26 Wash. 583 (1901). Where one street railway company takes a lease of the street railways of three other companies on an agreement whereby the stock of the latter companies is deposited with a trustee, and the lessee issues "stock trust certificates" therefor, being its obligation to pay a fixed rate of interest per year, with an option on its part to pay the principal sum or not at its option at a specified time, the stock being security therefor, to be sold by the trustee in case the principal and interest are not paid, this form of financing does not create a debt, and hence such certificates are not subject to taxation as a bond and mortgage, the transaction being really a guaranteed dividend or rental. Commonwealth *v.* Union, etc. Co., 192 Pa. St. 507 (1899).

[1] Williams *v.* Montgomery, 148 N. Y. 519, 526 (1896), where the court said that under the New York statute the power of alienation is suspended only when there are no persons in being by whom an absolute title can be conveyed, and that "the test of alienability of real or personal property is that there are persons in being who can give a perfect title," and that "where there are living parties who have unitedly the entire right of ownership, the statute has no application," and that inasmuch as the agreement of several persons not to sell for a specified time may at any time be waived or canceled by unanimous consent, the statute does not apply. A trust deed is not void as suspending the power of alienation, inasmuch as by payment the mortgage may cease, or by agreement of all parties interested it may be canceled. Balfour-Guthrie, etc. Co. *v.* Woodworth, 124 Cal. 169 (1899). See to same effect, § 812, *infra*.

[2] Williams *v.* Montgomery, 148 N. Y. 519, 526 (1896), where the agreement not to sell for six months was upheld, the court saying: "Nor was the agreement opposed to public policy, for a reasonable regulation as to the mode of selling the stock, so as to prevent the sacrifice thereof, was not a restraint upon trade. As an incident to the contract, making partition of the shares, it was competent for the parties to agree that the stock donated to the corporation, in which they had a common interest, should be first offered for sale. This was no restraint upon the business freedom of the parties, but a promotion of the general interest, by temporarily withholding from the market shares owned by individuals in order to afford a reasonable opportunity to sell shares indirectly owned by all. The protection of the interests of all concerned, by preventing the market from suddenly becoming overcrowded and ruinously depressed, was a reasonable, just, and honest purpose, which the law does not condemn. There was no evil tendency in the arrangement, as it simply prevented a course of action that would have brought loss both to the common and the personal interests." See also cases on pp. 1363, 1365, *supra*.

transaction. In other words, such a pooling of stock is not illegal in itself, but, like all contracts, may be illegal if actual fraud is involved.

It remains to add that while the agreement of the holder of a trustee's certificate, like the agreement of a holder of a certificate of stock, not to sell the same during a specified time, is legal, just as the agreement of a partner in a copartnership, not to sell his interest therein or dissolve the partnership for a term of years, is legal,[1] nevertheless such contracts do not actually prevent a sale. A sale made in violation of such a contract is upheld by the courts, but the party making such a sale in violation of his contract is liable in damages to the other parties.[2]

§ 622g. *One corporation owning and holding the stock of other corporations.*—The latest method of tying up the majority of the stock of a corporation and thereby securing control is by organizing another corporation to purchase, own, hold, and vote the stock of the former corporation.[3] This plan is especially used where it is desired to unite the control of two or more competing railroad corporations or manufacturing corporations. Such was the plan adopted in the Northern Securities Company, which acquired a majority of the stock of the Northern Pacific Railroad Company and

[1] Bagley *v.* Smith, 10 N. Y. 489 (1853). A contract to continue a partnership for a definite period of time is valid. Greenhood on Public Policy, p. 503.

[2] Dart *v.* Laimbeer, 107 N. Y. 669 (1887); Bagley *v.* Smith, 10 N. Y. 489 (1853); Skinner *v.* Dayton, 19 John. 513, 537 (1822), where the court said: "Even where partners covenant with each other that the partnership shall continue seven years, either partner may dissolve it the next day by proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant." Marquand *v.* New York, etc. Co., 17 John. 511, 529 (1819), where the court, in answer to the argument that a sale by a partner in violation of the partnership agreement should be declared void, said: "According to the doctrine on the part of the appellants a party may lock up his capital in a mercantile house by such an agreement as the one in this case, and it must remain untouched, without the consent of his copartners, during his life. If the creditors take it by assignment they must become partners in the firm, and can only touch the yearly profits, and must be liable to the yearly losses, and for all the engagements of the firm. This doctrine appears to me to be too unreasonable, and too inconvenient, to be endured." See also Bishop *v.* Breckles, Hoffman, Ch. 534 (1840); 3 Kent, Com. 58; Parsons on Partnership (4th ed.), secs. 280, 309, note; Am. & Eng. Ency. of Law, vol. XVII, pp. 1099, 1100.

[3] An agreement of various stockholders in several street railway companies to form a new corporation and transfer their interest thereto and divide the new stock in a certain proportion does not constitute such a partnership as to entitle one to sue the others for an accounting of profits where the others had formed such a corporation with other parties, leaving out the first-named party. Schantz *v.* Oakman, 163 N. Y. 148 (1900).

the Great Northern Railroad Company. Such also was the plan of the United States Steel Corporation, which acquired the control of a large number of competing steel manufacturing corporations. Ordinarily one corporation has no charter power to purchase the stock of another corporation,[1] but the statutes of most of the states now allow incorporation for any legal purpose, and hence it is possible to organize a corporation for the purpose of owning and holding the stock of other corporations. The advantage of this plan is that the absolute title to the stock passes, whereas, in a pooling or trustee agreement, the stock is to be returned to the participating parties, and there is always danger that one or more of the participating parties may at any time bring suit to recover back such stock. The objection to the plan, however, is that it enables the directors of the stockholding corporation to sell the stock at any time, and it involves not merely temporary pooling of the stock, but the permanent parting with the title. Another objection is that the stockholding corporation itself is liable to be attacked by the state, on the ground that it is an illegal combination of competitors, in restraint of trade, and in violation of statutes prohibiting such combinations. Such was the result of the formation of the Northern Securities Company.[2]

§ 623. *Who may be a director or corporate officer — Qualification shares.*— If the charter or statutes require a director to be a stockholder, one who holds stock transferred to him in trust for the express purpose of qualifying him for the position may serve.[3] And

[1] See §§ 314–316, *supra.*

[2] See § 317, *supra.*

[3] Budd *v.* Munroe, 18 Hun, 316 (1879). *Contra,* Bartholomew *v.* Bentley, 1 Ohio St. 37 (1852). Where an agent of a corporation purchases with corporate funds, without authority, stock in another company, and sells one of the shares to a person in order to enable the latter to qualify as a director in such company, the person receiving the one share is protected in his title, and the first-named corporation cannot compel him to give it up, even though the agent had no power to sell, the purchaser having purchased in good faith. Hence, his acts as a director are valid. Scarlett *v.* Ward, 52 N. J. Eq. 197 (1893). Although the statute requires a director to be a stockholder, it is no objection that a qualification share was put in a director's name merely for the purpose of qualifying him. *Re* Leslie, 58 N. J. L. 609 (1896). In a stockholder's suit to enjoin the corporation from entering into a consolidation, he cannot question the right of the directors to hold office on the ground that the qualification shares did not really belong to them. Langan *v.* Francklyn, 20 N. Y. Supp. 404 (1892). Stock may be given to a person to qualify him as a director. Louisville, etc. Co. *v.* Kaufman, 105 Ky. 131 (1898). Where four shares of stock are transferred to a person by the corporation to qualify him as a director, and he agrees to return the same to the corporation when ceasing to be a director, but thereafter, and before he ceases to be a director, he agrees with the indorsers of his note that they shall have the stock as collateral security, they are protected, even though the stock was actually de-

where a person has the right to vote on stock as a stockholder, he is eligible to any corporate office to which any stockholder is eligible, and accordingly may be elected a director, even though an assignee in bankruptcy has been appointed of his estate.[1] He may obtain stock in any way and become thereby qualified.[2] Although the charter requires the directors to be stockholders, it has been held that the transferee and holder of a certificate of stock is qualified, even though the stock itself stands on the books of the company in the name of his transferrer.[3] In general, any one who may be an agent may be elected a director of a private corporation; and at common law it is not necessary that a director be a stockholder.[4] A director need not be a citizen of the state by which the

livered to them after they had notice of the first agreement, it being shown, however, that they had no notice of such agreement at the time they became sureties. Dueber, etc. Co. *v.* Daugherty, 62 Ohio St. 589 (1900).

[1] State *v.* Ferris, 42 Conn. 560 (1875).

[2] A stockholder may have purchased stock with a view of becoming a director, or have obtained it by gift, or he may hold it upon a trust, and be qualified to be a director. He is qualified unless the "title was put in him colorably, with a view to qualify him to be a director for some dishonest purpose, in furtherance of some fraudulent scheme touching the organization or control of the company, or to carry into effect some fraudulent arrangement with the company." *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). A person is qualified who buys stock in his own name with his wife's money and transfers the certificate to her, but afterwards, and before registry, keeps the stock for himself. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). If the director has sufficient stock registered in his name, it is immaterial that he does not own it. Pulbrook *v.* Richmond, etc. Co., L. R. 9 Ch. D. 610 (1878); Bainbridge *v.* Smith, 41 Ch. D. 462 (1889).

[3] State *v.* Smith, 15 Oreg. 98 (1887). The corporate books are not conclusive as to the qualification of a person to act as a director. If he owns stock he is qualified, even though he does not appear as a stockholder on the corporate books, and *vice versa.* The inspectors cannot reject votes on the ground that the candidate is not qualified. *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882). Under the statutes of North Dakota an unregistered holder of stock is not qualified to be elected a director. *Re* Argus Printing Co., 1 N. D. 434 (1891).

[4] State *v.* McDaniel, 22 Ohio St. 354, 367 (1872); McDowall *v.* Sheehan, 129 N. Y. 210 (1891); Wight *v.* Springfield, etc. R. R., 117 Mass. 226 (1875); *Re* St. Lawrence Steamboat Co., 44 N. J. L. 529 (1882); Hoyt *v.* Bridgewater, etc. Co., 6 N. J. Eq. 253, 274 (1847); Bristol, etc. Trust Co. *v.* Jonesboro, etc. Trust Co., 101 Tenn. 545 (1898); *Ex parte* Stock, 33 L. J. (Ch.) 731 (1864); Bartholomew *v.* Bentley, 1 Ohio St. 37 (1852); People *v.* Northern R. R., 42 N. Y. 217 (1870); Cammeyer *v.* United, etc. Churches, 2 Sandf. Ch. 186, 249 (1844); Hurrell & Hyde on Directors and Officers, 2; State *v.* Swearingen, 12 Ga. 23 (1852) — a municipal corporation case. The charter or by-laws may, however, provide otherwise. Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). See also Cumming *v.* Prescott, 2 Younge & C. (Exch.) 488 (1837). It is not necessary that the directors should be either subscribers to the stock or corporators. Densmore Oil Co. *v.* Densmore, 54 Pa. St. 43 (1877); *Re* British Provident, etc.

corporation is created.[1] The constitutionality of a statute which prohibits the citizens of other states from being directors in a corporation may well be doubted.[2]

An alien may be a stockholder and director in a corporation if the statutes do not prohibit it.[3] A married woman is not at common law qualified to act as an incorporator nor as treasurer,[4] but under the usual statutes conferring rights upon her she is qualified to act as a director or officer.[5] An executor may be a director.[6] A trustee is qualified to act as a director, even though the charter required each director to hold stock "in his own right," but where a director's trustee in bankruptcy claims the stock the director is no longer qualified.[7]

Votes cast for a person not eligible to the office cannot elect him. He is not even a *de facto* director, and he may be ousted by legal proceedings.[8] Such votes, however, are not to be ignored so as to

Assoc., L. R. 5 Ch. D. 306 (1877). It has been doubted whether the by-laws of a company may require directors to be stockholders. People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869). *Cf.* Cross *v.* West Virginia, etc. Ry., 37 W. Va. 342 (1892).

[1] Kerchner *v.* Gettys, 18 S. C. 521 (1882). A citizen of one state may be a stockholder and director in a corporation incorporated in another state. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). Directors of a national bank "are not required to reside at the bank's place of business." Robinson *v.* Hall, 59 Fed. Rep. 648 (1894). The directors of a corporation need not be residents of the state unless the statutes expressly require it. North, etc. Rolling-stock Co. *v.* People, 147 Ill. 234 (1893).

[2] See § 813, *infra*, to the effect that such a statute as regards trustees in a mortgage deed of trust is unconstitutional and void. A constitutional provision requiring directors to be stockholders does not apply to a consolidated railroad company existing as one corporation in two states. Ohio, etc. Ry. *v.* People, 123 Ill. 467 (1888).

[3] Commonwealth *v.* Hemmingway, 131 Pa. St. 614 (1890).

[4] 9 Ry. & Corp. L. J. 197.

[5] People *v.* Webster, 10 Wend. 554 (1833).

[6] *Re* Santa Eulalia S. Min. Co., 4 N. Y. Supp. 174 (1889). An executor may be a director even though the stock does not stand in his name. Schmidt *v.* Mitchell, 101 Ky. 570 (1897); *Re* Santa Clara, etc. Co., N. Y. Daily Reg., June 19, 1888.

[7] Sutton *v.* English, etc. Co., 87 L. T. Rep. 438 (1902).

[8] The election of a person not qualified does not make him even a *de facto* director. *Re* Newcomb, 18 N. Y. Supp. 16 (1891); Hamley's Case, L. R. 5 Ch. D. 705 (1877); Jenner's Case, L. R. 7 Ch. D. 132 (1877). A director who is not a stockholder cannot complain that a meeting of the directors was held without notice to him. Anderson, etc. Co. *v.* Pungs, 127 Mich. 543 (1901). In a stockholder's suit in behalf of the corporation, a request to the legal board of directors to bring the suit is necessary, even though it is alleged that a majority of the directors are involved in the fraud complained of, where it appears that such directors were not qualified to act as directors by reason of not being stockholders, and never had acted as such. Loomis *v.* Missouri, etc. Ry., 165 Mo. 469 (1901). Where a director was not quali-

elect a candidate who receives a minority of all the votes cast.[1] The election is good as to those who were eligible.[2] Although the statutes require a director to be a stockholder, yet a person not a stockholder may be elected, and may then acquire one or more shares of stock before acting as director. This satisfies the law.[3]

fied and a new director has been elected in his place, he cannot have *mandamus* to allow him to inspect the company's books and exercise other rights of a director, even though for a time he was permitted to act as director. People *v.* N. Y. etc. Co., 34 N. Y. Misc. Rep. 326 (1901). Where cumulative voting prevails, and the statutes require three directors to be residents, and all votes cast are cumulated on non-residents excepting thirty-two which are cast for three residents, the three residents are elected, and the remaining directors are those of the non-residents who received the highest number of votes. Horton *v*. Wilder, 48 Kan. 222 (1892). Where directors must be stockholders qualified to vote, a stockholder not qualified to vote by reason of not owning his stock for thirty days before the election is not qualified to be a director. His election does not make him even a *de facto* director. *Re* Newcomb, 18 N. Y. Supp. 16 (1891). Where an election is "conceived in fraud and conducted contrary to law," the call being insufficient, the notice concealed, the instigators having sold and transferred their certificates of stock, the purpose of the election being to steal the control from one who really owned all the stock, and two of the alleged new directors not being stockholders as required by law, there are no directors *de facto*, even though they take possession and drive away the contractor who is building the road. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872). In Barber's Case, L. R. 5 Ch. D. 963 (1877), arising under similar facts, the court said: "Mr. Barber was not qualified to be elected a director, and his election was absolutely null and void. . . . If he had acted as a director, there might have been an estoppel." The board of directors cannot, even under a by-law authorizing them to fill vacancies, oust a director on the ground that he was ineligible when elected, and then proceed to fill his place. Commonwealth *v.* Detwiller, 131 Pa. St. 614 (1890). A director who is not a stockholder cannot sign a statutory notice of a meeting to increase the capital stock. *Re* Wheeler, 2 Abb. Pr. (N. S.) 361 (1866). It formerly was held in England that the election of one not a shareholder as a director in a corporation in which it is required that the directors be owners of a certain amount of stock is valid; and such a person, upon acceptance of the directorship, is bound to take and pay for the required number of shares. But the later decisions have established the rule that by accepting the directorship he does not thereby become liable as a subscriber for stock to the amount of qualification shares. See § 52, *supra*. The election of a disqualified person as director is voidable, not void. People *v.* Albany, etc. R. R., 55 Barb. 344, 373 (1869).

[1] See § 620, *supra*.

[2] Schmidt *v.* Mitchell, 101 Ky. 570 (1897).

[3] Greenough *v.* Alabama, etc. R. R., 64 Fed. Rep. 22 (1894). Where directors must be stockholders, a person elected director without his knowledge and owning no stock, and who never acted as a director for ten years, is not a director, even though a share of stock was given to him shortly after his election and he took the same. Hence he may purchase corporation property at a judicial sale. Rozecrans Gold Min. Co. *v.* Morey, 111 Cal. 114 (1896).

A statute requiring directors to be stockholders does not apply to directors named in the certificate of incorporation for the first year.[1]

Where a person not eligible to the office is declared elected, and no stockholder objects or takes legal proceedings to test the right to the office, and such person is allowed to perform the duties of his office, he becomes an officer *de facto*. As such his acts cannot be objected to on the ground that he was not a legally-elected director. Neither corporate creditors, nor the corporation, nor the stockholders, nor the director himself, are allowed to raise this objection in that manner. The remedy is to oust him by *quo warranto* or to enjoin him as a usurper. But after he is allowed to become a *de facto* director, his title to office cannot be attacked collaterally, nor can his acts be repudiated on that ground.[2] A director, as a *de facto* director, may bind the company by his acts, if allowed to continue in his position.[3]

Where the charter requires the directors to be stockholders, a director must continue to hold stock during his term of office. If he sells all his stock in the company, he thereby becomes disqualified and ceases, *ipso facto*, to be a director.[4] The provision in the

[1] Hamilton T. Co. *v.* Clemes, 163 N. Y. 423 (1900); Camden, etc. Co. *v.* Burlington, etc. Co., 33 Atl. Rep. 479 (N. J. 1895); McDowall *v.* Sheehan, 129 N. Y. 200 (1891); Portal *v.* Emmons, L. R. 1 C. P. D. 664, 667 (1876). The New York statute that only one incorporator need be a resident repeals by implication the prior statute that two directors for the first year must be residents. People *v.* McDonough, 28 Misc. Rep. 652 (1899).

[2] See § 713, *infra*.

[3] A director who sells his stock ceases to be a *de jure* director. If he continues and is permitted to act he is a director *de facto*. Beardsley *v.* Johnson, 121 N. Y. 224 (1890).

[4] Where the statutes require the director to be a stockholder, it follows "that as soon as a director parts with all beneficial interest in, and control over, the stock which he is required to hold, and causes the officers of the corporation to have knowledge of such fact by a request that a proper transfer be made on the books of the company, he no longer possesses the qualifications which the statute declares to be essential," and hence he ceases *ipso facto* to be a director, and is no longer liable on a director's statutory liability. "The statute executing itself operated to divest him of title to the office." Chemical Nat. Bank *v.* Colwell, 132 N. Y. 250 (1892). Notes issued by directors who are disqualified by having sold their stock and as a scheme to create a liability on the part of the stockholders are not good, especially where the meeting of the directors was not properly called. Close *v.* Potter, 155 N. Y. 145 (1898). Where a director must be a stockholder, and there is a statutory liability attached to the directorship, the director may transfer his stock in order to cease to be a director and in order to avoid such liability. Sinclair *v.* Fuller, 158 N. Y. 607 (1899). *Cf.* Nathan *v.* Tompkins, 82 Ala. 437 (1887), holding that he may be removed, but does not cease to be a director by the mere act of selling his stock. To same effect, Atlas Nat. Bank *v.* F. B. Gardner Co., 8 Biss. 537 (1879); s. c., 2 Fed. Cas. 186. Although the statute requires three directors, who shall be stockholders, and one assigns his stock, and the other two authorize

New York statutes that "if a director should cease to be a stockholder his office shall become vacant" is self-executing.[1] Where the charter requires directors to be stockholders, and three of the seven are clerks, to each of whom one share of stock is transferred, and the certificate therefor is at once retransferred to the real parties in interest, this is good ground for a forfeiture of the charter.[2] The director does not become disqualified by reason of his pledging his stock.[3] The secretary, treasurer, or other officer of a corporation need not be a stockholder or resident or citizen unless the statute requires it.[4] "It is not uncommon for a single individual to hold several offices in a corporation."[5]

A corporation may pass a by-law prescribing the qualifications of its directors, and may prescribe that a person who is an attorney against it in a suit shall not be a director.[6]

§ 624. *Acceptance and resignation of office and failure to elect officers — Removal of directors.*— An acceptance of the office by

and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. Kuser *v.* Wright, 52 N. J. Eq. 825 (1895), rev'g Wright *v.* First Nat. Bank, 52 N. J. Eq. 392. Where a director sells and delivers all his stock, he ceases to be an officer *de jure*, the statute requiring him to be a stockholder; and where the whole board of directors have sold their stock, their acts as a board of directors are not binding on the corporation. Orr, etc. Co. *v.* Reno Water Co., 17 Nev. 166 (1882). "Can a director part with his qualification shares?" See on this subject, 8 Ry. & Corp. L. J. 99. A person may purchase stock although such stock constitute the qualification shares of the vendor as a director. Kern *v.* Day, 45 La. Ann. 71 (1893). A motion declaring the office vacant and electing another person before the director has really sold his stock is void. Craw *v.* Easterly, 54 N. Y. 679 (1873).

1 Sinclair *v.* Fuller, 158 N. Y. 607 (1899). A statute that, upon an officer in a bank borrowing money of the bank without security, his office shall become vacant and he shall cease to become a director, is self-executing. His continuance in office may bind the corporation by his acts, but does not prevent a creditor attacking an assignment for creditors made by him in behalf of the bank. Cupit *v.* Park City Bank, 20 Utah, 292 (1899).

2 Lorillard *v.* Clyde, 142 N. Y. 456 (1894).

3 Cummings *v.* Prescott, 2 Y. & C. Exch. 488 (1837). This was held in a case where the qualification shares were to be held by the directors in their own right. Pulbrook *v.* Richmond, etc. Mining Co., L. R. 9 Ch. D. 610 (1878). The court, in *Ex parte* Littledale, 24 L. J. (Bankr.) N. S. 9 (1855), assumed that a director became disqualified where he had pledged his stock, even though the transfer was not recorded.

4 Kerchner *v.* Gettys, 18 S. C. 521 (1882); McCall *v.* Byram Mfg. Co., 6 Conn. 428 (1827). But in Matthews *v.* Trustees, 2 Brewst. (Pa.) 541 (1869), the court enjoined the company from compelling its resident treasurer to turn over funds to a newly elected non-resident treasurer.

5 Manhattan Co. *v.* Kaldenberg, 165 N. Y. 1 (1900).

6 Cross *v.* West Virginia, etc. Ry., 37 W. Va. 342 (1892).

one who is elected director is necessary to constitute him a director. Some direct and positive act of acceptance is necessary.[1]

A director may resign, and no formal acceptance or entry thereof on the minute-book of the corporation is necessary to complete the resignation.[2] Even though an officer resigns for the purpose of

[1] Osborne, etc. Co. *v.* Croome, 14 Hun, 164 (1878); aff'd, 77 N. Y. 629; Cameron *v.* Seaman, 69 N. Y. 396 (1877); Rozecrans, etc. Co. *v.* Morey, 111 Cal. 114 (1896). An "honorary director," who sits with the board, makes up a quorum and accepts pay, is subject to the disabilities and liabilities of a director as to being interested in contracts with the company. There is no such thing in law as an "honorary director." *Ex parte* Stears, Johns. V.-C. 480 (1859). It is a question for the jury whether a person accepted a directorship. The mere fact that as an adviser he met with the directors and made motions is not conclusive if he declined to accept. Blake *v.* Bayley, 82 Mass. 531 (1860). Acceptance is presumed. Lockwood *v.* Mechanics,' etc. Bank, 9 R. I. 308 (1869). But may be disproved, even though the person attended directors' meetings. Blake *v.* Bayley, 82 Mass. 531 (1860). The fact that a director does not attend meetings or signify his acceptance of the office does not justify the board in declaring his office vacant. Acceptance is presumed. Halpin *v.* Mutual, etc. Co., 20 N. Y. App. Div. 583 (1897). Notice of a directors' meeting need not be given to a director who has never accepted the office. United Growers' Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897). Directorship is not proved by an annual report signed and sworn to by the president. Bank, etc. *v.* Faber, 38 N. Y. App. Div. 159 (1899). A director who acts as such cannot defend against his statutory liability on the ground that he was irregularly elected. Union, etc. Bank *v.* Scott, 53 N. Y. App. Div. 65 (1900).

[2] Movius *v.* Lee, 30 Fed. Rep. 298 (1887); Smith *v.* Danzig, 64 How. Pr. 320 (1883); Chandler *v.* Hoag, 2 Hun, 613 (1874); aff'd, 63 N. Y. 624; Blake *v.* Wheeler, 18 Hun, 496 (1879); aff'd, 80 N. Y. 128. A resignation to take effect on the termination of the term for which a director is elected is effectual, and he does not hold over though no successor is elected. Van Amburgh *v.* Baker, 81 N. Y. 46 (1880). A resignation releases a director if laid before the board of directors, and it is effective, though not accepted, where it has been duly presented. Maitland's Case, 4 De G., M. & G. 769 (1853). Even though an officer resigns for the purpose of preventing service upon the company, yet, if the resignation is accepted, service cannot be made upon him. Sturgis *v.* Crescent, etc. Co., 10 N. Y. Supp. 470 (1890). A director may resign after the company and officers have been enjoined from interfering with the corporate assets, and may then pursue his remedies as a corporate creditor. Mexican, etc. Co. *v.* Mexican, etc. Co., 47 Fed. Rep. 351 (1891). A resignation takes effect upon its delivery, even though not accepted. International Bank *v.* Faber, 86 Fed. Rep. 443 (1898). A resignation may be effective without acceptance. Noble *v.* Euler, 20 N. Y. App. Div. 548 (1897). Where a treasurer and general manager tenders his resignation to take effect upon acceptance, his salary ceases upon the date of acceptance. Savannah C. Mills *v.* Cunningham, 100 Ga. 468 (1897). Even though a director resigns for the sole purpose of avoiding a statutory liability and causes his son to be elected director in his place and continues to be the agent and manager of the business, nevertheless he is not liable under the statute. Brown *v.* Clow, 62 N. E. Rep. 1006 (Ind. 1902). *Cf.* 174 N. Y. 247; 80 N. Y. App. Div. 578.

preventing service being made upon him, yet such resignation is sufficient.[1]

A director may resign by an oral statement to that effect, and his resignation may be accepted in the same manner by the president.[2] But a mere statement of a director that he will have nothing more to do with the office is not a sufficient resignation.[3]

A resignation may be effectual even though it is not accepted; but it has been doubted whether all the directors can resign, thereby leaving the corporation helpless.[4]

A director whose resignation has been accepted cannot afterwards vote at a meeting as a director.[5] The fact of the resignation need not be published or made known to corporate creditors.[6]

In England it has been held that the resignation of a director must be presented to a meeting of the stockholders in order to be effective, unless the by-laws allow the directors to accept it. It is not sufficient to present the resignation to a meeting of the board of directors. Hence, although a resignation is sent in in the middle of the year, and is not accepted until the stockholders' meeting

[1] Continental, etc. Co. *v.* Lewis Voight, etc. Co., 106 Fed. Rep. 550 (1900). Where by the by-laws an officer shall continue to hold office until his successor is elected and qualified, an officer does not cease to be an officer by a mere resignation, and hence service of process may still be made upon him as such officer. Colorado, etc. Corp. *v.* Lombard, etc. Co., 71 Pac. Rep. 584 (Kan. 1903). But not where the by-laws are silent on this question. Yorkville Bank *v.* Henry, etc. Co., 80 N. Y. App. Div. 578 (1903).

[2] Briggs *v.* Spaulding, 141 U. S. 132, 150 (1891). A resignation may be oral, and the election of an officer constitutes an acceptance of such resignation. Johnson *v.* Griswold, 177 Mass. 34 (1900). A director of a corporation may resign at any time. His resignation may be oral or in writing. The fact that a statute says directors shall continue until their successors are appointed does not prevent a director resigning at any time. Fearing *v.* Glenn, 73 Fed. Rep. 116 (1896). Service upon the president is good although he testifies that he had resigned, there being proof to the contrary and that he afterwards acted as president. Mott Iron Works *v.* West Coast, etc. Co., 113 Cal. 341 (1896).

[3] A mere statement by one director to another that he would have no more to do with the office is not a resignation. Kindberg *v.* Mudgett, 24 N. Y. Week. Dig. 229 (1886). A statement by a director to the secretary and treasurer at the time of transferring all his stock that he severed all connection with the company is not a resignation, so far as corporate creditors' rights are concerned. Chemical Nat. Bank *v.* Colwell, 9 N. Y. Supp. 285 (1890); Chemical Nat. Bank *v.* Colwell, 9 N. Y. Supp. 288 (1890); reversed on other grounds, 132 N. Y. 250. Application to sue may be made to the president though he claims to have resigned. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889).

[4] Carnaghan *v.* Exporters', etc. Co., 11 N. Y. Supp. 172 (1890). A resignation is complete when it is tendered, and its validity does not depend upon acceptance by the directors or the election of a successor. Manhattan Co. *v.* Kaldenberg, 165 N. Y. 1 (1900). *Cf.* 174 N. Y. 247.

[5] Wickersham *v.* Crittenden, 93 Cal. 17 (1892).

[6] Bruce *v.* Platt, 80 N. Y. 379 (1880).

later in the year, the director continues to be such until such acceptance.[1] The by-laws generally give the board of directors the power to accept resignations and to fill vacancies in the board.[2] It is legal for the board of directors to resign and substitute in their places the purchasers of a majority of the stock, provided no actual fraud is involved.[3]

The insolvency of a director does not vacate his office.[4] A director does not lose his seat by absence.[5] But the by-laws may provide otherwise.[6]

A director, unless he has resigned, continues to be such until his successor is elected, even though he never attends meetings and is never consulted.[7]

A reduction in the number of trustees may be valid, although the statutory certificate is not filed, so far as corporate creditors are concerned.[8] The failure to have the number of directors required by statute does not invalidate their acts.[9]

The stockholders have no power to remove directors before the expiration of their term of office unless the charter or by-laws expressly give that power.[10] Nor can they remove the president.[11] The president is elected by the directors,[12] and after election the di-

[1] Municipal, etc. Land Co. *v.* Pollington, 63 L. T. Rep. 238 (1890). Where the by-laws give the directors power to fill vacancies in the board, they may fill vacancies due to the original directors refusing to serve. La Compagnie de Mayville *v.* Whitley, [1896] 1 Ch. 788.

[2] See § 603, *supra.*

[3] See § 622*a*, *supra.*

[4] Atlas Nat. Bank *v.* F. B. Gardner Co., 8 Biss. 537 (1879); s. c., 2 Fed. Cas. 186.

[5] Phelps *v.* Lyle, 10 Ad. & E. 113 (1839).

[6] Wilson *v.* Wilson, 6 Scott, 540 (1838), holding that an absconding director becomes "unable to act" within the meaning of the by-laws. Sturges *v.* Vanderbilt, 73 N. Y. 384 (1878); s. c. below, *sub nom.* Sturgis *v.* Drew, 11 Hun, 136.

[7] First Nat. Bank *v.* Lamon, 130 N. Y. 336 (1891).

[8] Wallace *v.* Walsh, 125 N. Y. 26 (1890).

[9] See § 713*a*, *infra.*

[10] See § 711, *infra.* A director cannot be excluded from his duties as such, nor can his election be declared invalid, merely because of what he may contemplate doing as a director. Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892). A charter provision giving the stockholders power to remove the "officers" refers to directors only. Deposit Bank, etc. *v.* Hearne, 104 Ky. 819 (1898).

[11] Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892). A contract between a company and a person that he shall be the managing director for ten years does not prevent the corporation from dismissing him. Bainbridge *v.* Smith, L. R. 41 Ch. D. 462 (1889). A voluntary unincorporated association, without articles, constitution, or rules, may remove its president or other officer at any time and without notice, except that the meeting held for that purpose must be duly held, and cannot expel a member without notice. Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying: "The holding of an office unprotected by rules is not an individual right, but is subject to change at the pleasure of the association."

[12] The stockholders have no power to elect the president. Their action is a nullity. Walsenburg Water Co. *v.* Moore, 5 Colo. App. 144 (1894).

rectors cannot remove him.[1] Nevertheless, the stockholders are not always helpless in such circumstances as these. The stockholders may, at a meeting called for that purpose, amend the by-laws so as to increase the number of directors, and may elect such additional directors where the number of directors is not fixed by the charter.[2] The stockholders may also, at a special meeting duly called, amend the by-laws so as to authorize the board of directors to remove the president and treasurer, and the board of directors may subsequently make such removal under the amended by-laws.[3]

A failure to elect officers at the stated time does not work a dissolution of the corporation. The old directors continue in office until their successors are duly elected.[4] But in England it is held that, where the by-laws provide that the directors shall be elected annually, and shall hold office for one year, they cannot hold over. They cease to be directors at the end of the year, and insurance

[1] Where three out of five directors met without notice to the other two, and deposed the president and authorized a mortgage, their acts are void. Hatch *v.* Johnson L. & T. Co., 79 Fed. Rep. 828 (1895). Where the statute prescribes that officers and agents shall hold their places during the pleasure of the board, the board may oust the secretary and treasurer at any time. Darrah *v.* Wheeling, etc. Co., 50 W. Va. 417 (1901).

[2] *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899).

[3] *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899). Where a directors' by-law, confirmed by the stockholders, fixes their term of office at one year, the stockholders cannot, by amending the by-law, turn the directors out during the year. Stephenson *v.* Vokes, 27 Ont. (Can.) 691 (1896). Where the by-laws authorize the board of directors to discharge an officer for a cause, they may discharge the vice-president upon his selling all his stock. Selley *v.* American, etc. Co., 93 N. W. Rep. 590 (Iowa, 1903).

[4] State *v.* Bonnell, 35 Ohio St. 10, 17 (1878), in which an election of directors being held invalid, those previously in office were restored to office as being entitled to hold until their successors were qualified. Huguenot Nat. Bank *v.* Studwell, 6 Daly, 13 (1875); reversed on other grounds, 74 N. Y. 621 (1878); and see § 631, *infra.* Holding over may also arise from acting as a director. Sanborn *v.* Lefferts, 58 N. Y. 179 (1874). Hold-over directors may hold meetings, fill vacancies in the board, and vote to sell property, the same as though regular elections had been held. Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890). Directors who hold over are liable on the statutory liability of directors. Jenet *v.* Nims, 7 Colo. App. 88 (1895). A hold-over president and manager for sixteen years may institute a suit in behalf of the corporation. Lucky Queen Min. Co. *v.* Abraham, 26 Oreg. 282 (1894). For purposes of making service a director and president of a railroad company is presumed to continue as such, even though elected annually and the year has expired. Buell *v.* Baltimore, etc. R. R., 39 N. Y. App. Div. 236 (1899). A hold-over director is liable on a statutory liability, and the fact that he was a director may be proved by the corporate books. St. George, etc. Co. *v.* Fritz, 48 N. Y. App. Div. 233 (1900), 54 Atl. Rep. 454; 71 Pac. Rep. 865.

assessments levied by them after the year are invalid.[1] Even though the failure to elect has extended over a period of several years, and there are by reason thereof no directors in office, the old directors having wholly abandoned their trust, the stockholders may at any time, in a lawful manner, proceed to the election of a new board of directors.[2] But if the majority fail or refuse to hold an election, and the corporate property is thereby endangered, a court of equity may appoint a receiver to take charge of it,[3] and will in a proper case authorize a winding up.[4]

A director is an "officer" of the corporation in the usual meaning of that term.[5] A director is entitled at all times to examine the books and papers of the company.[6]

Questions relative to the meetings of directors are considered elsewhere.[7] Where the treasurer of a corporation uses its money for his own purposes he may be sued therefor, even though he continues to be treasurer.[8]

§ 625. *Stockholders can act only at corporate meetings.*— Stockholders can hold elections and transact the other business which they as a body are qualified to transact only at a corporate meeting duly called and convened. Consequently, all votes taken elsewhere than at such a meeting, and all separate consents, either oral or in writing, whereby the stockholders assume to bind the company, are invalid and void.[9]

[1] Tyne, etc. Assoc. *v.* Brown, 74 L. T. Rep. 283 (1896).

[2] People *v.* Twaddell, 18 Hun, 427 (1879). In Reilly *v.* Oglebay, 25 W. Va. 36, 43 (1884), it is held that where there is no board of directors the stockholders themselves may, pending a regular election, lawfully assume and perform the duties which ordinarily belong to a board of directors. But see § 709, *infra.*

[3] Lawrence *v.* Greenwich F. Ins. Co., 1 Paige, 587 (1829). See also § 617, *supra.* Under the statutes of California where a bank becomes insolvent the court may appoint directors to fill vacancies. Braslan *v.* Superior Court, etc., 124 Cal. 123 (1899).

[4] Brown *v.* Union Ins. Co., 3 La. Ann. 177, 182 (1848), in which the neglect for nearly ten years to appoint officers being to the injury of the creditors, the court appointed a manager to wind up the affairs of the company.

[5] See § 10, *supra.*

[6] See § 511, *supra.*

[7] See § 713*a*, *infra.*

[8] Marlborough Assoc. *v.* Peters, 179 Mass. 61 (1901). See also § 648, *supra.*

[9] Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850); Finley Shoe, etc. Co. *v.* Kurtz, 34 Mich. 89 (1876); Peirce *v.* New Orleans Building Co., 9 La. 397, 404 (1836); Livingston *v.* Lynch, 4 Johns. Ch. 573, 597 (1820); Torrey *v.* Baker, 83 Mass. 120 (1861); *Ex parte* Johnson, 31 Eng. L. & Eq. 430 (1854); Shortz *v.* Unangst, 3 Watts & S. (Pa.) 45 (1841). *Cf.* Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886); Granger *v.* Grubb, 7 Phila. 350 (1870). For the rule relative to directors' meetings, see § 713*a*, *infra.* An assignment of all the company's property would not be within the power of the stockholders, even though all signed it, without formal action at a meeting held for that purpose. De La Verge, etc. Co. *v.* German, etc. Inst., 175 U. S. 40 (1899). A lease authorized upon

§§ 626, 627. *Stockholders cannot carry on the business of or enter into contracts for the corporation.*—This subject is fully considered elsewhere.[1]

a two-thirds vote of the stockholders cannot be effected by two-thirds consenting thereto in writing without a meeting. Reiff *v.* Western, etc. Tel. Co., 49 N. Y. Super. Ct. 441 (1883). The separate assent of stockholders to an act is not valid. Their acts must be in meeting assembled. Duke *v.* Markham, 105 N. C. 131 (1890). The agreement of a majority of the stockholders separately, that the corporation should pay for certain work and that they would vote for a resolution to that effect at the next meeting, does not bind the corporation. Nicholstone City Co. *v.* Smalley, 21 Tex. Civ. App. 210 (1899). An actual meeting of the stockholders is not necessary if all consent, even though the statute require a meeting. A subsequent creditor cannot complain. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). In *Re* George Newman & Co., [1895] 1 Ch. 674, 686, the court said: "Individual assents given separately may preclude those who give them from complaining of what they have sanctioned; but, for the purpose of binding a company in its corporate capacity, individual assents given separately are not equivalent to the assent of a meeting." See also § 709, *infra.*

[1] See § 709, etc., *infra.*

CHAPTER XXXVIII.

DISSOLUTION, FORFEITURE, AND IRREGULAR INCORPORATION.

§ 628. *Methods of dissolution.*— The dissolution of a corporation may be brought about by reason of (1) the forfeiture of its franchises by the adjudication of a court;[1] (2) the loss of its charter by a charter provision to that effect, in case the corporation fails to do certain things within a certain time;[2] (3) the repeal of its charter under the reserved power of the state;[3] (4) the voluntary surrender of the franchises by the stockholders; or (5) the expiration of the time limited for its existence in the charter.[4] Upon dissolution by any one of these methods the stockholders have certain rights in the corporate assets. Where a special charter is granted, and

[1] See §§ 632–637, *infra.*

[2] See § 638, *infra.*

[3] This subject is considered in § 639, *infra.*

[4] "The dissolution of corporations is or may be effected by expirations of their charters, by failure of any essential part of the corporate organizations that cannot be restored, by dissolution and surrender of their franchises with the consent of the state, by legislative enactment within constitutional authority, by forfeiture of their franchises and judgment of dissolution declared in regular judicial proceedings, or by other lawful means." Swan, etc. Co. *v.* Frank, 148 U. S. 603, 611 (1893). In Michigan all charters except those of railroad, canals, and turnpikes are limited by the constitution to thirty years. "The evident intent of this section was to prevent the perpetuation of corporate power and corporate wealth so as to place it practically beyond the reach of the people or the legislature." It does not apply to a county-fair corporation. Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890).

nothing is prescribed as to the duration of the corporation, the charter is perpetual.[1]

§ 629. *Dissolution by the stockholders — A court of equity has no power to dissolve a corporation — Receiver, and distribution of assets by court of equity — Statutory dissolution.*— It is an unquestioned rule that all the stockholders, by unanimous consent, may effect a dissolution of the corporation by the surrender of the corporate franchises.[2]

Greater difficulty is found in determining whether a majority of the stockholders may dissolve a corporation. It has been held that the majority in interest of the stockholders of a corporation may dissolve it by a voluntary surrender of its franchises, even though a minority of the stockholders are opposed to the dissolution.[3]

Such, undoubtedly, is the case where the corporation is insolvent or is doing a failing business, and is manifestly unable to accomplish the purposes of its organization.[4] But where such is not the case, and where the term during which the corporation was to exist has not expired;[5] or where the dissolution is desired in order to ob-

[1] State *v.* Ladies of Sacred Heart, 99 Mo. 533 (1889). A corporation without limit of time in its charter as to duration is perpetual. Snell *v.* Chicago, 133 Ill. 413 (1890). See also § 913, *infra.* A grant by a city, under authority of a statute, to a water-works company to lay pipes in the streets is perpetual, where no limit of time is expressly stated, and is irrevocable when acted upon. National Water-works Co. *v.* Kansas City, 65 Fed. Rep. 691 (1895).

[2] Mobile, etc. R. R. *v.* State, 29 Ala. 573, 586 (1857); Savage *v.* Walshe, 26 Ala. 619 (1855); Attorney-General *v.* Clergy Society, 10 Rich. Eq. (S. C.) 604 (1859); Chesapeake, etc. Canal Co. *v.* Baltimore, etc. R. R., 4 Gill & J. (Md.) 1, 121 (1832); McIntyre Poor School *v.* Zanesville Canal, etc. Co., 9 Ohio, 203 (1839); La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870); Slee *v.* Bloom, 19 Johns. 456 (1822); Webster *v.* Turner, 12 Hun, 264 (1877); Houston *v.* Jefferson College, 63 Pa. St. 428 (1869); Denike *v.* New York, etc. Co., 80 N. Y. 599, 606 (1880). Although a stockholder has sued in the federal court to wind up a Connecticut corporation, nevertheless it seems that such corporation may dissolve voluntarily. Kessler *v.* Continental, etc. Co., 42 Fed. Rep. 258 (1890).

[3] Treadwell *v.* Salisbury Mfg. Co., 73 Mass. 393 (1856); Hancock *v.* Holbrook, 9 Fed. Rep. 353 (1881) (reversed on another point, 112 U. S. 229); Wilson *v.* Central Bridge, 9 R. I. 590 (1870). Compare, however, dictum in Denike *v.* New York, etc. Co., 80 N. Y. 599, 606 (1880), citing cases, and in Mobile, etc. Co. *v.* State, 29 Ala. 573, 586 (1857), citing New Orleans, etc. Co. *v.* Harris, 27 Miss. 517 (1854); Ward *v.* Society, etc., 28 Eng. Ch. (1 Collier), 370 (1844); Angell & Ames, Corp., § 772. See also Berry *v.* Broach, 65 Miss. 450 (1888), where the business was a losing one.

[4] The majority have a right to have the business wound up and sold when such business cannot be advantageously carried on. Price *v.* Holcomb, 89 Iowa, 123 (1893). See also § 670, *infra.*

[5] Kean *v.* Johnson, 9 N. J. Eq. 401 (1853); Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Mowrey *v.* Indianapolis, etc. R. R., 4 Biss. 78 (1866); s. c., 17 Fed. Cas. 930; Lauman *v.* Lebanon, etc. R. R., 30 Pa. St. 42 (1858). See also Von Schmidt *v.* Huntington, 1 Cal. 55 (1850). Dissolution of a solvent

tain a new charter for a different object;[1] or where the dissolution is merely a device to effect a consolidation which otherwise would be *ultra vires*,[2]— it has been held that the majority cannot dissolve the corporation in opposition to the wishes of the minority.[3] Stockholders owning only a minority of the stock cannot, at common law, compel a dissolution before the expiration of the time limited in the charter for the existence of the corporation.[4] The directors of a corporation cannot dissolve it.[5]

corporation before its charter time has elapsed cannot be had except by unanimous consent of the stockholders. Barton *v.* Enterprise, etc. Assoc., 114 Ind. 226 (1887). In Louisiana a majority of the stockholders have the power to wind up the affairs of the corporation even though it is solvent. Pringle *v.* Eltringham, etc. Co., 49 La. Ann. 301 (1897). In Tennessee it is held that where a hotel company cannot raise sufficient capital to build, and it has become impracticable and undesirable to proceed, and the enterprise is clearly a failure, a minority stockholder may force a winding up and distribution. O'Connor *v.* Knoxville Hotel Co., 93 Tenn. 708 (1894). It seems that a company cannot dissolve itself by a vote of a majority of the stockholders without judicial action before the expiration of the charter. Economy, etc. Assoc. *v.* Paris, etc. Co., 68 S. W. Rep. 21 (Ky. 1902).

[1] Ward *v.* Society of Attornies, 1 Coll. 370 (1844).

[2] Black *v.* Delaware, etc. Canal Co., 22 N. J. Eq. 403 (1871). A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. Treadwell *v.* United, etc. Co., 47 N. Y. App. Div. 613 (1900). The voluntary dissolution, under the New York statute, of a prosperous corporation will be enjoined at the instance of minority stockholders where it is alleged that it is a mere scheme to freeze out the latter and to buy in the property for a partnership. Elbogen *v.* Gerbereux, etc. Co., 30 N. Y. Misc. Rep. 264 (1900). In the case of Arents *v.* Blackwell's, etc. Co., 101 Fed. Rep. 338 (1900), where the holders of 159,769 shares out of 160,000 shares of the stock of a tobacco company wished to accept the offer of another company to buy it out for $2,800,000, and a person had purchased one share for the purpose of stopping the sale and having the charter repealed, the court appointed a receiver to sell the property as preliminary to a dissolution and distribution of the assets. See also § 670, *infra;* 54 Atl. Rep. 543.

[5] Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 53 (1861); Curien *v.* Santini, 16 La. Ann. 27 (1861). See also dictum in Mobile, etc. R. R. *v.* State, 29 Ala. 573 (1857).

[4] Denike *v.* New York, etc. Co., 80 N. Y. 599 (1880) (citing cases); Folger *v.* Columbian Ins. Co., 99 Mass. 267 (1868); Pratt *v.* Jewett, 75 Mass. 34 (1857).

[5] Lake Ontario, etc. Bank *v.* Onondaga Bank, 7 Hun, 549 (1876); Jones *v.* Bank of Leadville, 10 Colo. 464 (1888); Ward *v.* Sea Ins. Co., 7 Paige, 294 (1838); Abbot *v.* American Hard Rubber Co., 33 Barb. 578 (1861). *Cf.* Bank of Switzerland *v.* Bank of Turkey, 5 L. T. (N. S.) 549 (1862), where the directors repaid sums advanced to an abortive company.

A court of equity has, in the absence of statutory power, no jurisdiction over corporations for the purpose of decreeing their dissolution and the distribution of their assets among the individual corporators at the suit of one or more of the stockholders.[1]

where dissolution was denied, although the business was a losing one and the single person holding a majority of the stock was mismanaging the business; Croft *v.* Lumpkin, etc. Min. Co., 61 Ga. 465 (1878), where the corporation was solvent, but made no effort to transact business or proceed; Waterbury *v.* Merchants' Union Exp. Co., 50 Barb. 177 (1867), holding that misconduct of the corporate officers is no cause for dissolution at the suit of the minority. To same effect, Belmont *v.* Erie Ry., 52 Barb. 637 (1869). A stockholder has no right to bring an action for the dissolution of the corporation. Byrne *v.* New York Brick, etc. Co., 16 Week. Dig. 139 (1882). A stockholder cannot cause a receiver to be appointed merely on the ground that the liabilities exceed the assets and the company has ceased to do business. Murray *v.* Superior Court, 129 Cal. 628 (1900). A minority stockholder of an alien corporation cannot file a bill in equity to have the company wound up and its assets distributed, even though he complains of the management, and even though the main purpose of the corporation is to acquire land in the state, it being shown that the corporation is solvent. Sidway *v.* Missouri, etc. Co., 101 Fed. Rep. 481 (1900). Where the stockholders of a bank have legally ordered the winding up of its business, and for three years thereafter the officers still continue to do business at a great loss, apparently without any effort to wind up its affairs, a stockholder may file a bill for an accounting and the appointment of a receiver, and no request to the corporation to bring the suit need be made. Mathews *v.* Bank of Allendale, 38 S. E. Rep. 437 (S. C. 1901). Even though a corporation has lost most of its assets and has abandoned its business, yet a minority stockholder cannot have a receiver appointed, except for mismanagement, especially where the object of the receivership is to bring suits against the directors, which the stockholder himself may bring. Clark *v.* National, etc. Co., 105 Fed. Rep. 787 (1900).

[1] U. S. Trust Co. *v.* N. Y. etc. R. R., 101 N. Y. 478 (1896); Taylor *v.* Decatur, etc. Co., 112 Fed. Rep. 449 (1901); Oldham *v.* Mt. Sterling Imp. Co., 45 S. W. Rep. 779 (Ky. 1898); Verplanck *v.* Mercantile, etc. Co., 1 Edw. Ch. 84 (1831); Hardon *v.* Newton, 14 Blatchf. 376 (1878); s. c., 11 Fed. Cas. 500; Fountain Ferry, etc. Co. *v.* Jewell, 8 B. Mon. (Ky.) 140 (1848); Ferris *v.* Strong, 3 Edw. Ch. 127 (1837). See also Strong *v.* McCagg, 55 Wis. 624 (1882); Latimer *v.* Eddy, 46 Barb. 61 (1864). But see dictum in Benedict *v.* Columbus, etc. Co., 49 N. J. Eq. 23, 36 (1891); Barton *v.* International, etc. Alliance, 85 Md. 14 (1897); Wallace *v.* Pierce-Wallace, etc. Co., 101 Iowa, 313 (1897); People *v.* Weigley, 155 Ill. 491 (1895); State, etc. Ins. Co. *v.* San Francisco Super. Ct., 101 Cal. 135 (1894). Mismanagement is not a good cause for the appointment of a receiver with a view to winding up the business and distributing the assets. A court of equity has no such power. Ulmer *v.* Maine, etc. Co., 93 Me. 324 (1899). A court of equity has no power to wind up a solvent corporation and distribute its assets simply on the ground of dissensions among the stockholders. Sternberg *v.* Wolff, 56 N. J. Eq. 555 (1898). See s. c., 56 N. J. Eq. 389 (1897). A court of equity has no jurisdiction to appoint a receiver of and dissolve a solvent beneficial assessment association on the ground of mismanagement, fraud, and the abuse of corporate powers. Mason *v.* Equitable League, 77 Md. 483 (1893). A stockholder cannot

But where the directors of a corporation have misappropriated the funds of the company, created fraudulent debts, levied assessments upon the stock, caused the stock to be forfeited for non-payment, and judgment to be entered on said debts and the property to be sold out, a stockholder may file a bill to set aside all the transactions and to compel the directors to account and to wind up the company.[1] A court of equity has no power to sequestrate the prop-

file a bill for the dissolution of an insolvent corporation. Heap *v.* Heap Mfg. Co., 97 Mich. 147 (1893). But the court will appoint a receiver to preserve the corporate assets where the majority do not elect officers. Lawrence *v.* Greenwich Fire Ins. Co., 1 Paige, 587 (1829). In Tennessee, where a corporation has abandoned business for many years, and has no known board of directors, a stockholder may file a bill to wind up its affairs, but he should not join the corporation as a complainant with himself. In such a case no request to the directors is necessary. Tennessee, etc. Co. *v.* Ayers, 43 S. W. Rep. 744 (Tenn. 1897).

Where, upon voluntary dissolution, the stockholders appoint two of their number to administer the assets, the court will not displace them and appoint a receiver. Follett *v.* Field, 30 La. Ann. 161 (1878). A single stockholder in an insolvent corporation cannot have it dissolved in a court of equity. Merryman *v.* Carroll, etc. Co., 4 Ry. & Corp. L. J. 12 (1888). A corporation cannot be dissolved except by judicial sentence or sovereign power. A court of equity has no inherent power to decree dissolution. A member cannot sue for his part of the assets until a dissolution is had. Magee *v.* Geneseo Academy, 17 N. Y. St. Rep. 221 (1888). A stockholder cannot have the corporation wound up in equity. Hinckley *v.* Pfister, 83 Wis. 64 (1892). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental were declared illegal and void. Where the same company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892). The appellate court, in Florida Const. Co. *v.* Young, 59 Fed. Rep. 721 (1892), refused to reverse an order in an action brought by stockholders in a construction company for an accounting between the company and a railroad company, and a distribution of the assets of the former. The order appointed a receiver of the former and granted an injunction. "The power to declare a forfeiture of corporate franchises was originally in England vested in the courts of law, and was exercised in a proceeding brought by the attorney-general in the name of the sovereign. The court of chancery never assumed jurisdiction in such cases until it was conferred by act of parliament. It declined, until the power was conferred by statute, to sequestrate corporate property through the medium of a receiver or to dissolve corporate bodies, or to restrain the usurpation of corporate powers." Decker *v.* Gardner, 124 N. Y. 334 (1890). In the absence of statutory authority, a court of equity has no jurisdiction to dissolve a corporation. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892).

[1] Jellenik *v.* Huron, etc. Co., 177 U. S.

erty of a corporation by means of a receiver.[1] Sequestration is the taking of property from the owner for a time till the rents, issues, and profits satisfy a demand. The judgment in such case does not dissolve the corporation.[2] Sometimes the corporation, after paying its debts, distributes its assets among its stockholders without any dissolution.[3]

In many of the states and in England there are statutes regulating the dissolution of a corporation. These statutes generally specify what parties may bring suit for dissolution, on what grounds dissolution will be decreed, and what proceedings must be taken to obtain the decree. Such a statutory dissolution is hardly a voluntary dissolution, and yet it approaches that kind of dissolution more nearly than any other.[4] A bill filed by a stockholder

1 (1899). Where a corporation organized to build a town and sell lots finds that its plans are impossible, and it owes no debts and has been practically abandoned by its stockholders, and the officers each year sell a little of the land to pay taxes, some of the stockholders, even though they are a minority, may file a bill to have the court wind up the affairs of the company and distribute the proceeds, it being shown that there are a great number of stockholders scattered throughout the country, and that it is impossible to get a majority of them together. Noble *v.* Gadsden, etc. Co., 31 S. Rep. 856 (Ala. 1902).

[1] *Re* Binghamton Gen. Elec. Co., 143 N. Y. 261 (1894). A receiver will not be appointed for a benevolent society in a suit by a member charging that illegal expulsions have been made and illegal elections held, even though the illegal officers are running the business; nor will a receiver be appointed, although the purpose of the company is impracticable, the member bringing the suit having been a party thereto. Equity will not interfere, although the company is wholly illegal and unauthorized. The remedy is at law. Crombie *v.* Order of Solon, 157 Pa. St. 588 (1893).

[2] Proctor *v.* Sidney, etc. Co., 8 N. Y. App. Div. 42 (1896). A collusive suit by officers for dissolution and the appointment of a receiver does not prevent a creditor filing an independent bill. Taber *v.* Royal, etc. Co., 124 Ala. 681 (1899). Under a prayer for general relief in a judgment creditor's suit the court may wind up the affairs of the corporation. Barber *v.* International Co., 73 Conn. 587 (1901).

[3] See §§ 670–672, *infra*, and § 548, *supra*.

[4] Thus, in New York, elaborate provision is made. The majority of the directors may apply for dissolution. See Code Civ. Pro., §§ 2419, etc. As also may a creditor or stockholder. Code Civ. Pro., §§ 1784, etc. Under the New York statute the court will order the dissolution of a corporation where a majority of the directors and stockholders wish it, where the interests are discordant, and a dissolution will be beneficial. *Re* Importers', etc. Exchange, 132 N. Y. 212 (1892). Where a reduction of the number of directors is attempted, but not made in compliance with the statute, an attempt at voluntary dissolution by a majority of the directors as reduced is not legal, they not being a majority of the original number of directors. Matter of Dolgeville, etc. Co., 160 N. Y. 500 (1899). Under the old statute, part of the stockholders might compel a dissolution where there had been a failure to elect officers. Ward *v.* Sea Ins. Co., 7

under the terms of a statute to bring about a dissolution and winding up of the corporation will be dismissed where it is shown that the suit is brought in the interest of rival corporations. The rea-

Paige, 294 (1838). Where a majority of the directors and stockholders apply for dissolution the court will presume that it should be granted. *Re* Niagara Ins. Co., 1 Paige, 258 (1828). In general, see also *Re* Pyrolusite, etc. Co., 29 Hun, 429 (1883); *Re* Boynton, etc. Co., 34 Hun, 369 (1884). Corporate creditors cannot, before judgment, apply for a dissolution of the corporation. Cole *v.* Knickerbocker, etc. Ins. Co., 23 Hun, 255 (1880); aff'd, 91 N. Y. 641. In a stockholders' suit to dissolve and wind up a corporation the books of the company are not admissible as against them, being mere declarations in its favor. Matter of Dittman, 65 N. Y. App. Div. 343 (1901). It is legal for a person to contract with the directors of an insurance company to purchase at least sixty-five per cent. of the stock of the company, the same offer being made to all the stockholders, even though it is proposed to thereupon wind up the company. Garrett Co. *v.* Morton, 65 N. Y. App. Div. 366 (1901). In this case the lower court has held (35 N. Y. Misc. Rep. 10 — 1901) that under the New York statute it is illegal for an insurance company to transfer its business and liquidate its affairs without dissolution proceedings, in accordance with the statute, and hence the purchaser of the business cannot maintain a suit for false representations as to the condition of the company. Under a statute authorizing the court to dissolve any corporation on good cause shown, a minority stockholder may file a bill to have the corporation dissolved for purchasing unnecessary real estate. Bixler *v.* Summerfield, 62 N. E. Rep. 849 (Ill. 1902). Where the minority stockholders file a bill for the dissolution of a corporation the court may refuse to proceed unless the stockholders at large are brought in. McKleroy *v.* Gadsen, etc. Co., 126 Ala. 184 (1900). Where the statute provides that two-thirds of the stockholders may cause the corporation to be wound up, their right to do so is absolute and cannot be controlled by the court. Watkins *v.* Lawrence Nat. Bank, 51 Kan. 254 (1893). The voluntary dissolution of a company under the statute, but without ten days' notice required by the statute, is not such a dissolution as to prevent creditors from attaching the property of the company as though no dissolution had been had. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 82 (1893). But the dissolution cannot be enjoined by creditors in the absence of fraud. Cleveland, etc. Co. *v.* Taylor, etc. Co., 54 Fed. Rep. 85 (1893). Under statutes in some of the states, an information in the nature of *quo warranto* may be filed at the relation of a shareholder against an illegally-existing corporation to compel a dissolution. Albert *v.* State, 65 Ind. 413 (1879). Under the National Banking Act, see Kennedy *v.* Gibson, 8 Wall. 498 (1869); Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 383 (1871); Bank *v.* Kennedy, 17 Wall. 19 (1872); *Re* Platt, 1 Ben. 534 (1867); s. c., 19 Fed. Cas. 815. A resolution of two-thirds of the stockholders in a national bank to go into liquidation does not dissolve the corporation. Merchants' Nat. Bank *v.* Gaslin, 41 Minn. 552 (1889). Where a statute provides that on a certain vote a corporation may be dissolved and a liquidator appointed by the stockholders and such action is taken, the liquidator may file a bill in a court of equity to take charge of such liquidation and enjoin creditors' suits and supervise the acts of the liquidators. *In re* Grant, etc. Co., 51 La. Ann. 1254 (1899). Under the statutes of Louisiana a state may file a bill in equity to enjoin a corporation from

son for dismissal is that the suit is a fraud upon the court.[1] A stockholder may vote for the dissolution of the corporation as allowed by the statute, even though his object is to terminate a contract which he has with the corporation.[2]

acting as a corporation, its organization being defective, and may also ask that the charter be forfeited for violation of law, even though it had been legally organized. The incorporators and officers need not be made parties defendant. New Orleans, etc. Co. *v.* Louisiana, 180 U. S. 320 (1901). Proceedings for the dissolution of a corporation are not an act of bankruptcy. *In re* Empire, etc. Co., 95 Fed. Rep. 957 (1899). Where the bill does not specify any act which is illegal, fraudulent, or *ultra vires*, nor show any effort on the part of the minority stockholder to change the management, the court will not appoint a receiver and will not decree dissolution of the corporation. Worth, etc. Co. *v.* Bingham, 116 Fed. Rep. 785 (1902). In West Virginia one-third in interest of the stockholders may apply to the court for a dissolution. See Hurst *v.* Coe, 30 W. Va. 158 (1887).

Under the English act it has been held that the majority cannot insist upon dissolution, though the business is a losing one. *Re* Suburban Hotel Co., L. R. 2 Ch. 737 (1867). But the court may grant it under such circumstances even to a few stockholders. *Re* Factage Parisien, 34 L. J. (Ch.) 140 (1865). In determining whether to order a winding up the court will not consider possible future profits. *Re* European, etc. Soc., L. R. 9 Eq. 122 (1869). For an application to have a winding up because business had not been commenced within a year, see *Re* Tumacacori, L. R. 17 Eq. 534 (1874). If the corporation has sold its property and ceased business the court will order a distribution of the assets. Cramer *v.* Bird, L. R. 6 Eq. 143 (1868). The mere fact that the company is losing money is not sufficient to have a winding up. *Re* Joint-stock Coal Co., L. R. 8 Eq. 146 (1869). The court has a judicial discretion, and will not ordinarily order a winding up at the instance of one stockholder in opposition to all the others. *Re* London Suburban Bank, L. R. 6 Ch. 641 (1871). But if the company is insolvent or is doing a ruinous business, with no prospect of a change, the court will order a winding up on the petition of a minority. *Re* Great Northern, etc. Min. Co., 17 W. R. 462 (1869). Where the main purpose of a corporation is the furnishing of lodgings and refreshments at the queen's jubilee, a stockholder has the right to have the company dissolved after the jubilee, even though, under general clauses, the objects of the company are to furnish lodgings and refreshments generally, and even though the directors intend to continue the

[1] Watson *v.* Le Grand, etc. Co., 177 Ill. 203 (1898).

[2] Windmuller *v.* Standard, etc. Co., 115 Fed. Rep. 748 (1902). In the case of Robotham *v.* Prudential Ins. Co., 53 Atl. Rep. 842 (N. J. 1903), the court approved the decision in Windmuller *v.* Standard, etc. Co., but said that if the complaint had been framed on a different theory, and "if the complainants had attacked the action of the directors in instituting the proceedings for dissolution as the product of bribery or improper influence of any kind, or of favoritism to the majority stockholder, who had appointed the directors, a very different case would have been presented. If the complainants had also charged that the directors, their trustees, had not only committed a gross and flagrant breach of duty, but that the majority stockholder had instigated them to do it, a strong case, apparently, would have been made out, in which to hold the majority stockholder liable for damages."

An American court has no power to dissolve an English corporation and wind up its business. A resolution to that effect by the stockholders may be declared invalid. But the American courts will not enjoin a dissolution and winding up of the company in England in accordance with English laws.[1] The courts of one state cannot dissolve a corporation created by another state,[2] but may appoint a receiver of the corporate assets within the jurisdiction.[3]

Where a dissolution is being obtained or has been obtained by fraud and an inequitable overbearing of the rights of an innocent stockholder,[4] a court of equity will, at the instance of the latter, enjoin or set aside the dissolution.[5]

business. *Re* Amalgamated Syndicates, Ltd., [1897] 2 Ch. 600. Where a company is organized to work gold mines in a specified place as well as elsewhere, and the company actually works mines elsewhere, but not in the specified place, the main purpose of the company is not carried out and a dissolution may be had. *Re* Coolgardie, etc. Mines, Ltd., 76 L. T. Rep. 269 (1897). Where a corporation has been enjoined from using its name, this is cause for a dissolution. *Re* Thomas, etc. Sons, Ltd., [1897] 1 Ch. 406. A court has no jurisdiction to wind up a corporation where a company was never incorporated, one of the requisite incorporators not having signed the articles of incorporation. *Re* National, etc. Corp., [1891] 2 Ch. 505. See also, in general, under this winding-up act, *Re* Factage Parisien, 34 L. J. (Ch.) 140 (1865); *Re* Exmouth Docks Co, L. R. 17 Eq. 181 (1873); *Re* Sanderson's Patents Assoc., L. R. 12 Eq. 188 (1871); *Re* Bradford Navigation Co., L. R. 10 Eq. 331 (1870); Princess of Reuss *v.* Bos, L. R. 5 H. L. 176 (1871); *Re* Commercial Bank, L. R. 6 Eq. 517 (1868); *Re* London India Rubber Co., L. R. 1 Ch. 329 (1866); *Re* Pen-y-Van Colliery Co., L. R. 6 Ch. D. 477 (1877); *Re* United Service Co., L. R. 7 Eq. 76 (1868); *Re* German Date Coffee Co., L. R. 20 Ch. D. 169 (1882), holding that where a company was organized and chartered to engage in manufacture and sale of goods under a certain patent, when in fact there was no patent such as was referred to, and an application for such a patent was refused, *held*, that the substratum upon which the company was based or main object for which it was formed not being in existence, the company must be dissolved on petition of a shareholder, notwithstanding it was profitably engaged in the manufacture and sale of the commodity without any patent, and notwithstanding a very large majority of the company desired to have the company continue in business. To same effect, under somewhat similar circumstances, *Re* Haven Gold Min. Co., L. R. 20 Ch. D. 151 (1882). A lender of money to a benefit building society cannot petition to wind it up. *Ex parte* Williamson, L. R. 5 Ch. 309 (1869). Mortgage bondholders cannot institute winding-up proceedings under the English act. *Re* Uruguay, etc. Ry., L. R. 11 Ch. D. 372 (1879). For many cases relative to the question of when a court will order a winding up and when not, under the English statute, see Healey, Companies Law and Practice, pp. 446, etc.

[1] Republican, etc. Mines *v.* Brown, 58 Fed. Rep. 644 (1893).

[2] Baker *v.* Backus, 32 Ill. 79, 110 (1863).

[3] See § 865, *infra*.

[4] People *v.* Hektograph Co., 10 Abb. N. Cas. 358 (1882).

[5] *Re* Beaujolais Wine Co., L. R. 3 Ch. 15 (1867); *Re* London, etc. Discount Co., L. R. 1 Eq. 277 (1865). In Stupart *v.*

§ 630. There has been some doubt whether a voluntary dissolution by all or a majority of the stockholders is completed by a mere vote of the stockholders, or whether a decree of a court is needed and is sufficient; or whether a legislative acceptance and confirmation of the dissolution is essential. The better opinion is that the resolution of the stockholders to dissolve will effect a dissolution only after the legislature has accepted it and ordained it, or a court duly authorized by statute to accept a voluntary dissolution has entered a decree to that effect.[1] Where a charter expires no adjudication of dissolution is necessary.[2]

Arrowsmith, 3 Sm. & G. 176 (1855), a bill filed by a shareholder on behalf of himself and others to set aside a dissolution, after three years' acquiescence, no fraud or imposition being alleged, was dismissed with costs. *Cf.* Kent *v.* Jackson, 2 De G., M. & G. 49 (1852); Bailey's Appeal, 96 Pa. St. 253 (1880), where certain stockholders procured the dissolution of a corporation by fraud. They were held to be trustees *ex maleficio* for the *bona fide* stockholders, and as such liable to account to them for the assets of the company.

[1] Portland Dry Dock, etc. Co. *v.* Trustees of Portland, 12 B. Mon. (Ky.) 77 (1851); La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870); Harris *v.* Muskingum Mfg. Co., 4 Blackf. (Ind.) 267 (1836); Town *v.* Bank of River Raisin, 2 Doug. (Mich.) 530 (1847); Curien *v.* Santini, 16 La. Ann. 27 (1861); Norris *v.* Smithville, 1 Swan (Tenn.), 164 (1851); Bradt *v.* Benedict, 17 N. Y. 93, 99 (1858); Boston Glass Mfy. *v.* Langdon, 41 Mass. 49 (1841); Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Penobscot Boom Corp. *v.* Lamson, 16 Me. 224 (1839); Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28, 45 (1828); Mumma *v.* Potomac, etc., 8 Pet. 281, 287. An acceptance by the state of a surrender of a charter is necessary in order to complete a dissolution by voluntary surrender. Mylrea *v.* Superior, etc. Ry., 67 N. W. Rep. 1138 (Wis. 1896). A mere resolution of the stockholders is ineffectual. New York, etc. Works *v.* Smith, 4 Duer, 362 (1855); Powell *v.* Oregonian Ry., 38 Fed. Rep. 187 (1889). A notice of the resolution sent to the governor is ineffectual. Mechanics' Bank *v.* Heard, 37 Ga. 401 (1867); Revere *v.* Boston, etc. Co., 32 Mass. 351 (1834). By a statute the acceptance may be made by a proclamation. Campbell *v.* Mississippi Union Bank, 7 Miss. 625, 681 (1842). The judgment of a court of law in such a case is ineffectual. Chesapeake, etc. Co. *v.* Baltimore, etc. R. R., 4 Gill & J. (Md.) 1, 107 (1832). In England the surrender at common law was to the king, and had to be accepted by him in order to work a dissolution. Rex *v.* Amery, 2 T. R. 515, 531 (1788); Rex *v.* Gray, 8 Mod. 358 (1825). *Cf.* Bruce *v.* Platt, 80 N. Y. 379 (1880). A voluntary dissolution need not be accepted by the state. Merchants', etc. Line *v.* Waganer, 71 Ala. 581 (1882). The case of Webster *v.* Turner, 12 Hun, 264 (1877), can be upheld only in connection with § 631, *infra.* See also cases in notes *supra*, to effect that a court cannot decree a dissolution at the instance of stockholders. Many states now have statutes expressly giving to courts such authority. The statutes may of course make a voluntary dissolution effectual without legal proceedings.

[2] People *v.* James, 5 N. Y. App. Div. 412 (1896), holding also that where the statute provides for the directors winding up the company the attorney-general cannot maintain an action for that purpose in behalf of the state.

§ 631. *Acts which do not constitute dissolution.*— There are certain acts and facts which do not in themselves constitute a dissolution. A dissolution is not effected by a failure to elect officers;[1] nor by a sale or assignment of all the corporate property;[2] nor by the fact that one person owns all the shares of stock;[3] nor by a cessation of all corporate business and acts;[4] nor by the death of its stock-

[1] Rose *v.* Turnpike Co., 3 Watts (Pa.), 46 (1834); Lehigh Bridge Co. *v.* Lehigh Coal, etc. Co., 4 Rawle (Pa.), 8, 23 (1832); Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850); Hoboken Building, etc. Assoc. *v.* Martin, 13 N. J. Eq. 427 (1861); Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447 (1850); Nashville Bank *v.* Petway, 3 Humph. (Tenn.) 522 (1842); Boston Glass Mfy. *v.* Langdon, 41 Mass. 49 (1841); Russell *v.* McLellan, 31 Mass. 63 (1833); Cahill *v.* Kalamazoo, etc. Ins. Co., 2 Doug. (Mich.) 124, 140 (1845); Harris *v.* Mississippi Valley, etc. R. R., 51 Miss. 602 (1875); People *v.* Runkle, 9 Johns. 147 (1812); Phillips *v.* Wickham, 1 Paige, 590 (1829); Slee *v.* Bloom, 5 Johns. Ch. 366 (1821); s. c., 19 Johns. 456 (1822); St. Louis, etc. Loan Assoc. *v.* Augustin, 2 Mo. App. 123 (1876); Knowlton *v.* Ackley, 62 Mass. 93 (1851); Mendota *v.* Thompson, 20 Ill. 197 (1858); People *v.* Wren, 5 Ill. 269 (1843). Nor will a resignation of all the officers dissolve the corporation. Muscatine Turn Verein *v.* Funck, 18 Iowa, 469 (1865); Evarts *v.* Killingworth Mfg. Co., 20 Conn. 447 (1850). The corporate rights and franchises are, in such a case, merely dormant until other officers are elected. Philips *v.* Wickham, 1 Paige, 590 (1829). *Cf.* Lea *v.* American Atlantic, etc. Canal Co., 3 Abb. Pr. (N. S.) 1 (1867).

[2] Quoted and approved in State *v.* Mitchell, 104 Tenn. 336, 343 (1898); Barclay *v.* Talman, 4 Edw. Ch. 123 (1842); De Camp *v.* Alward, 52 Ind. 468 (1876); Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883); Rollins *v.* Clay, 33 Me. 132 (1851); Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279 (1877); Troy, etc. R. R. *v.* Kerr, 17 Barb. 581 (1854), where a railroad corporation had leased the entire property to another corporation; State *v.* Merchant, 37 Ohio St. 251 (1881); Smith *v.* Gower, 2 Duv. (Ky.) 17 (1865). To same effect, State *v.* Rives, 5 Ired. L. (N. C.) 297 (1844); Bruffett *v.* Great Western R. R., 25 Ill. 353 (1861). The fact that the company sells its property and that one person acquires all the stock does not dissolve the corporation. Parker *v.* Bethel Hotel Co., 96 Tenn. 252 (1896).

[3] See § 709, *infra.*

[4] Attorney-General *v.* Bank of Niagara, Hopk. Ch. 403 (1825); Harrington *v.* Connor, 51 Neb. 214 (1897); Baptist Meeting-house *v.* Webb, 66 Me. 398 (1877); Rollins *v.* Clay, 33 Me. 132 (1851); Harris *v.* Nesbit, 24 Ala. 398 (1854); Kansas City Hotel Co. *v.* Sauer, 65 Mo. 279, 288 (1877); Nimmons *v.* Tappan, 2 Sweeney (N. Y.), 652 (1870); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844); State *v.* Barron, 58 N. H. 370 (1878); *Re* Jackson M. Ins. Co., 4 Sandf. Ch. 559 (1847); West *v.* Carolina, etc. Co., 31 Ark. 476 (1876); Bache *v.* Horticultural Soc., 10 Lea (Tenn.), 436 (1882); Brandon Iron Co. *v.* Gleason, 24 Vt. 228 (1852); Atlanta *v.* Gate, etc. Co., 71 Ga. 106 (1883); Law *v.* Rich, 47 W. Va. 634 (1900). Mere non-user does not dissolve a corporation. A proceeding in behalf of the state is first necessary. Bloch *v.* O'Connor, etc. Co., 129 Ala. 528 (1900). Dissolution may exist by cessation, etc., so far as the reversion of property given to the corporation is concerned. Stone *v.* Framingham, 109 Mass. 303 (1872). A cessation of business with the understanding that the company is dissolved, the property having been transferred to the stockholders, does not work a dissolution. Suits may be instituted against the

holders;[1] nor by insolvency;[2] nor, in all cases, by a consolidation with another corporation under statutory authority.[3] Nor is it dissolved by the appointment of a receiver,[4] or the foreclosure of a mortgage,[5] nor by failure to file reports.[6] The fact that there are less stockholders than the charter requires does not invalidate the acts of the corporation.[7] For certain purposes, however, such as rendering stockholders liable on their statutory liability,[8] or relieving directors from a penal liability,[9] dissolution is held to arise by some of these acts.

§ 632. *Only the attorney-general can institute a suit to forfeit a corporate charter.*— Such unquestionably is the law. It is for the state alone to withdraw the charter which the state has given.

company. Carnaghan *v.* Exporters', etc. Co., 11 N. Y. Supp. 172 (1890). A foreclosure sale of all the property and franchises of a corporation will close out and foreclose the whole interest of the stockholders therein. Vatable *v.* New York, etc. R. R., 96 N. Y. 49 (1884); Thornton *v.* Wabash Ry., 81 N. Y. 462, 467 (1880). See also Sullivan *v.* Portland, etc. R. R., 94 U. S. 806 (1876). As to reorganization, see ch. LII, *infra.*

[1] Boston Glass Mfy. *v.* Langdon, 41 Mass. 49, 52 (1841); Russell *v.* McLellan, 31 Mass. 63, 69 (1833).

[2] Stolze *v.* Manitowoc, etc. Co., 100 Wis. 208 (1898); Geneva, etc. Co. *v.* Coursey, 45 N. Y. App. Div. 268 (1899); Moseby *v.* Burrow, 52 Tex. 396 (1880); Valley Bank, etc. Inst. *v.* Sewing Soc., 28 Kan. 423 (1882). Such is the case though a receiver has been appointed. State *v.* Merchant, 37 Ohio St. 251 (1881); National Bank *v.* Insurance Co., 104 U. S. 54 (1881); Kincaid *v.* Dwinelle, 59 N. Y. 548 (1875). The insolvency of a corporation and the appointment of a receiver do not constitute dissolution. Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1 (1896).

[3] See ch. LIII, *infra.*

[4] The appointment of a receiver does not dissolve a corporation. Nothing but the expiration of the charter or the judgment of a court can do that. Hasselman *v.* Japanese, etc. Co., 2 Ind. App. 180 (1891).

[5] Smith *v.* Gower, 2 Duv. (Ky.) 17 (1865); White, etc. R. R. *v.* White, etc. R. R., 50 N. H. 50 (1870). In Pennsylvania it seems to be held that the foreclosure sale of all the assets of the company extinguishes the company itself. Reynolds *v.* Cridge, 1 Pa. Dist. 693 (1892); New Castle Northern Ry. *v.* New Castle, etc. R. R., 1 Pa. Dist. 768 (1892). Where a railroad company's property has been foreclosed, and for twenty-six years it has owned no property and kept up no existence, it will be presumed to have been dissolved, and service upon it will be set aside. Combes *v.* Keyes, 89 Wis. 297 (1895). A corporation is not dissolved by the fact that it has lost all its property. Weigand *v.* Alliance Supply Co., 44 W. Va. 133 (1897). A corporation is not dissolved by reason of its property being sold out under a mortgage. Bump *v.* Butler County, 93 Fed. Rep. 290 (1899).

[6] Failure to file a report does not work a forfeiture of the charter. State *v.* Brownstown, etc. Co., 120 Ind. 337 (1889).

[7] Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). The facts that the corporate officers are dead, and the number of stockholders is less than the number required for incorporation, do not dissolve the corporation. *Re* Belton, 47 La. Ann. 1614 (1895).

[8] See Slee *v.* Bloom, 19 Johns. 456 (1822), and § 219, *supra.* *Cf.* Bradt *v.* Benedict, 17 N. Y. 93 (1858).

[9] Losee *v.* Bullard, 79 N. Y. 404 (1880).

A stockholder cannot institute the suit;[1] nor a corporate creditor;[2] nor can the municipal authorities by reason of a change of route by a railroad;[3] nor can a person who is overcharged on a turnpike bring suit to forfeit the company's charter.[4] The secretary of state cannot forfeit a charter, even though the statute prescribes forfeiture for non-payment of taxes;[5] but it is constitutional to provide by statute, as is the case in New Jersey, that the charter and all corporate powers shall be void and cease upon the non-payment of taxes.[6] A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder, by being a stockholder, is estopped from complaining, and is presumed to have had knowledge of the facts from the time that he became a stockholder.[7] Where a public corporation, vested with state property for public use, makes a lease of it which is *ultra vires*, a private person cannot sustain a suit to contest it; this can be done only by the state or the corporation.[8]

[1] North *v.* State, 107 Ind. 356 (1886); Baker *v.* Backus, 32 Ill. 79 (1863); Commonwealth *v.* Union Ins. Co., 5 Mass. 230 (1809); State *v.* Paterson, etc. Turnp. Co., 21 N. J. L. 9 (1847); Murphy *v.* Farmers' Bank, 20 Pa. St. 415 (1853); Rice *v.* National Bank, 126 Mass. 300 (1879); Folger *v.* Columbian, etc. Ins. Co., 99 Mass. 267 (1868), where the court refused to recognize a dissolution decreed by a New York court at the instance of a stockholder; Raisbeck *v.* Oesterricher, 4 Abb. N. Cas. 444 (1878), where the plaintiff claimed that the incorporation was irregular.

[2] Gaylord *v.* Fort Wayne, etc. R. R., 6 Biss. 286 (1875); s. c., 10 Fed. Cas. 121. A judgment forfeiting the charter of a private corporation, where the state is not a party to the suit, is a nullity. Pickett *v.* Abney, 84 Tex. 645 (1892).

[3] Moore *v.* Brooklyn, etc. R. R., 108 N. Y. 98 (1888).

[4] Commonwealth *v.* Allegheny Bridge Co., 20 Pa. St. 185 (1852); State *v.* White's, etc. Co., 3 Tenn. Ch. 164 (1876), where the bill purported to be in the attorney-general's name. A shipper of freight cannot by bill in equity compel a canal company to repair and render its canal navigable. Only the state can complain. Buck, etc. Co. *v.* Lehigh, etc. Co., 50 Pa. St. 91 (1865). The statutes of a state, however, sometimes change these rules of law.

[5] Fox *v.* Robbins, 62 S. W. Rep. 815 (Tex. 1901). A statute of West Virginia stating that charters shall be forfeited if corporate taxes are not paid does not authorize the secretary of state to declare corporate charters forfeited. Forfeiture can be made only in a suit by the state brought for that purpose. Greenbrier Lumber Co. *v.* Ward, 30 W. Va. 43 (1887).

[6] See General Corporation Act of New Jersey, L. 1896, p. 319. As to such a provision being self-executing, see § 638, *infra*.

[7] Coquard *v.* National L. O. Co., 171 Ill. 480 (1898).

[8] Directors, as such, of such corporation, cannot sustain such a suit. Smith *v.* Cornelius, 41 W. Va. 59 (1895).

§ 633. *Forfeiture for misuser — Acts which constitute a misuser — Ultra vires acts and usurpation of franchises.*— The law is clear that, if a corporation misuses its powers, the state may by a suit withdraw the charter which it has given. Great difficulty, however, arises in determining what constitutes a misuser. A clear idea can be obtained only by a study of the cases themselves.[1]

[1] A corporation organized to manufacture railway cars has no power to lay out a town around its works and build twenty-two hundred homes to lease to its employees, to build and run a hotel and saloon, and also a theatre, a gas plant, a system of water-works and a brick plant, and to own and run a farm for supplies to sell, and for its employees, and to own stock in other corporations manufacturing and selling bar iron and railroad spikes; but may erect an office building containing more space than it requires at the time, and may purchase more real estate than it actually requires at the time, and may supply liquor, etc., to passengers on its cars, and may sell surplus steam power. The state may bring *quo warranto* proceedings to forfeit the charter. It is no defense that the usurpations had continued for many years to the knowledge of the state, or that a legislative committee had reported that the real estate was properly taxed. People *v.* Pullman's Palace Car Co., 175 Ill. 125 (1898). The state will, at the instance of the attorney-general, forfeit the charter of the corporation whose stockholders have entered into a "trust" with the stockholders of competing corporations, for the purpose of forming a monopoly in and raising the price of sugar. The "trust" is not a joint-stock association. It is of the character of a trust estate. People *v.* North River Sugar Ref. Co., 121 N. Y. 582 (1890). *Quo warranto* lies against a corporation formed to purchase substantially all the distilleries in the country. Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895). The state may forfeit a charter for a failure of the officers to file the annual report and of the stockholders to pay in the capital stock as required by statute. It is immaterial that the state's action was induced by parties who were themselves responsible for the failure to comply with the statute. People *v.* Buffalo, etc. Co., 131 N. Y. 140 (1892). It is cause for forfeiture that some of the directors, all of whom were required to be stockholders, held but one share each, the certificates for which shares were transferred back at once to the real parties in interest, thus leaving the directors disqualified; also that required certificates had not been filed; also that annual elections had not been held; also that the corporation had done business *ultra vires.* But unless public interest so requires, the attorney-general should not bring suit at his own instance. Lorillard *v.* Clyde, 142 N. Y. 456 (1894). A water-works charter may be forfeited where it wilfully and persistently charges more for water than its charter specifies. State *v.* New Orleans, etc. Co., 31 S. Rep. 395 (La. 1901). See s. c., 185 U. S. 336.

In the case of State *v.* Hogan, 163 Mo. 43 (1901), it was held that an option to buy a mine is not property for which stock may be issued, under the constitution and statutes of the state of Missouri, there being no proof that the person giving the option owned it. Hence where $90,000 of stock was issued for the option and for services in inspecting the mine, and $30,000 of the stock was turned back for treasury stock, the court held that the state might maintain a bill to forfeit the charter.

Under the statutes of Alabama in ref-

In Ohio it has been held that a statute giving to a court the power to forfeit the franchises of turnpike companies for being

erence to watered stock, *quo warranto* lies where $1,000,000 of stock is issued for the possibility of patents to be thereafter granted. In such *quo warranto* proceedings stockholders need not be made parties. State *v.* Webb, 97 Ala. 111 (1893). Where a railroad leases its line in violation of a constitutional provision prohibiting the consolidation of parallel lines, it is subject to forfeiture. So also where it issues "watered stock" in violation of the constitution. State *v.* Atchison, etc. R. R., 24 Neb. 143 (1888). In the case of State *v.* New Orleans, etc. Co., 51 La. Ann. 1827 (1899), the subscribers to the stock of a debenture company paid ninety-five per cent. of their subscription by borrowing that amount from the company on their notes, and thereupon full-paid stock was issued to them, although the statute prohibited the issue of stock until paid for. The state brought suit to set aside the charter and liquidate the company. The court held that under the constitution of Louisiana the incorporation was illegal. The court held also that the charter was illegal, in that the debentures issued were forfeited if deferred payments were not made, and that they provided for cancellation at fifty per cent. on the amount paid, and that they were redeemable in numerical order in six years and that it would be impossible for the company to pay them. The same conclusion was reached in State *v.* Louisiana, etc. Co., 51 La. Ann. 1795 (1899). Where a corporation is authorized to commence business only when $100,000 of stock has been subscribed, and it does commence business prior to such subscription being made, the state may file a bill to forfeit its charter. State *v.* Debenture, etc. Co., 51 La. Ann. 1874 (1899). In the case of State *v.* Portage City, etc. Co., 107 Wis. 441 (1900), the court stated that a contract between a city and a water-works company, giving to the latter the right to use the streets for its water pipes, was a franchise, and that *quo warranto* would lie to forfeit such franchise for failure to supply water in accordance with its terms.

Where an unauthorized lease of competing lines has been made, the state may forfeit the charter of the lessor and cause a receiver of the charter to be appointed, and such proceedings will lie even six years after the lease has been made. Eel River R. R. *v.* State, 155 Ind. 433 (1900). In *quo warranto* against a turnpike company the burden of proof is on the company to prove its title, and deeds from other companies without seals and not acknowledged as corporate deeds are insufficient. Lyons, etc. Co. *v.* People, 68 Pac. Rep. 275 (Colo. 1902). The charter of a plank-road company for failure to keep the road in repair was forfeited in the case of People *v.* Detroit, etc. Co., 90 N. W. Rep. 687 (Mich. 1902). For failure to keep a part of its road in repair, or to rebuild a burned bridge, or for abandoning a part of its road, a plank-road company's charter may be forfeited. People *v.* Plainfield, etc. Co., 105 Mich. 9 (1895). The charter of a water-works company may be forfeited when, in violation of its charter, it does not furnish pure water and does not increase its source of supply. It is no defense that the municipality had elected to take over the property as provided in the original ordinance, or that the municipality had the right to annul the contract between the municipality and the company. Capital City Water Co. *v.* State, 105 Ala. 406 (1894). To a *quo warranto* to forfeit a water-works charter because it failed to supply sufficient water, it is no answer that the company had intended to enlarge, but had not done so because the city had declared its intention to exercise its op-

out of repair for the preceding six months, without having a jury pass upon the question and without appeal, is unconstitutional.[1]

tion to buy the works. State *v.* Capital City Water Co., 102 Ala. 231 (1894). It has been held to be misuser to file a false certificate that the capital stock has been paid up, Eastern, etc. Co. *v.* Regina, 22 Eng. L. & Eq. 328 (1853); or to establish a branch bank where the charter authorizes only a principal banking place, People *v.* Oakland County Bank, 1 Doug. (Mich.) 282 (1843); or for an insurance company to take risks which it cannot pay if required, Ward *v.* Farwell, 97 Ill. 593 (1881); or for taking "grave-yard" insurance, State *v.* Central, etc. Assoc., 29 Ohio St. 399 (1876), the person receiving the insurance having no insurable interest in the person insured; or for not keeping tracks in a condition required by the charter, State *v.* Madison Street Ry., 72 Wis. 612 (1888); or for a canal company to allow the canal to become out of repair, State *v.* Pennsylvania, etc. Canal Co., 23 Ohio St. 121 (1872); or for a ferry company to be guilty of the same neglect, State *v.* Council Bluffs, etc. Co., 11 Neb. 354 (1881); or for filing false and fraudulent articles of association; State *v.* Bailey, 16 Ind. 46 (1861), holding also that mere insolvency is no cause for forfeiture; or for accepting subscriptions by persons who are notoriously insolvent, Holman *v.* State. 105 Ind. 569 (1885); Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242 (1878); or for a failure of a river-improvement company to make an improvement as commanded by a statute, People *v.* Improvement Co., 103 Ill. 491 (1882); or for a bank to loan to its directors in violation of a statute, Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 497 (1837); or for a charitable corporation to divide with a lobbyist an appropriation obtained from the legislature, People *v.* Dispensary, etc. Soc., 7 Lans. 304 (1873); or for an insurance company to insure in a manner contrary to statute and to delay payments of losses, State *v.* Standard, etc. Assoc., 38 Ohio St. 281 (1882); for a bank to contract debts beyond the charter limits, and to make dividends before resuming specie payments, State Bank *v.* State, 1 Blackf. (Ind.) 267 (1823); or for persistently taking usurious interest, Commonwealth *v.* Commercial Bank, 28 Pa. St. 383 (1857); State *v.* Commercial Bank, 33 Miss. 474 (1857); or for a mutual relief association to be run for the benefit of its officers only, State *v.* People's, etc. Assoc., 42 Ohio St. 579 (1885); or for a bank to suspend specie payments, State *v.* Bank of South Carolina, 1 Spears, L. (S. C.) 433 (1841); Commercial Bank *v.* State, 14 Miss. 599 (1846); but see State *v.* New Orleans, etc. Co., 2 Rob. (La.) 529 (1842); or for a turnpike company to allow its road to be out of repair. Washington, etc. T. Co. *v.* State, 19 Md. 239 (1862); Coon *v.* Plymouth, etc. Co., 32 Mich. 248 (1875); Darnell *v.* State, 48 Ark. 321 (1887); State *v.* Pawtucket, etc. Corp., 8 R. I. 182 (1865), where the company neglected a part of its road which it had sold to a municipality. Not every neglect is fatal. The question is for the jury. People *v.* Royalton, etc. Turnp. Co., 11 Vt. 431 (1839). And it is no defense to forfeiture for neglect that the road has been sold on an execution sale. Commonwealth *v.* Tenth, etc. Turnp. Co., 59 Mass. 509 (1850). Nor is it a defense that the state has authorized a competing line. Turnpike Co. *v.* State, 3 Wall. 210 (1865).

In State *v.* Essex Bank, 8 Vt. 489

[1] Salt Creek Val. Turnp. Co. *v.* Parks, 50 Ohio St. 568 (1893). The legislature may authorize county commissioners to institute proceedings to forfeit the charters of plank-road companies which do not keep their plank-roads in repair. Davis *v.* Vernon, etc. Co., 103 Ga. 491 (1898).

A charter will not be forfeited merely because the corporation was incorporated in one state and all its officers and stockholders

(1836), the court refused to decree a forfeiture, since the public were not injured, though the corporation was clearly guilty of misuser. If a gas company is ordered by a municipality under a statutory power to reduce the price of gas, it may defend against forfeiture for non-compliance by asserting that the municipality was fraudulently induced to act. State *v.* Cincinnati, etc. Co., 18 Ohio St. 262 (1868). If a company has incorporated under a general act, but for a purpose not authorized by it, a suit for forfeiture lies. State *v.* Beck, 81 Ind. 501 (1882), where a turnpike company incorporated to *purchase* turnpikes, a purpose not authorized by the statute. The state may create causes for the forfeiture of insurance companies' charters. Chicago, etc. Ins. Co. *v.* Needles, 113 U. S. 574 (1885). Where the state sues to forfeit the charter of a railroad company which has leased its road, the latter cannot institute a suit to test the validity of that lease. Ogdensburgh, etc. R. R. *v.* Vermont, etc. R. R., 4 Hun, 712 (1875): s. c., 63 N. Y. 176. If *quo warranto* is brought for not making reports, the corporation may offer to make the reports. State *v.* Barron, 57 N. H. 498 (1876). By statute, forfeiture may be decreed where the court decides that a continuance of business by an insurance company will be hazardous to the community. Ward *v.* Farwell, 97 Ill. 593 (1881). The legislature cannot amend a charter by forfeiting the charter if specie payments are not made within a specified time. State *v.* Tombeckbee Bank, 2 Stew. (Ala.) 30 (1829). It cannot provide that charters shall be forfeited for non-payment of corporate obligations, so far as corporations existing before the statute are concerned. Aurora, etc. Co. *v.* Holthouse, 7 Ind. 59 (1855). But it may prescribe that the charter be repealed unless within a certain time the company do certain things — here make good its capital. Lothrop *v.* Stedman, 42 Conn. 583 (1875). And may force the dissolution of insolvent insurance corporations, or corporations whose continuance of business will be dangerous to the public. Ward *v.* Farwell, 97 Ill. 593 (1881); Chicago Life Ins. Co. *v.* Auditor, 101 Ill. 82 (1881). So also as to banks. The remedy "for a violation of duty may be altered and changed by legislative provisions if the power of accomplishing the same objects by any means is within the legitimate scope of legislative authority." Commonwealth *v.* Farmers', etc. Bank, 38 Mass. 542 (1839). *Quo warranto* does not lie against a corporation for *ultra vires* acts, such as issuing watered stock or purchasing its own stock. "Acts in excess of power may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture." The courts refuse to define what *ultra vires* acts will and what will not sustain *quo warranto* proceedings. They must be acts which "so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created." State *v.* Minnesota, etc. Co., 40 Minn. 213 (1889). A suit by a state to enjoin the defendant railroad company from being managed by directors elected by the votes of stock of the company owned by a foreign railroad corporation *ultra vires*, and also to declare such votes and elections void, and also for a receiver, or in lieu of all this for a forfeiture of the charter, is not demurrable. State *v.* Port Royal, etc. Ry., 45 S. C. 470 (1895).

The following acts and facts do not constitute a misuser: Where, eight years after the organization of a waterworks company, the attorney-general applies for leave to bring suit to forfeit

reside in another state; nor because it keeps its books out of the state, in violation of a statute.[1]

the charter on account of the issue of watered stock and bonds, and of violations of city ordinances, and for not keeping accurate books of account, the city having the right to buy the works at the end of seven years, the court will not allow the suit to be commenced. The court said: "Unless there is a clear, wilful misuse, abuse, or non-use of the franchises sought to be forfeited, or violation of law, — something that strikes at the very groundwork of the contract between the corporation and the sovereign power; something that amounts to a plain, wilful abuse of power or violation of law, within the meaning of the statute on the subject, whereby the corporation fails to fulfill the very design and purpose of its organization,—leave will not be granted by the court to resort to the extraordinary remedy for a forfeiture of its franchises." State *v.* Janesville Water Co., 92 Wis. 496, 501 (1896). A waterworks company's charter will not be forfeited because another company has purchased a majority of its stock and illegally placed a mortgage upon its property. Commonwealth *v.* Punxsutawney, etc. Co., 47 Atl. Rep. 843 (Pa. 1901). The fact that a corporation has levied illegal assessments on its stockholders is no ground for a dissolution at the instance of the state. People *v.* Rosenstein, etc. Co., 131 Cal. 153 (1900). Where a company is granted power by the city to build tracks on the streets on condition that the tracks conform to the street grade, and on condition that the company pay for the paving between its tracks, its failure to comply with such conditions is no ground for declaring a forfeiture of the company's charter. State *v.* Omaha, etc. Co., 91 Iowa, 517 (1894). A state may forfeit the charter of a corporation which is engaged in the lottery business. State *v.* Nebraska, etc. Co., 92 N. W. Rep. 763 (Neb. 1902). An action by the state against a stock exchange in San Francisco, to annul its charter on the ground that it was a gambling institution, failed in People *v.* San Francisco Public Stock Exchange, 33 Pac. Rep. 785 (Cal. 1893), because the complaint did not clearly allege gambling acts. There is no misuser of franchises by a corporation

[1] North, etc. Stock Co. *v.* People, 147 Ill. 234 (1893). In Kansas the charter of a corporation may be forfeited at the instance of the state if the corporation fails to keep its general office and the office of its treasurer within the state in accordance with the terms of the statutes. State *v.* Topeka Water Co., 59 Kan. 151 (1898). Where a corporation removes all its offices from the state, a stockholder may apply, under a statute, for a dissolution on the ground of an abuse of powers. Simmons *v.* Norfolk, etc. Steamboat Co., 113 N. C. 147 (1893). In State *v.* Park, etc. Lumber Co., 58 Minn. 330 (1894), the court forfeited the charter of a company that had been incorporated in Minnesota for the purpose evidently of doing all its business in Wisconsin. The charter was forfeited on the ground that the company had not complied with the statute in having its place of business and keeping its books within the state. The court also approved of a decision in Wisconsin to the effect that at common law a charter may be forfeited where the corporation keeps its principal office, books, and records out of the state to such an extent that it is impossible for the state and its courts to have full jurisdiction and visitorial power over the corporation. To same effect where the company kept its books and place of business out of the state. State *v.* Milwaukee, etc. Ry., 45 Wis. 590 (1878).

A charter will be forfeited where it authorizes a medical school but is actually used to sell medical diplomas.[1]

where the objectionable act was by a cashier in direct violation of orders given to him by the directors, State *v.* Commercial Bank, 6 Sm. & M. (Miss.) 218 (1846); or where a railroad or turnpike company has constructed its road over land without obtaining the right of way. State *v.* Kill Buck Turnp. Co., 38 Ind. 71 (1871); People *v.* Hillsdale, etc. Turnp. Co., 2 Johns. 190 (1807); or where the company deviates slightly from its route, fails to file a map of the route, and neglects to elect new directors, Harris *v.* Mississippi, etc. R. R., 51 Miss. 602 (1875); or fails to file a statement of its condition as required by statute, the object of such filing having ceased, People *v.* Improvement Co., 103 Ill. 491 (1882); or where the public are compelled to open a drawbridge for themselves, Commonwealth *v.* Breed, 21 Mass. 460 (1827); or where a bank has assigned its assets to trustees to pay its debts, State *v.* Commercial Bank, 21 Miss. 569 (1850); or for the insolvency of a bank, it having since then become solvent, People *v.* Bank of Niagara, 6 Cow. 196 (1826); People *v.* Washington, etc. Bank, 6 Cow. 212 (1826) (but the contrary has been held as regards a suspension of specie payments and a subsequent resumption, Commercial Bank *v.* State, 14 Miss. 599 (1846); Planters' Bank *v.* State, 15 Miss. 163 — 1846); or where a bridge company gives reduced rates to constant patrons, and gives free passage in payment for land and fails to file required statements, Commonwealth *v.* Alleghany, etc. Co., 20 Pa. St. 185 (1852); or on the ground that the corporation has incorporated also in another state, Commonwealth *v.* Pittsburg, etc. R. R., 58 Pa. St. 26 (1868); or that required statements are not filed, State *v.* Barron, 58 N. H. 370 (1878). Though a corporation take more interest than allowed by charter it may recover. The only penalty is such as the usury law prescribes. Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847). For a vigorous and interesting but futile effort to oust a going railroad company from its franchises for all kinds of misfeasances, malfeasances, and non-feasances, see International, etc. Ry. *v.* State, 75 Tex. 356 (1889); and for a successful case in the same line, see East Line, etc. Ry. *v.* State, 75 Tex. 434 (1889). It is not for the state to institute an action to dissolve and wind up a mutual benefit and building corporation merely because some of the members are dissatisfied. People *v.* Lowe, 117 N. Y. 175, 190 (1889). No *quo warranto* lies for using an abbreviated corporate name. People *v.* Bogart, 45 Cal. 73 (1872). The averments of misuser must be definite and certain. Danville, etc. Pr. Co. *v.* State, 16 Ind. 456 (1861). And the misuser must be wilful. State *v.* Columbia, etc. Co., 2 Sneed (Tenn.), 254 (1854); Baltimore *v.* Connellsville, etc. Ry., 6 Phila. 190 (1866). In charging misuser the word "wilful" is not necessary. State *v.* Equitable L. etc. Co., 142 Mo. 325 (1897). Concerning the pleadings in *quo warranto*, see People *v.* Stanford, 77 Cal. 360 (1888). An information in the nature of *quo warranto* to forfeit the charter of a temperance enterprise is not definite enough in its charges when it charges a perversion of funds. People *v.* Dashaway Assoc., 84 Cal. 114 (1890), containing also a discussion on the pleadings and practice. Where the state has brought suit to forfeit the charter of a railroad company on the ground that a

[1] Illinois, etc. University *v.* People, 166 Ill. 171 (1897). The charter of a medical college will be forfeited at the instance of a state where it is shown that the college is carried on chiefly to sell medical diplomas. Independent, etc. College *v.* People, 182 Ill. 274 (1899).

Frequently a corporation does acts which its charter does not authorize it to do, or which its charter or a statute expressly prohibits it from doing. The question then arises, What is the remedy of the state? The right of a stockholder, or the corporation itself, or a person contracting with the corporation, to object to such acts is discussed elsewhere.[1] But may the state object? Undoubtedly it may. It seems that the state has four remedies. Its legislature may repeal the charter of the corporation under the reserved right of the state to repeal;[2] or the state may institute a proceeding to forfeit the charter for misuser of powers; or such proceeding may be only to oust the corporation from the exercise of the usurped powers; or, according to some authorities, a suit may be commenced in equity for an injunction restraining the corporation from committing the *ultra vires* acts.[3] Taking up first the subject of *quo warranto*, it seems that the judgment in an ordinary *quo warranto* proceeding may be either a forfeiture of all the corporate franchises and of the charter, or may be a forfeiture only of the right to continue to do the illegal acts, and that it is within the discretion of the court to say which judgment shall be rendered.[4]

majority of its stock is held, contrary to the statutes and constitution of the state, by another railroad company, the case may be removed to the federal court if the latter company is an instrument of interstate commerce and purchased the stock for interstate commerce purposes. It is also removable where the latter company claims that its charter existed before such constitution and statutes, and give it a right to own such stock. South Carolina *v.* Port Royal, etc. Ry., 56 Fed. Rep. 333 (1893).

[1] See Part IV, *infra.*

[2] See § 639, *infra.*

[3] See § 635, *infra.*

[4] State *v.* People's, etc. Assoc., 42 Ohio St. 579 (1885), where only a discontinuance of the acts complained of was ordered; People *v.* Improvement Co., 103 Ill. 491 (1882), where a complete forfeiture of charter, etc., was decreed. See also People *v.* Utica Ins. Co., 15 Johns. 357 (1818), where an insurance company had engaged in banking contrary to statute. A partial ouster does not seem to differ much from an injunction at the instance of the state. See § 635, *infra.* In State *v.* Building Assoc., 35 Ohio St. 258 (1879), the court said that where the corporation is guilty of an offense which by statute is cause for forfeiture of its franchise as a corporation, the court will decree that forfeiture; but where the cause of forfeiture is outside of those prescribed in the statutes, then the court may decree either a forfeiture of the franchise to be a corporation or an ouster from the powers and acts illegally assumed or done. There may be a judgment of ouster of a particular franchise, and not of the whole charter. State *v.* Old Town Bridge Corp., 85 Me. 17 (1892). Where two competing gas companies agree on rates to be charged the public and agree not to interfere with each others' patrons, the state may forfeit their charters, or the court may in its discretion declare a forfeiture or ouster of the right of the defendants to carry out the illegal acts. State *v.* Portland, etc. Co., 153 Ind. 483 (1899). Forfeiture of a water-works grant from the city will not be decreed except in a clear case, and where no other punishment will adequately rem-

Quo warranto lies to forfeit the exclusive feature of a franchise without forfeiting the remainder of the franchise.[1] It has been held in a recent well considered case, that where a corporation is exercising a power which it has no charter right to exercise, a judgment may oust it from exercising that particular power, but where the corporation has been guilty of acts which by statute are made the cause of forfeiture, the whole charter may be forfeited.[2] The nature of *scire facias*, *quo warranto*, and information in the nature of a *quo warranto*, is explained in the notes below.[3]

edy the mischief. City of Ashland *v.* Ashland, etc. Co., 110 Wis. 94 (1901). The court may forfeit the charter of a railroad corporation for illegally leasing its road, and need not merely enjoin the continuation of the lease. East Line, etc. R. R. *v.* State, 75 Tex. 434 (1889). "Corporate charters are not forfeited in fragments, or annulled as damages for the violation of private contracts." In condemnation proceedings the defendant cannot set up that the charter has been violated. *Re* Long Island R. R., 143 N. Y. 67 (1894). In Pennsylvania, where the state filed an information to declare *ultra vires* a contract between a canal company and a coal company, whereby one-half of the canal facilities were monopolized by the latter, the court held that an information was a proper remedy, and that the court, in its judgment in favor of the state, might order the corporation to discontinue the unauthorized act, and that the judgment need not oust the corporation from its charter and franchises. Commonwealth *v.* Delaware, etc. Canal Co., 43 Pa. St. 295 (1862). Although the state proves the case, yet the court will not adjudge a forfeiture unless justice requires it. State *v.* Essex Bank, 8 Vt. 489 (1836).

[1] Commonwealth *v.* Sturtevant, 182 Pa. St. 323 (1897).

[2] Marion Bond Co. *v.* Mexican, etc. Co., 65 N. E. Rep. 748 (Ind. 1902). Where a railroad company has been adjudicated to have no power to own warehouses it may lease them. State *v.* New Orleans, etc. Co., 33 S. Rep. 81 (La. 1902). See 73 S. W. Rep. 645.

[3] Professor Dwight explained these as follows:

"*Scire facias* is resorted to where there is original defect in the charter, as if, *e. g.*, a grant obtained by fraud. It may be used also in the case where the charter was valid but the powers of a corporation have been abused. The distinction taken in England is this: that a *scire facias* may be resorted to where a legal corporation in full possession of its powers abuses them, while a *quo warranto* is applicable where a corporation, from a defect in its constitution, such as a loss of part of its members which are integral to its existence, becomes an imperfect body, but nevertheless continues to act as a corporation. See Grant on Corporations, 296.

"*Writ of quo warranto.* This is an ancient writ, employed by the king against any one who claims or usurps an office or franchise, or who, having had a right to the franchise, neglects to exercise it, to inquire by what warrant he still claims to exercise it. The theory of the writ is, there is an unlawful encroachment upon the royal prerogative, and, being a dilatory proceeding and technical, it is not now so much employed as the succeeding remedy.

"*Information in the nature of a quo warranto.* This is in form a criminal proceeding. There were two proceedings in the criminal law for the conviction of criminals. One is termed an information and the other an indict-

Quo warranto at the instance of the state does not lie merely because a street railway company has been given street rights in perpetuity by a municipality, while the statute limits its corporate existence to thirty years.[1] In an action by the state to forfeit a railroad charter the state must prove not only that a cause of for-

ment. They differ in this respect: that while an indictment is found by a grand jury, an information is simply the allegation of an officer who files it. In this case the attorney-general proceeds on twofold ground, both to punish the usurper and to prevent the unlawful exercise of its franchises. In the case of a corporation the main object is to interfere with the exercise of the franchise. The inquiry is the same as in the writ of *quo warranto;* that is, by what warrant the franchise is exercised. The reason why it is more resorted to is that it is easy and simple of application.

"Under the New York code the proceeding is simply an action brought by the attorney-general, governed by the same general rules as an action at common law. If judgment goes against the corporation it is liable to be dissolved. This proceeding in England was instituted in the great criminal court, the king's or queen's bench, and in New York in the supreme court only, which represents the queen's bench."

A *quo warranto* is not such a criminal proceeding as to require the degree of certainty as is required in criminal proceedings. Independent, etc. College *v.* People, 182 Ill. 274 (1899). In the case of State *v.* Merchants', etc. Trust Co., 8 Humph. (Tenn.) 235 (1847), the court said: "By the common law the forfeiture of a charter can be enforced in a court of law only; and the proceeding to repeal it is by a *scire facias* or an information in the nature of a writ of *quo warranto.* A *scire facias* is the proper remedy where there is a legal existing body capable of acting, but which had been guilty of an abuse of the power intrusted to it; a *quo warranto* where there is a body corporate *de facto*, which takes upon itself to act as a body corporate, but from some defect in its constitution it cannot legally exercise the power it affects to use." Citing 8 Wheat. 483, 484. For the ancient learning as to *scire facias* in forfeiting charters, see State *v.* Moore, 19 Ala. 514 (1851). When the information has for its object to oust the defendants from acting as a corporation, and to test the fact of their incorporation, it must be filed against individuals. When the object is to effect a dissolution of a corporation which has had an actual existence, or to oust such corporation of some franchise which it has unlawfully exercised, the information must be filed against the corporation. People *v.* Rensselaer, etc. R. R., 15 Wend. 113 (1836). *Quo warranto* against a corporation in its corporate name admits that it was legally incorporated. North, etc. Stock Co. *v.* People, 147 Ill. 234 (1893). As to the pleadings in *quo warranto*, see Distilling, etc. Co. *v.* People, 156 Ill. 448 (1895); People *v.* Stanford, 77 Cal. 360 (1888). As to the pleadings in *quo warranto* against a street railway company assuming to be a corporation, see Smith *v.* State, 140 Ind. 343 (1895). For pleadings in *quo warranto* proceedings by the state to oust a corporation from usurped franchises and to forfeit a railroad charter, see People *v.* Stanford, 77 Cal. 360 (1888), holding also that the statute of limitations is no bar. The state cannot file a *quo warranto* proceeding to forfeit a charter, where a receiver is already in charge, unless the consent of the court is first obtained. Wayne Pike Co. *v.* State, 134 Ind. 672 (1893).

[1] Attorney-General *v.* Detroit Suburban Ry., 96 Mich. 65 (1893).

feiture did exist, but that it still continues to exist. Moreover some public interest must be involved in obtaining the forfeiture.[1] *Quo warranto* lies against a railroad corporation to recover back to the state canal lands which the railroad is using.[2] *Quo warranto* or an information in the nature thereof is the proper remedy where the corporation has not been legally incorporated.[3] The attorney-general may file an information in *quo warranto* without leave of the court.[4] *Quo warranto* for claiming to be a corporation should be against the officers of the corporation as individuals.[5] Under the Massachusetts statutes any person who is injured by a corpo-

[1] People *v.* Ulster, etc. R. R., 128 N. Y. 240 (1891). See also § 634, *infra.*

[2] Ohio *v.* Railway Co., 53 Ohio St. 189 (1895).

[3] The state may forfeit a charter where the statute required five persons to sign and acknowledge the articles, but only four out of the five actually did acknowledge them. People *v.* Montecito Water Co., 97 Cal. 276 (1893). In *quo warranto* proceedings on the ground that the company was not properly incorporated, the corporation itself is a necessary party defendant. People *v.* Montecito Water Co., 97 Cal. 276 (1893). A charter of the company will be forfeited at the instance of the state where some of the parties who are alleged to join in the corporation did not so join, but their names were inserted without their sanction or authority. Such parties are not liable as stockholders. La Banque d'Hochelaga *v.* Murray, L. R. 15 App. Cas. 414 (1890). See also §§ 236, 237, *supra.* In a *quo warranto* proceeding to declare void an alleged charter the corporation is a necessary party defendant. People *v.* Flint, 64 Cal. 49 (1883). After the attorney-general institutes *quo warranto* proceedings and much testimony is taken, and then the proceeding is discontinued, and the company proceeds to expend money and make contracts, the attorney-general will not be allowed to institute new proceedings. *Re* Equity Gas-Light Co., 10 N. Y. Supp. 801 (1890). See 141 N. Y. 232 (1894). In *quo warranto* charging defendants with usurping a public franchise to operate a ferry, where they attempted to defend on the ground that they had a legal right to use the ferry, the burden was on them to show a valid title. Gunterman *v.* People, 138 Ill. 518 (1891). Where an incorporation is for several objects, one of which is illegal, the charter will be forfeited, the objects not being clearly separable. People *v.* Chicago Gas T. Co., 130 Ill. 268 (1889). The issuing of transferable certificates of stock is not assuming the functions of a corporation. Rice *v.* Rockefeller, 56 Hun, 516 (1890); reversed on other points in 134 N. Y. 174. A suit instituted by the state to forfeit a charter cannot be removed to the federal court on the ground that a contract exists between the corporation and the state, and that such contract will be violated. Commonwealth *v.* Louisville Bridge Co., 42 Fed. Rep. 241 (1890). A corporation incorporated for an illegal purpose, such as buying a majority or all of the stock in each of four competing gas corporations, and thereby creating a monopoly, is subject to having its charter forfeited at the instance of the attorney-general. People *v.* Chicago Gas Trust Co., 130 Ill. 268 (1889). In *quo warranto* proceedings against a turnpike company, the latter has the burden of proof to show by what authority it is exercising its privileges. People *v.* Volcano, etc. Co., 100 Cal. 87 (1893).

[4] State *v.* Equitable Loan, etc. Co., 142 Mo. 325 (1897).

[5] State *v.* Fleming, 147 Mo. 1 (1898).

ration may file an information in the nature of *quo warranto* against the corporation.[1] But at common law an information to forfeit a charter does not lie for wrongs to creditors and stockholders. It lies only for *ultra vires* acts, wilful and continued, and relating to some franchise granted.[2] *Quo warranto* lies against foreign corporations doing business illegally in the state.[3] The state by *quo warranto* may oust a railroad from discriminations in favor of oil shipped in tank cars.[4] An exemption from taxation is not a franchise. Hence, *quo warranto* does not lie to oust the corporation from such exemption.[5] Although *quo warranto* can be only for acts committed within five years in Ohio, yet it serves to oust a company from exercising a power which it has not exercised continuously for twenty years.[6] The court has no power to appoint a receiver in *quo warranto* proceedings. A receiver can be appointed only in a suit in equity unless a statute provides otherwise.[7]

§ 634. *Non-user as a cause for forfeiture — Forfeiture for failure to complete a railroad or enterprise.*— Non-user of its franchise is a cause for forfeiture where a corporation is possessed not only of its franchise to be a corporation, but also other franchises, such as a right of way, which the public are interested in having kept in active use. Thus, where a charter required a street railway company to lay its tracks on certain streets, and the company did so on a part of such streets and then removed them, and for many years operated no cars thereon at all, the court held that the charter might be forfeited at the instance of the state.[8] Where a street

[1] Hartnett *v.* Plumbers' Supply Assoc., 169 Mass. 229 (1897).

[2] State *v.* Southern, etc. Assoc., 31 S. Rep. 375 (Ala. 1902).

[3] State *v.* Western, etc. Ins. Co., 47 Ohio St. 167 (1890); State *v.* Fidelity, etc. Co., 39 Minn. 538 (1888). *Quo warranto* against a foreign corporation illegally doing business in the state must be against the corporation as such and not merely against its officers and agents. State *v.* Somerby, 42 Minn. 55 (1899). Where a foreign corporation has not complied with reasonable regulations by the state as a condition of its doing business in the state, *quo warranto* lies to oust it of its claim of right to do business in the state. State *v.* American, etc. Co., 69 Pac. Rep. 563 (Kan. 1902). An injunction lies at the instance of the state against foreign corporations. See § 635, *infra.*

[4] State *v.* Cincinnati, etc. R. R., 47 Ohio St. 130 (1890).

[5] International, etc. Ry. *v.* State, 75 Tex. 356 (1889).

[6] State *v.* Standard Oil Co., 49 Ohio St. 137 (1892).

[7] Commonwealth *v.* Order of Vesta, 156 Pa. St. 531 (1893).

[8] People *v.* Broadway R. R., 126 N. Y. 29 (1891). A suit for forfeiture lies where a railroad company takes up part of its track. State *v.* West, etc. Ry., 34 Wis. 197 (1874); S. C., 36 Wis. 466 (1874). Or where a railroad company constructs but part of its road, has no station or freight-houses and no passenger coaches, but engages only in getting out coal from beds owned by those interested in the company. State *v.* Railway Co., 40 Ohio St. 504 (1884). But the suit does not lie on the ground that the company does not *intend* to complete

railway does not run its cars as required by the ordinance, the state, at the instance of the city, may by *quo warranto* proceedings oust the company from its rights in said ordinance. The remedy in such a case is not in equity.[1] A street railway grant from the city may be forfeited at the instance of the state where the company runs but one car a day in order to hold the franchise. It may also be forfeited for failure to construct the entire line within the time specified by statute.[2]

It is good cause for forfeiture of a charter by judicial decree that a railroad company does not complete its road, or does not complete it within a prescribed time.[3] And such a forfeiture at

its road. State *v.* Kingan, 51 Ind. 142 (1875); State *v.* Beck, 81 Ind. 501 (1882). No forfeiture is decreed because a railroad company discontinues passenger trains over a branch line which is run at a loss by reason of horse-car competition. Commonwealth *v.* Fitchburg R. R., 78 Mass. 180 (1858). The lessee of a railroad is a proper party defendant to a suit to forfeit franchises for non-user. People *v.* Albany, etc. R. R., 77 N. Y. 232 (1879); State *v.* Minnesota Cent. Ry., 36 Minn. 246 (1886). An assignment of all corporate assets to others, thereby rendering the corporation incapable of continuing business, is cause for forfeiture. State *v.* Real Estate Bank, 5 Ark. 595 (1843). A bank which ceases to do business and to file statements, and which makes improper loans to its directors, is liable to forfeiture of charter. State *v.* Seneca County Bank, 5 Ohio St. 171 (1856). It is not a non-user for a county-fair corporation to rent its grounds. Kent County Agr. Soc. *v.* Houseman, 81 Mich. 609 (1890). Where the statute prescribes that non-user for a year shall be cause for forfeiture, a non-user for a few days is insufficient. People *v.* Atlantic, etc. R. R., 125 N. Y. 513 (1891). A railroad which is leased to another company without statutory provisions to do so is subject to forfeiture at the instance of the state. State *v.* Atchison, etc. R. R., 24 Neb. 143 (1888). As to a failure of a railroad corporation to complete its road, see § 638, *infra*. The abandonment of the right of way by the railroad is no ground for an action of trespass by the former owner to recover it. Logan *v.* Vernon, etc. R. R., 90 Ind. 552 (1883). See, on this subject, § 906, *infra*.

[1] In this case the company had not run its cars for three years. State *v.* East Fifth St. Ry., 140 Mo. 539 (1897).

[2] People *v.* Sutter St. Ry., 117 Cal. 604 (1897), holding also that the court may impose a fine instead of forfeiting the rights.

[3] The failure of a railroad corporation to complete its line as laid down in the charter is ordinarily good cause for forfeiture of its charter, but the state may waive it. People *v.* Ulster, etc. R. R., 128 N. Y. 240 (1891). See also New York, etc. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884). A railroad may construct its line long subsequently to the date of its charter, there being no limit in its charter as to time of construction. Western, etc. R. R.'s Appeal, 104 Pa. St. 399 (1883); Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410 (1836). If the time limited for the completion of the road has expired, this is a defense to eminent-domain proceedings. Morris, etc. R. R. *v.* Central, etc. R. R., 31 N. J. L. 205 (1865). *Cf.* § 637, *infra*. The state may forfeit the charter where the road is not constructed within the time fixed by the charter and amendments; also where it abandons a part of its lines. State *v.* Nonconnah Turnp. Co., 17 S. W. Rep. 128

the instance of the state, by reason of the failure of the corporation to complete its enterprise as required by charter, has often been decreed.[1]

(Tenn. 1875). Where a railroad company mortgages such part of its road as is completed, and the mortgage is foreclosed, the purchasers are not bound to go on and complete the road. Failure on their part to complete it is no defense to an action on a subscription. Chartiers Ry. *v.* Hodgens, 85 Pa. St. 501 (1877). The court will not forfeit the municipal grant to a water-works company, even though the latter does not extend its mains as required by the charter. *Mandamus* is the proper remedy. City of Topeka *v.* Topeka Water Co., 58 Kan. 349 (1897). *Cf.* § 931, *infra.*

[1] People *v.* Kingston, etc. Turnp. Co., 23 Wend. 193 (1840), where the road was not constructed as required; Thompson *v.* People, 23 Wend. 537 (1840), reversing 21 Wend. 235, holding that an immaterial omission is not fatal; People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1887); aff'd, 129 Ill. 618 (1889), forfeiting for failure to complete subscriptions as required by charter; Eastern, etc. Co. *v.* Regina, 22 Eng. L. & Eq. 328 (1853), for failure to pay in capital stock as required by charter; People *v.* City Bank, 7 Colo. 226 (1883), to same effect. See People *v.* Jackson, etc. P. R. Co., 9 Mich. 285 (1861), for a case of the construction of a road in sections. And where the charter prescribes that a certain number of miles shall be completed within a certain time, but does not prescribe that the effect of non-compliance shall be a forfeiture, then the only way of forfeiting the charter is by a suit and a decree of a court. Hughes *v.* Northern Pac. Ry., 18 Fed. Rep. 106 (1883); Arthur *v.* Commercial Bank, 17 Miss. 394, 430 (1848). The fact that a corporation commences business in another state within a year suffices for a charter provision that it must commence business within a year. *Re* Capital F. Ins. Co., L. R. 21 Ch. D. 209 (1882); People *v.* Kankakee Improvement Co., 103 Ill. 491 (1882). In this case the charter required the proposed improvements to be completed within eight years as far east as the state line. The company completed as far east as Kankakee City, and claimed the right to exercise the option of making or not making further improvements between that point and the state line. The court said: "The non-compliance with the requirements was *per se* a misuser, and a cause of forfeiture of the franchise as for condition broken;" and "we can see here but one entire franchise for the improvement of these streams, and that this obligation to make the improvements above Kankakee City was a condition annexed to this entire franchise. . . . We think the non-compliance with the requirement in question was a cause of forfeiture of the entire franchise." The bondholders of the company take the risk of this forfeiture of the charter for non-compliance with conditions. Silliman *v.* Fredericksburg, etc. R. R., 27 Gratt. (Va.) 119 (1876), where, however, the corporate officers were endeavoring to enforce fraudulent bonds. Some of the English railway acts are plainly not obligatory, but only enabling; and it is held that the evident intention of parliament was to permit the companies to complete their lines as far as possible or desirable before the limit of time set, and to abandon the remaining portion. York, etc. Ry. *v.* The Queen, 1 El. & Bl. 858 (1853), reversing same case, 1 El. & Bl. 178; Great Western Ry. *v.* The Queen, 1 El. & Bl. 874 (1853), reversing same case, 1 El. & Bl. 253; Edinburgh, etc. Ry. *v.* Philip, 2 Macq. H. L. Cas. 514, 526 (1857); Scottish N. E. Ry. *v.* Stewart, 3 Macq. H. L. Cas. 382, 414 (1859). See also Rex *v.*

A water-works charter will be forfeited where the company has abandoned business and attempted to sell out.[1] It is not the duty of the attorney-general, however, to lie in wait for all corporations, which have not fully or technically complied with all the requisites of their charters.[2]

Turning now to purely private corporations which do not exercise any great public franchises, it is the rule here too that for non-user *quo warranto* will lie.[3] Thus where a river-improvement company that has received a land grant from the state for the purpose of improving the river has long ceased operations, and the parties interested in it departed, an injunction and dissolution at the instance of the state may be obtained.[4]

A bill filed by the attorney-general to enjoin the construction of an electric street railroad will be dismissed where it was filed really at the instance of rival companies.[5] A corporation is not bound to

Birmingham Canal, 2 W. Bl. 708 (1780), by Lord Mansfield; Blakemore *v.* Glamorganshire Canal, 1 Myl. & K. 162 (1832), by Lord Eldon; The Queen *v.* Eastern Counties Ry., 10 Ad. & El. 531 (1839); The Queen *v.* Lancashire, etc. Ry., 1 El. & Bl. 228 (1852).

[1] City Water Co. *v.* State, 33 S. W. Rep. 259 (Tex. 1895).

[2] People *v.* De Grauw, 133 N. Y. 254 (1892); People *v.* Equity G. L. Co., 141 N. Y. 232 (1894); Lorillard *v.* Clyde, 142 N. Y. 456, 465, 466 (1894); People *v.* Ulster, etc. R. R., 128 N. Y. 240 (1891); United States *v.* San Jacinto Tin Co., 125 U. S. 273 (1888).

[3] The state may forfeit a charter for wilful non-user, although the corporation is a private one. People *v.* Milk Exchange, 133 N. Y. 565 (1892); Edgar Coll. Inst. *v.* People, 142 Ill. 363 (1892). See Attorney-General *v.* Simonton, 78 N. C. 57 (1878), holding that the suit will not lie, although only five shares of stock were subscribed for and no other act done by the corporation; State *v.* Societe Republicaine, etc., 9 Mo. App. 114 (1880), holding the same, though the company was dormant. But the case of State *v.* Pipher, 28 Kan. 128 (1882), forfeited the charter of an agricultural college for non-user for nineteen years. And see dicta in Terrett *v.* Taylor, 9 Cranch, 43, 51 (1815); State *v.* Commercial Bank, 21 Miss. 569 (1850). In New York by statute such a suit will lie. Code Civ. Pro., § 1798. See also *Re* Jackson, etc. Ins. Co., 4 Sandf. Ch. 559 (1847). Where a corporation has abandoned its authorized business and engaged in another it will be wound up. This is different from a case where the directors have merely and incidentally committed *ultra vires* acts. *Re* Crown, etc. Bank, L. R. 44 Ch. D. 634 (1890). An abandonment by a corporation of part of the purposes of its incorporation is no cause for dissolution. Norwegian Titanic Iron Co., 35 Beav. 223 (1865), where, its purpose being to purchase English and Norway mines, it sold the English mines. By the terms of a new constitution, all corporations which have failed to organize before its adoption may be deemed to have forfeited their franchises thereby. Chinclecla-manch, etc. Co. *v.* Commonwealth, 100 Pa. St. 438 (1882).

[4] State *v.* Cannon, etc. Assoc., 67 Minn. 14 (1896).

[5] People *v.* General Electric Ry., 172 Ill. 129 (1898). A bill filed by a stockholder under the terms of a statute to bring about a dissolution and winding up of the corporation will be dismissed where it is shown that the

exercise all the powers contained in its charter.[1] Even though the property of a private corporation is sold out on execution and it does no business for eight years, yet it may resume business.[2]

§ 635. *Injunction at the instance of the state.*— Turning now to the subject of injunction as a remedy, it is very doubtful whether the state may file a bill in equity to enjoin a corporation from committing an *ultra vires* act. The remedy of the state is *quo warranto.*[3] In England, however, a bill has been sustained to restrain a railroad corporation from engaging in the coal business.[4] And an injunction lies to enjoin a corporation, the same as an individual, from creating a public nuisance.[5] The state may enjoin a railroad corporation from purchasing a competing line in violation of the constitution.[6] In Wisconsin it is held that the attorney-general may enjoin

suit is brought in the interest of rival corporations. The reason for dismissal is that the suit is a fraud upon the court. Watson *v.* Le Grand, etc. Co., 177 Ill. 203 (1898). The state cannot bring *quo warranto* to prevent a street railway company from carrying freight where the proceedings are instituted at the instance of a competitor for the purpose of preventing competition. State *v.* Dayton, etc. Co., 60 N. E. Rep. 291 (Ohio, 1901).

[1] Illinois, etc. Bank *v.* Doud, 105 Fed. Rep. 123 (1900).

[2] Geneva, etc. Co. *v.* Coursey, 45 N. Y. App. Div. 268 (1899). See also § 631, *supra.*

[3] In *quo warranto* proceedings it is not necessary to forfeit the whole charter or none. There may be judgment of ouster from particular powers. See § 633, *supra.*

[4] Attorney-General *v.* Great Northern Ry., 1 Dr. & Sm. 154 (1860). But the attorney-general cannot enjoin a corporate act merely because it is *ultra vires.* Some injury to the public must be involved. The attorney-general's suit, at the instance of a manufacturer, to enjoin one railroad from leasing its rolling-stock to another failed. Attorney-General *v.* Great Eastern Ry., L. R. 11 Ch. D. 449 (1879). A court of equity cannot compel a corporation to cease collecting tolls, although it has not improved a stream as required by its charter. Pixley *v.* Roanoke, etc. Co., 75 Va. 320 (1881). In Attorney-General *v.* Mid-Kent Ry., L. R. 3 Ch. App. 100 (1867), a mandatory injunction requiring the defendant to construct a bridge was granted. The case of Attorney-General *v.* North, etc. Tramways Co., 72 L. T. Rep. 340 (1895), was an action brought by the attorney-general at the relation of several car manufacturers to restrain a street-railway company from manufacturing and selling rolling-stock to other companies on the ground that such acts were *ultra vires.*

[5] Attorney-General *v.* Jamaica Pond, etc. Corp., 133 Mass. 361 (1882). A corporation may be enjoined from doing criminal acts — in this case prize-fighting — and a receiver may be put in. Columbian Athletic Club *v.* State, 143 Ind. 98 (1895).

[6] Louisville, etc. R. R. *v.* Commonwealth, 97 Ky. 675 (1895); aff'd in 161 U. S. 677 (1896), *sub nom.* Louisville, etc. Ry. *v.* Kentucky. A court of equity has no jurisdiction to forfeit the franchises of a corporation, but it may, at the instance of the attorney general, enjoin the abuse or misuse of corporate franchises. State *v.* American, etc. Assoc., 64 Minn. 349 (1896). In the case of Trust Co. etc. *v.* State, 109 Ga. 736 (1900), there is a dictum that the state may enjoin a corporation from illegally purchasing shares of stock in other corporations where it is shown that an

railroad companies from taking greater rates than are prescribed by statute;[1] and in some of the states such a bill will lie by statute.[2] The attorney-general may file a bill to restrain a railroad company from laying its tracks on the street, and it is not necessary for him to prove any injury to the public.[3] A state may maintain a suit for an injunction against an elevator company using all its capacity for the benefit of its stockholders, where the objection is not raised that there is an adequate remedy at law.[4]

The weight of authority, however, is that the remedy of the state is by *quo warranto* and not by a bill in equity for an injunction.[5] As, for instance, the attorney-general cannot enjoin a gas

injury to the public is involved. The court said that while injunction was not the proper remedy for an act which was merely *ultra vires*, yet where some public interest intervened, such an injunction would lie.

[1] Attorney-General *v.* Railroad Cos., 35 Wis. 523, 553 (1874), reviewing many cases; but *cf.* Strong *v.* McCagg, 55 Wis. 624 (1882). A lease by a domestic railroad company of its railroad to a foreign railroad corporation is illegal, especially where it is expressly prohibited by statute. The court will enjoin the lease upon the application of the attorney-general where the effect of the lease would be to create a combination in the transportation of coal and to destroy competition in production and sale. Stockton *v.* Central R. R. of N. J., 50 N. J. Eq. 52 (1892). That a bill in equity will lie, at the instance of the United States government, to declare invalid a violation of a federal charter, see U. S. *v.* Western U. Tel. Co., 50 Fed. Rep. 28 (1892); aff'd, 160 U. S. 1 (1895).

[2] State *v.* Merchants', etc. Co., 8 Humph. (Tenn.) 254 (1874), where an insurance company was restrained from banking. So also in New York Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 496 (1837); Brinckerhoff *v.* Bostwick, 88 N. Y. 52 (1882), explaining the difference between this class of cases and cases where other parties are complainants. Concerning the power of the state to object to an *ultra vires* act of a private corporation by any proceeding other than *quo warranto*, see People *v.* Ballard, 134 N. Y. 269 (1892), a carefully considered case.

[3] Grey *v.* Greenville, etc. Co., 60 N. J. Eq. 153 (1900). And although a private owner of land who is not injured in any way different from the rest of the public cannot file such a bill, yet such private owner may be relator in an information filed by the attorney-general. Morris, etc. Co. *v.* Greenville, etc. Ry., 46 Atl. Rep. 638 (N. J. 1900).

[4] Central Elevator Co. *v.* People, 174 Ill. 203 (1898).

[5] Attorney-General *v.* Utica Ins. Co., 2 Johns. Ch. 371 (1817); Attorney-General *v.* Bank of Niagara, Hopk. Ch. 354 (1825). But see People *v.* Ballard, 134 N. Y. 269 (1892). In Attorney-General *v.* Tudor Ice Co., 104 Mass. 239 (1870), an injunction restraining an ice company from importing teas was denied. A state creating a corporation has no visitorial power over it — *i. e.*, power to correct corporate abuses — except "(1) where municipal, charitable, religious, or eleemosynary corporations, public in their nature, had abused their franchises, perverted the purpose of their organization, or misappropriated their funds; and as they, from the nature of their corporate functions, were more or less under government supervision, the attorney-general proceeded against them to obtain correction of the abuse; or (2) where private corporations, chartered for private and limited purposes,

company from laying its pipes, even though he claims that the charter was void by reason of the company not having commenced work within the prescribed time.[1] *Quo warranto* may be the remedy of the state where "watered" stock has been illegally issued.[2]

An injunction does not lie at the instance of the state against a corporation doing business, on the ground that its stock was not properly issued and that there was no intent to do any business within the state or to have an office therein; nor does an injunction lie at the instance of the state to restrain a corporation from transacting business, even though it was formed to bring about, by conditions imposed upon selling agents, a monopoly in the cigarette business, and had largely succeeded in doing so.[3] The state may enjoin foreign corporations from doing business illegally in the state.[4]

had exceeded their powers, and were restrained or enjoined in the same manner from the further violation of the limitation to which their powers were subject." Hence the United States, as the creator of the Union Pacific Railroad, cannot exercise visitorial power over it in respect to frauds in its management. U. S. *v.* Union Pacific R. R., 98 U. S. 569, 617 (1878). *Cf.* Attorney-General *v.* Wilson, 1 Cr. & Ph. 1 (1840), holding that the court had jurisdiction over charitable corporations, and that when the trustees of them abuse their trust the court would take notice of such abuse by reason of its visitorial powers. Also, on this point, Attorney-General *v.* Foundling Hospital, 2 Ves. Jr. 42 (1793). See the Pennsylvania cases in § 314, *supra*, where the state enjoined an illegal purchase of stock by a corporation.

[1] People *v.* Equity Gas Light Co., 141 N. Y. 232 (1894). The attorney-general cannot maintain an injunction against a combination of insurance companies to fix rates and commissions, inasmuch as insurance business is not a public or quasi-public business, nor does it concern a staple of life. Queen Ins. Co. *v.* State, 86 Tex. 250 (1893).

[2] See § 37, *supra*. Even though a person who has a contract with a street railway company that the latter will lease its street railway on certain terms, turns over such contract to a new corporation for $900,000 of stock of the latter, and the latter then assumes the lease, and even though such stock is illegal under the constitution and statutes of Pennsylvania, yet where the state delays three years in filing a bill to declare it void, and meanwhile the stock has passed into *bona fide* hands, and not until five years thereafter are the real owners of the stock made parties defendant, the bill will be dismissed. Commonwealth *v.* Reading, etc. Co., 53 Atl. Rep. 755 (Pa. 1902).

[3] The remedy, if any, is by *quo warranto*. The court reviewed the cases wherein injunction would lie. Stockton *v.* American, etc. Co., 55 N. J. Eq. 352 (1897).

[4] The state may enjoin a foreign railroad company from carrying on the warehouse business, except so far as the same is incidental to the railroad business, the charter of such company not including warehouse business as a business in itself. State *v.* Southern, etc. Co., 52 La. Ann. 1822 (1900). The Tennessee statute, prohibiting foreign corporations from doing business in the state where they have combined to lessen competition and influence prices, is legal, and the state may file a bill to restrain foreign corporations from

§ 636. *The state may waive its right to forfeit a charter.*— Various acts have been held to constitute such a waiver. "When a legislature has full power to create corporations, its act recognizing as valid a *de facto* corporation, whether private or municipal, operates to cure all defects in steps leading up to the organization, and makes a *de jure* out of what before was only a *de facto* corporation." There must, however, be a *de facto* organization upon which this recognition may act.[1] Numerous instances of acts of the legislature which constitute a waiver are set forth in detail in the notes below.[2]

doing business in the state where they have violated such statute. State *v.* Schlitz, etc. Co., 104 Tenn. 715 (1900). As to *quo warranto* against foreign corporations, see § 633, *supra.*

[1] Comanche County *v.* Lewis, 133 U. S. 198 (1890).

[2] A legislative recognition of a charter may cure any unconstitutionality in the statute creating it. Snell *v.* Chicago, 133 Ill. 413 (1890). The extension of time to complete railroads applies so as to prevent forfeiture for non-completion within the original time. State *v.* Bergen Neck Ry., 53 N. J. L. 108 (1890). Although suit is brought to forfeit a street-railway franchise for using electric power without authority, the legislature may cure the defect of power. To forfeit for not commencing work within a year the pleading must allege when the work was commenced. People *v.* Los Angeles, etc. Ry., 91 Cal. 338 (1891). An amendment to a charter is a waiver of any forfeiture thereof due to not commencing business within the prescribed time. Farnsworth *v.* Lime Rock, etc. R. R., 83 Me. 440 (1891). Although the act requires the certificate of incorporation to specify the termini, and the certificate merely says the termini are in a certain city, yet if the legislature subsequently, by special act, recognizes the company, the legality of its existence cannot be questioned. Koch *v.* North Ave. Ry., 75 Md. 222 (1892). In this case the organization was under the general railroad law. Under such a charter the route and its termini are to be determined by the mayor and city council "under their general power of control and regulation of the streets." A statute authorizing a corporation to reduce its capital stock waives informalities in its incorporation, and such waiver may extend to an illegal issue of watered stock. State *v.* Webb, 110 Ala. 214 (1896). A waiver may be express or by statutes recognizing its continued existence, *Re* New York El. R. R., 70 N. Y. 327, 338 (1877); People *v.* Manhattan Co., 9 Wend. 352, 380 (1832); or requiring it to make alterations on its road, Atty. Gen. *v.* Petersburg, etc. R. R., 6 Ired. L. (N. C.) 470 (1846); or authorizing a transfer of its property and franchises to another corporation, Chesapeake, etc. Canal Co. *v.* Baltimore, etc. R. R., 4 G. & J. (Md.) 1, 127 (1832); or requiring a bank to resume specific payments by a certain date, Commercial Bank *v.* State, 6 Sm. & M. (Miss.) 599, 622 (1846). But waiver as to terminus is not a waiver of an abandonment of part of the road, nor of a defect as to the width of the turnpike. People *v.* Fishkill, etc. Co., 27 Barb. 445 (1857). Waiver may arise by a statute extending the corporate powers. People *v.* Ottawa, etc. Co., 115 Ill. 281 (1885); Central, etc. R. R. *v.* Twenty-third, etc. R. R., 54 How. Pr. 168, 186 (1877); or by authorizing a change of route, State *v.* Fourth, etc. Co., 15 N. H. 162 (1844); or by expressly waiving the cause for forfeiture, Lumpkin *v.* Jones, 1 Ga. 27 (1846). The legislature may

§ 637. ***Who may allege that forfeiture or non-incorporation or dissolution exists — De facto corporations.***— It has already been shown that no one but the state can institute a suit to declare a forfeiture.[1] Also, that no one can institute a suit in equity to dissolve a corporation.[2] The question now arises whether the state or any person, either as plaintiff or defendant, may allege forfeiture or dissolution or non-incorporation where there have been no *quo warranto* proceedings instituted and prosecuted by the state to judgment. With a few exceptions such an allegation is not allowed.

A creditor of a supposed corporation cannot ordinarily hold the stockholders liable as partners although they did not legally incorporate.[3] It is true that in certain cases, where a stockholder is made liable to corporate creditors upon the dissolution of the corporation, a dissolution is held to exist where the corporation is

expressly waive a cause for forfeiture arising from suspension of specie payments. Atchafalaya Bank *v.* Dawson, 13 La. 497 (1839). May waive by extending the time for completion. La Grange, etc. R. R. *v.* Rainey, 7 Coldw. (Tenn.) 420 (1870). Amending charter, etc., is a waiver. White's, etc. Co. *v.* Davidson County, 3 Tenn. Ch. 396 (1877). An act reviving a corporation is a waiver, even though the act was fraudulently passed. *Re* Mechanics' Soc., 31 La. Ann. 627 (1879). The waiver protects a turnpike corporation from an indictment for obstructing the road. State *v.* Godwinsville, etc. Co., 44 N. J. L. 496 (1882). But the waiver must have been clearly intended. People *v.* Kingston, etc. Co., 23 Wend. 193 (1840). The appointment of a corporate officer by the governor and senate is not a waiver. People *v.* Phœnix Bank, 24 Wend. 431 (1840). Long delay in bringing the *quo warranto* may be a waiver. People *v.* Williamsburgh, etc. Co., 47 N. Y. 586 (1872); People *v.* Oakland, etc. Bank, 1 Doug. (Mich.) 282 (1843). *Cf.* § 633, notes, *supra. Dictum*, that the state may waive forfeiture. Briggs *v.* Cape Cod, etc. Co., 137 Mass. 71 (1884), citing cases. A special act amending the charter waives defects in the articles of association as filed. Basshor *v.* Dressel. 34 Md. 503 (1871). An amendment to a charter waives the right of forfeiture for fraud, non-user, and misuser. People *v.* Ottawa, etc. Co., 115 Ill. 281 (1886). An amendment of the charter is a waiver. Attorney-General *v.* Petersburg, etc. R. R., 6 Ired. L. (N. C.) 456 (1846); Charles River Bridge Co. *v.* Warren Bridge, 24 Mass. 344 (1829). The waiver may be express. State *v.* Bank of Charleston, 2 McMull. (S. C.) 439 (1843); Enfield Bridge Co. *v.* Connecticut, etc. Co., 7 Conn. 28 (1828); Kanawha Coal Co. *v.* Kanawha, etc. Co., 7 Blatchf. 391 (1870); s. c., 14 Fed. Cas. 108. Where the incorporation had been irregular, the recognition of a corporation by the legislature is equivalent to a charter. McAuley *v.* Columbus, etc. Ry., 83 Ill. 348 (1876); Cowell *v.* Colorado Springs Co., 3 Colo. 82 (1876); Mead *v.* New York, etc. R. R., 45 Conn. 199 (1877); Kanawha Coal Co. *v.* Kanawha, etc. Co., 7 Blatchf. 391 (1870); s. c., 14 Fed. Cas. 108; St. Louis R. R. *v.* Northwestern, etc. Ry., 2 Mo. App. 69 (1876); Atlantic, etc. R. R. *v.* St. Louis, 66 Mo. 228 (1877); State *v.* Morris, 73 Tex. 435 (1889). *Contra*, where charters must be granted by general laws. Oroville, etc. R. R. *v.* Supervisors, 37 Cal. 354 (1869). But see Brent *v.* State, 43 Ala. 297 (1869).

[1] § 632, *supra*.

[2] § 629, *supra*.

[3] See ch. XIII, *supra*.

hopelessly insolvent.[1] And it is true that where a railroad corporation attempts to acquire a right of way, the persons whose property will be affected thereby may oppose the acquisition of the right of way by showing that the company is not legally incorporated.[2] But aside from these exceptions no one is allowed to assert that the corporation is dissolved, or its franchise forfeited, or its incorporation illegal, until after such a result has been decreed by a court in a proceeding instituted for that purpose by the state. Thus, a stockholder sued on his subscription cannot, unless his subscription was made previous to the incorporation, set up that the company was not legally incorporated.[3]

The corporation is called a *de facto* corporation, and only the state is allowed to question its existence.

If there is a law authorizing incorporation, and a company has attempted to organize under it and has acted as a corporation, it

[1] See § 631, *supra*.

[2] *Re* Brooklyn, etc. Ry., 72 N. Y. 245 (1878); *Re* New York Cable Co. *v.* Mayor, etc., 104 N. Y. 1 (1887). In condemnation proceedings the incorporation may be attacked as not being *de facto*. Its *de jure* existence cannot be so attacked. Brown *v.* Calumet River Ry., 125 Ill. 600 (1888). In condemnation proceedings the defense that the corporation has ceased to exist for failure to complete its road within ten years is not good, inasmuch as the corporate existence can be attacked only in a direct proceeding for that purpose. Morrison *v.* Forman, 177 Ill. 427 (1898). A railroad company regularly organized is entitled to condemn a right of way, even though it was organized in the interest of a coal company which furnished the capital for such railroad. The claim that the railroad company is merely a dummy for the coal company is no defense to the condemnation proceedings. Kansas, etc. Ry. *v.* Northwestern, etc. Co., 161 Mo. 288 (1901). An adjacent owner cannot enjoin a street-railway company on the ground that its charter is invalid, unless his property rights are affected. Nichols *v.* Ann Arbor, etc. Ry., 87 Mich. 361 (1891). A person whose land a corporation seeks to take under power of eminent domain cannot set up that the articles of incorporation had not been filed with the secretary of state, as required by the incorporating statute. Portland, etc. Co. *v.* Bobb, 88 Ky. 226 (1889). A railroad charter is not good so far as the right to condemn land is concerned, where the terminus is stated to be on the state line in a certain county. Atlantic, etc. R. R. *v.* Sullivant, 5 Ohio St. 276 (1855). In condemnation proceedings the defendant cannot set up that the charter has been violated. *Re* Long Island R. R., 143 N. Y. 67 (1894). The existence of a railroad corporation cannot be questioned in an action brought by it to condemn land. Wellington, etc. R. R. *v.* Cashie, etc. Co., 114 N. C. 690 (1894). Where a gas company opens the streets under a statute and pays damages, and partly lays its pipes, it cannot subsequently be enjoined by a property owner on the ground that the statute has subsequently been adjudged to be unconstitutional. King *v.* Philadelphia Co., 154 Pa. St. 160 (1893).

[3] §§ 183–186, *supra*. Concerning the question of who can complain of mistakes, irregularities, and illegalities in the corporation, see also ch. I, § 5, *supra*.

is a *de facto* corporation, and its *de jure* existence can be questioned only by the state.[1]

A person who gives a bond or note to a corporation is not allowed to defeat the bond by alleging that the corporation was not duly incorporated;[2] nor can the corporation defeat its bonds or

[1] Independent Order *v.* United Order, 94 Wis. 234 (1896). "The test of a *de facto* corporation is this: Was there a law under which there might have been a *de jure* corporation of the kind, character, and class to which the organization in question apparently belongs?" Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497, 508 (1899). In proving a *de facto* corporation the meetings and the issue of stock and the transaction of business may be proved by parol without producing the books. Johnson *v.* Okerstrom, 70 Minn. 303 (1897). A *de facto* corporation exists where the company might have incorporated under the statutes and has acted as a corporation. Methodist, etc. Church *v.* Pickett, 19 N. Y. 482 (1859). Estoppel as to corporate existence seems to mean that the corporation is obliged to prove only a *de facto* existence, and need not prove the details of incorporation. Leonardsville Bank *v.* Willard, 25 N. Y. 574 (1862).

[2] The validity of the incorporation of an insurance company cannot be questioned by a person who has given to it a capital-stock note. Raegener *v.* Hubbard, 167 N. Y. 301 (1901). A member of a building and loan association who borrows money from it cannot defend against the loan on the ground that it was illegally organized. Manship *v.* New, etc. Assoc., 110 Fed. Rep. 845 (1901). The maker of a note in payment for goods sold by a corporation cannot question the corporate existence. First etc. Church *v.* Grand Rapids, etc. Co., 15 Colo. App. 46 (1900). Where a bond has been given to a corporation for the performance by the treasurer of his duties, and the corporation sues on such bond, due incorporation cannot be denied. Wood *v.* Friendship, etc., 106 Ky. 424 (1899). A railroad suing on a note cannot be defeated by the defense that it has forfeited its charter, there being no adjudication to that effect. Toledo, etc. R. R. *v.* Johnson, 49 Mich. 148 (1882). A suit by the corporation on a bond is not to be met by a plea of forfeiture for non-user. West *v.* Carolina, etc. Ins. Co., 31 Ark. 476 (1876). Nor its suit on a note by the plea that it has abandoned its franchises. John *v.* Farmers', etc. Bank, 2 Blackf. 367 (1830); East Tennessee, etc. Co. *v.* Gaskell, 2 Lea (Tenn.), 742 (1879); Hartsville University *v.* Hamilton, 34 Ind. 506 (1870). An indorser sued by the corporation cannot claim that it has rendered its charter liable to forfeiture by suspension of specie payments. Atchafalaya Bank *v.* Dawson, 13 La. 497 (1839). See also McFarlan *v.* Triton Ins. Co., 4 Denio, 392 (1847); St. Louis *v.* Shields, 62 Mo. 247 (1876); Loaners' Bank *v.* Jacoby, 10 Hun, 143 (1877); Commissioners, etc. *v.* Bolles, 94 U. S. 104 (1876); Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532 (1729), where a foreign corporation sued and the general issue was not pleaded. Proof of organization in fact and user meets a plea of *nul tiel corporation* by the maker of a note to the corporation. Mitchell *v.* Deeds, 49 Ill. 416 (1867); Smelser *v.* Wayne, etc. T. Co., 82 Ind. 417 (1882). But see Williams *v.* Bank of Michigan, 7 Wend. 540 (1831). In a suit by a corporation on a note, the execution of the note to the corporation is *prima facie* proof of its incorporation. A *de facto* corporation may enforce a note given to it. Hudson *v.* Green Hill Seminary, 113 Ill. 618 (1885); Booske *v.* Gulf Ice Co., 24 Fla. 550 (1888); Winget *v.* Quincy Bldg. etc. Assoc., 128 Ill. 67 (1889). In a suit by a *bona fide* indorsee of a note from a corporation as indorser,

debt by alleging its want of lawful incorporation.[1] A tenant cannot, in an ejectment suit, set up that his landlord was not duly incorporated.[2] But where a proposed national bank is never authorized by the comptroller of the currency to commence business and

the maker cannot set up that the company was not properly incorporated. Brickley *v.* Edwards, 131 Ind. 3 (1892). The maker of a note to a bank cannot question its incorporation. Exchange Nat. Bank *v.* Capps, 32 Neb. 242 (1891); Columbia Electric Co. *v.* Dixon, 46 Minn. 463 (1891); Butchers', etc. Bank *v.* McDonald, 130 Mass. 264 (1881); Jones *v.* Bank of Tennessee, 8 B. Mon. (Ky.) 122 (1847); Leonardsville Bank *v.* Willard, 25 N. Y. 574 (1862); Nutting *v.* Hill, 71 Ga. 557 (1883); Irvine *v.* Lumberman's Bank, 2 Watts & S. (Pa.) 204 (1841); Congregational Soc. *v.* Perry, 6 N. H. 164 (1833); Pape *v.* Capital Bank, 20 Kan. 440 (1878); Massey *v.* Building Assoc., 22 Kan. 624 (1879); Vater *v.* Lewis, 36 Ind. 288 (1871); Smith *v.* Miss. etc. R. R., 14 Miss. 179 (1846), where the maker of the note claimed that the corporation was fraudulently and illegally organized; Studebaker, etc. Co. *v.* Montgomery, 74 Mo. 101 (1881); Stoutimore *v.* Clark, 70 Mo. 471 (1875); Blake *v.* Holley, 14 Ind. 383 (1860); Jones *v.* Cincinnati, etc. Co., 14 Ind. 89 (1860), holding also that the corporation need not prove even a *de facto* existence. To same effect, Montgomery R. R. *v.* Hurst, 9 Ala. 513 (1846). *Cf.* White *v.* Campbell, 5 Humph. (Tenn.) 38 (1844), where the remarkable decision was made that, if the corporation had been dissolved at the time the note was given, the maker was not liable and could have a mortgage which he gave as security set aside. A *de facto* corporation, as indorsee of a note, may enforce it. Wilcox *v.* Toledo, etc. R. R., 43 Mich. 584 (1880); Haas *v.* Bank of Commerce, 41 Neb. 754 (1894); Bank of Shasta *v.* Boyd, 99 Cal. 604 (1893); 94 N. W. Rep. 329.

[1] Independent Order, etc. *v.* Paine, 122 Ill. 625 (1887); Blackburn *v.* Selma, etc. R. R., 2 Flip. 525 (1879); s. c., 3 Fed. Cas. 526; Racine, etc. R. R. *v.* Farmers', etc. Co., 49 Ill. 331, 346 (1868); Liter *v.* Ozokerite Min. Co., 7 Utah, 487 (1891); Aller *v.* Cameron, 3 Dill. 198 (1874); s. c., 1 Fed. Cas. 522, where a municipality set up this defense; Empire, etc. Mfg. Co. *v.* Stuart, 46 Mich. 482 (1882), a promissory note case. A corporation cannot defend against a debt on the ground that by a mistake one of the duplicate originals of its certificate of incorporation was filed in the state recorder's office instead of the county recorder's office. Huntington, etc. Co. *v.* Schofield, 28 Ind. App. 95 (1901). Where the suit is on a bond, a stockholder cannot sue to have the corporation declared a copartnership by reason of irregular incorporation. Baker *v.* Backus, 32 Ill. 79 (1863). Even though the statute requires the articles of incorporation to be filed in each county where the company does business, yet failure to file in one county is no defense to a note given to the company. Farmers', etc. Co. *v.* Borders, 60 N. E. Rep. 174 (Ind. 1901). The corporation itself, when sued upon notes which it has made, cannot set up any informality in its incorporation. Kelley *v.* Newburyport, etc. R. R., 141 Mass. 496 (1886); Empire Mfg. Co. *v.* Stuart, 46 Mich. 482 (1881), where the corporation re-incorporated in order to cure the irregularity.

[2] Ricketson *v.* Galligan, 89 Wis. 394 (1895). Or where the corporation sues for rent due on a lease made by it. Oregonian Ry. *v.* Oregon, etc. Nav. Co., 22 Fed. Rep. 245 (1884); s. c., 23 Fed. Rep. 232 (1885). A lessee of corporate property cannot refuse to vacate on the ground that the company was not properly incorporated and officered, and that it did not own the property. Fayetteville Waterworks Co. *v.* Tillinghast, 119 N. C. 343 (1896).

never does commence business, a lease made in its name cannot be enforced against it.[1] A person who mortgages land to a supposed corporation cannot defeat a foreclosure of the mortgage by alleging that the mortgagee is not a corporation;[2] nor can the corporation itself, having given a mortgage, defeat a foreclosure by such a plea.[3] It has been held that where a consolidation of two railroad

[1] McCormick *v.* Market Nat. Bank, 162 Ill. 100 (1896).

[2] People's Sav. Bank *v.* Collins, 27 Conn. 142 (1858); West, etc. Sav. Bank *v.* Ford, 27 Conn. 282 (1858); and Hasenritter *v.* Kirchhoffer, 79 Mo. 239 (1883), where the mortgagor's grantee was held to be estopped; Franklin *v.* Twogood, 18 Iowa, 515 (1865); Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883); Hubbard *v.* Chappel, 14 Ind. 601 (1860), where it was held that the mortgagee need not even prove itself to be a *de facto* corporation; Jones *v.* Kokomo, etc. Assoc., 77 Ind. 340 (1881). A mortgagor cannot attack the corporate existence of a mortgagee. Equitable, etc. Assoc. *v.* Bidwell, 60 Neb. 169 (1900). The regularity of the incorporation cannot be questioned in a suit by a corporation to foreclose a mortgage. Washington, etc. Assoc. *v.* Stanley, 38 Oreg. 319 (1901). But the mortgagor may deny the corporate existence of the assignee of the mortgagee. Dundee, etc. Co. *v.* Cooper, 26 Fed. Rep. 665 (1886). A second mortgagee cannot question the incorporation of the first mortgagee. Williamson *v.* Kokomo, etc. Assoc., 89 Ind. 389 (1883). In a mortgage foreclosure case brought by a corporation, the mortgagee cannot claim that the corporation took the mortgage before stock was subscribed to the amount required by its charter. Johnston *v.* Elizabeth, etc. Assoc., 104 Pa. St. 394 (1883). Parties contracting with a corporation as such cannot attack a mortgage given by the corporation on the ground that the corporation was never legally organized. Andrews *v.* National, etc. Works, 77 Fed. Rep. 774 (1897). A mortgagor to a foreign insurance company cannot demur to a bill for foreclosure on the ground that the taking of the mortgage was *ultra vires* and no certificate was filed. Boulware *v.* Davis, 90 Ala. 207 (1890). A stockholder who has given a mortgage to the corporation cannot defeat the same on the ground that the charter was unconstitutional. Building & Loan Assoc. *v.* Chamberlain, 4 S. D. 271 (1893). As against its mortgage the corporation cannot set up the defense that it was not legally organized, in that no stock was ever subscribed for. Jones *v.* Hale, 32 Oreg. 465 (1898).

[3] Quoted and approved in Phinizy *v.* Augusta, etc. R. R., 62 Fed. Rep. 678 (1894); Wallace *v.* Loomis, 97 U. S. 146 (1877); Racine, etc. R. R. *v.* Farmers', etc. Co., 49 Ill. 331, 346 (1868). Where the mortgagor was a consolidated company, the grantee of the corporation cannot deny the validity of its mortgage to another person by alleging its want of legal incorporation. Hasselman *v.* U. S. etc. Co., 97 Ind. 365 (1884). The lessee of the road of a railroad corporation cannot defeat the foreclosure of a mortgage given by the latter by alleging that the latter was never duly incorporated. Beekman *v.* Hudson, etc. Ry., 35 Fed. Rep. 3 (1888). A mortgagee of a *de facto* corporation is not defeated by an attachment against the company. Defects in incorporation are immaterial herein. Duggan *v.* Colorado, etc. Co., 11 Colo. 113 (1888). In a mortgage foreclosure the defense that the mortgagor was not legally incorporated or organized cannot be set up. Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883). A mortgagor corporation cannot defend against the

companies without statutory authority is void, and the consolidated company is not even a *de facto* company, a mortgage deed of trust and the bonds given by such a consolidated company cannot be enforced and do not bind even the constituent companies.[1] But where there is a statute authorizing such a consolidation, the rule is different.[2]

A grantor of land to a *de facto* corporation cannot deny the legality of his grant on the ground that the corporation was not duly incorporated.[3] Theoretically, however, a deed to a supposed cor-

mortgage on the ground that the special charter of the mortgagor was unconstitutional and void. McTighe *v.* Macon Const. Co., 94 Ga. 306 (1894). A junior mortgagee cannot question the incorporation of a senior mortgagee, the latter being a *de facto* corporation. Williamson *v.* Kokomo, etc. Assoc., 89 Ind. 389 (1883). It is no defense to a foreclosure that the mortgagor was not legally organized, and a stockholder will not be allowed to intervene to set up that defense. Gunderson *v.* Illinois, etc. Bank, 100 Ill. App. 461 (1902). It is no defense to a mortgage that in the incorporation of the company most of its subscriptions were made by irresponsible parties. Gunnerson *v.* Illinois, etc. Bank, 65 N. E. Rep. 326 (Ill. 1902).

[1] American L. & T. Co. *v.* Minnesota, etc. R. R., 157 Ill. 641 (1895). *Cf.* Coe *v.* New Jersey, etc. Ry., 31 N. J. Eq. 105 (1879).

[2] Thus no one but the state can attack the legality of a consolidation of a line of railroad running through Ohio, Indiana, and Illinois, where the statutes of those three states provided for such consolidation under certain circumstances, even though a judgment creditor who endeavors to attack such consolidation offers to prove that this consolidated company did not come within the terms of the statutes. Such a consolidated company is a *de facto* corporation, and no one but the state can attack its *de jure* existence, there being a statute under which such corporations apparently might exist. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). A general creditor of a consolidated corporation cannot attack the validity of the bonds of the corporation on the ground that the consolidation was not legal. Louisville T. Co. *v.* Louisville, etc. Co., 84 Fed. Rep. 539 (1898); rev'd on other grounds, 174 U. S. 674. *Cf.* 54 Atl. Rep. 121.

[3] Smith *v.* Sheeley, 12 Wall. 358 (1870); Frost *v.* Frostburg Coal Co., 24 How. 278 (1860). See also Cahall *v.* Citizens', etc. Assoc., 61 Ala. 232 (1878), where the corporation brought ejectment; Thompson *v.* Candor, 60 Ill. 244 (1871), where the grantor sued to recover possession; Sword *v.* Wickersham, 29 Kan. 746 (1883), where the grantee was a municipality; Cowell *v.* Colorado Springs Co., 3 Colo. 82 (1876); affirmed, 100 U. S. 55 (1879), where the corporation sued for breach of covenant; Alexander *v.* Tolleston Club, 110 Ill. 65 (1884), where the grantor claimed the right of way; Bakersfield, etc. Assoc. *v.* Chester, 55 Cal. 98 (1880); Keene *v.* Van Reuth, 48 Md. 184 (1877); Baker *v.* Neff, 73 Ind. 68 (1880); Snyder *v.* Studebaker, 19 Ind. 462 (1862),— cases where a grantee of the grantor was held estopped; Fay *v.* Noble, 61 Mass. 188 (1851), where a third person was not allowed to impeach a transfer of property by a corporation to another person, setting up that the transfer was invalid owing to informalities in the corporation.

The grantee of the corporation cannot defeat an attachment against it and levied on the land by setting up this defense. Dooley *v.* Walcott, 86

poration, which is not even a *de facto* corporation, has been held to be absolutely void.[1]

Mass. 406 (1862). But Carey *v.* Cincinnati, etc. R. R., 5 Iowa, 357 (1857), allowed a grantor to a foreign corporation to allege this defense to its suit for possession. A grantor to a corporation who aids the corporation in conveying to others is certainly not allowed this defense. Close *v.* Glenwood Cemetery, 107 U. S. 466 (1882). A corporation may hold and sell land, though in its incorporation the incorporators did not attach a seal to their signatures as required by statute. Stoker *v.* Schwab, 1 N. Y. Supp. 425 (1888). A conveyance to or by a *de facto* corporation cannot be avoided on the ground of any defect in its organization. Doyle *v.* San Diego, etc. Co., 46 Fed. Rep. 709 (1891). The grantor who has been paid cannot rescind on the ground that the grantee corporation could not take. Long *v.* Georgia Pac. Ry., 91 Ala. 519 (1891). In ejectment the incorporation of a prior grantor need not be shown. Finch *v.* Ullmann, 105 Mo. 255 (1891). A creditor of a supposed corporation cannot attack a mortgage given by it to another creditor on the ground that the company was irregularly organized. Briar Hill Coal, etc. Co. *v.* Atlas Works, 146 Pa. St. 290 (1892). A transfer of land by a *de facto* corporation is valid as against all parties except the state. Crenshaw *v.* Ullman, 113 Mo. 633 (1893). In ejectment the corporate existence cannot be questioned, its deed being in the chain of title. Finch *v.* Ullmann, 105 Mo. 255 (1891). In a suit by a corporation to protect real estate held for it by trustees, the defendants cannot attack the incorporation of the company. First Baptist Church *v.* Branham, 90 Cal. 22 (1891). The grantor of land cannot claim that the grantee was unincorporated and not qualified to hold land, the incorporation being only partially completed. Reinhard *v.* Virginia, etc. Co., 107 Mo. 616 (1891). Under the Montana statutes, even though no organization meetings of the stockholders and directors are held, yet a deed of property to the corporation may be valid. Morrison *v.* Clark, 24 Mont. 515 (1900). Where the owner of real estate deeds it to a supposed corporation, and many years afterwards makes another deed to another corporation, the latter cannot claim that the first corporation was illegally organized. It is for the state alone to make such claim. Los Angeles, etc. *v.* Spires, 126 Cal. 541 (1899). A statute validating deeds made to supposed corporations, which afterwards become incorporated, applies to deeds made after such statute. Cumberland, etc. Co. *v.* Daniel, 52 S. W. Rep. 446 (Tenn. 1899). A grantor of land to a corporation cannot reclaim it on the ground of a dissolution, there having been no decree of dissolution. Bohannan *v.* Binns, 31 Miss. 355 (1856). The title to land owned by a corporation is not affected by the fact that the articles of incorporation were filed with the county recorder instead of the county clerk, as required by statute. San Diego, etc. Co. *v.* Frame, 70 Pac. Rep. 295 (Cal. 1902).

[1] A deed to a corporation not in existence is void. Provost *v.* Morgan's, etc. Co., 42 La. Ann. 809 (1890). A purchaser of land from a corporation may object to the title on the ground that the corporation took title before a certain amount of its capital stock had been obtained, as required by statute. Globe Realty Co. *v.* Whitney, 30 S. Rep. 745 (La. 1901). Where no organization meetings are held and no officers elected, and no by-laws adopted, and no certificates of stock issued, and no seal adopted, and no records kept, the incorporation does not exist, even though a certificate of incorporation was issued by the state officers. Hence a deed delivered to such corporation

The question of whether a deed to an unincorporated association is valid is considered elsewhere,[1] as is also the effect of a deed to a corporation to be thereafter organized.[2]

In general it may be said that the uniform current of authority is to the effect that only the state may question the legality of the organization of a *de facto* corporation. Hence persons sued by a corporation in an action *ex contractu*, as well as persons sued by the corporation in an action *ex delicto*, are equally debarred from setting up the defense that the corporation was not legally organized.[3]

does not give title. Wall *v.* Mines, 130 Cal. 27 (1900). A deed to certain persons "as incorporators" of a company not yet incorporated does not vest title in the company when incorporated. McCandless *v.* Inland, etc. Co., 112 Ga. 291 (1900). Where the articles must be filed with the secretary of state and a fee paid in order to form a corporation, a transfer of property before this is done does not convey title to the corporation. The transferrer's creditors may attach the property. Jones *v.* Aspen Hardware Co., 21 Colo. 263 (1895).

[1] See § 504, *supra*.

[2] See § 694, *infra*.

[3] Keokuk Commercial Bank *v.* Pfeiffer, 108 N. Y. 242 (1888). A city contracting with a water-works company for water cannot defeat the rent on the ground that the company was not legally organized. City of Greenville *v.* Greenville, etc. Co., 125 Ala. 625 (1900). Even though an electric light company is incorporated under the general manufacturing act, yet if a city grants the company the right to use the streets and the company exercises the right for nine years, the city will not then be allowed to repudiate its grant. The state alone can raise the question. Wyandotte, etc. Co. *v.* City of Wyandotte, 124 Mich. 43 (1900). A city, after granting a franchise to a gas company, cannot afterwards question the regularity of its incorporation. City of Kalamazoo *v.* Kalamazoo, etc. Co., 82 N. W. Rep. 811 (Mich. 1900). Even though a charter has been taken out for water-works and also electric light purposes, although the statutes do not authorize the combining of those two businesses in one corporation, yet a contract made by the city with such corporation to pay certain hydrant and electric light rentals may be enforced, inasmuch as the contract is valid, even if the corporation be considered but a parnership. Cunningham *v.* City of Cleveland, 98 Fed. Rep. 657 (1899). A purchaser of goods from a corporation cannot allege that the company commenced business before a certain part of the capital stock had been paid in as required by its charter. Wells Co. *v.* Avon Mills, 118 Fed. Rep. 190 (1902). The legality of the existence of a gas company cannot be tested by a bill in equity filed by a municipality to prevent its officers and agents from laying pipes in the streets, especially where the corporation itself is not made a party defendant. Mayor, etc. *v.* Addicks, 7 Del. Ch. 56 (1899). A member of a mutual insurance company cannot, when sued for an assessment, set up that the articles of incorporation did not comply with the statute. Gilman *v.* Druse, 111 Wis. 400 (1901). It is no objection to the validity of the issue of stock for patents that the corporation selling the patents was not legally incorporated. Way *v.* American, etc. Co., 60 N. J. Eq. 263 (1900). Where a corporation sues to prevent a loss of its property, the defendant cannot set up the defense that the articles of incorporation were not acknowl-

The same rule applies when the corporation is defendant instead

edged as required by statute. Franke *v.* Mann, 106 Wis. 118 (1900). A person who has contracted to purchase land from a supposed corporation cannot avoid the contract by the defense that the charter of the company had expired. West Missouri, etc. Co. *v.* Kansas City, etc. Ry., 161 Mo. 595 (1901).

The validity of the charter of a school incorporated as a joint-stock incorporation cannot be tested in *quo warranto* proceedings brought to determine the rights of parties claiming to be trustees. Commonwealth *v.* Yetter, 190 Pa. St. 488 (1899). The legality of the existence of the corporation cannot be questioned in a creditor's suit to wind up and administer the assets. Hooven, etc. Co. *v.* Evans, etc. Co., 193 Pa. St. 28 (1899). A person injured by a railroad cannot sue the lessor of such railroad on the ground that the lessee was not a legal corporation. Pinkerton *v.* Pennsylvania, etc. Co., 193 Pa. St. 229 (1899). Even though a corporation was incorporated by a special act in violation of the constitution, yet its existence cannot be attacked collaterally. Commonwealth, etc. *v.* Philadelphia County, 193 Pa. St. 236 (1899).

An officer cannot defend against an action to make him account, by setting up that the company was fraudulently organized. Haacke *v.* Knights, etc. Club, 76 Md. 429 (1892). A person taking water from an irrigation company under contract cannot defend against an action thereon by alleging that the company was not incorporated. Fresno, etc. Co. *v.* Warner, 72 Cal. 379 (1887). A debtor sued by a corporation on an account cannot deny the corporate existence which he has recognized. Plummer *v.* Struby, etc. Co., 23 Colo. 190 (1896). A debtor or creditor of a corporation cannot attack the incorporation on the ground that the certificate of the payment of the capital stock has not been filed as required by the New York statutes. Port Jefferson Bank *v.* Darling, 91 Hun, 236 (1895). That the corporation may ratify and enforce contracts entered into in its behalf by its promoters before incorporation, see § 705, etc., *infra.* A corporation cannot defend against its contracts by alleging that it never published its articles of association as required by statute. Wood *v.* Wiley, etc. Co., 56 Conn. 87 (1888). A corporation is liable for a tax even though it failed to file its articles of association with the secretary of state as required by statute. Walton *v.* Riley, 85 Ky. 413 (1887). The defendant cannot allege that the corporation was for an illegal purpose — that of running blockades — the charter not showing that fact. Importing, etc. Co. *v.* Lock, 50 Ala. 332 (1873). A corporation cannot be defeated in an action on a contract by the fact that twenty-four instead of twenty-five persons signed the articles of incorporation. Buffalo, etc. Ry. *v.* New York, etc. R. R., 22 Alb. L. J. 134 (N. Y. 1886). Where a corporation sues for the price of articles sold, the defendant cannot set up that the plaintiff sold the articles before its capital stock was fully paid up, as required by statute. Chase's, etc. Co. *v.* Boston, etc. Co., 152 Mass. 428 (1891); McCord, etc. Co. *v.* Glenn, 6 Utah, 139 (1889). A stockholder cannot enjoin the sale of his stock for non-payment of an assessment on the ground that an amendment to the charter increasing the number from seven to nine had not been filed with the secretary of state, as required by statute, it being shown that at corporate meetings he had voted for nine directors and had accepted certificates of stock signed by the president and secretary elected by nine directors. Jackson *v.* Crown Point, etc. Co., 21 Utah, 1 (1899). A person sued for tolls cannot set up that the corporation has not rendered required statements, and hence its charter is forfeitable.

of plaintiff. The corporation itself is no more entitled to set up

Kellogg *v.* Union Co., 12 Conn. 7 (1837). Nor that the charter was never legally vested or has been violated. In a suit by a toll road to recover a penalty for refusal to pay toll, the validity of the company's organization and the condition of the road cannot be brought into the controversy by way of defense. Canal St. etc. Co. *v.* Paas, 95 Mich. 372 (1893). But a turnpike company cannot recover fares for the part of its road which is constructed beyond its chartered limits. Pontiac, etc. Co. *v.* Hilton. 69 Mich. 115 (1888); Dyer *v.* Walker, 40 Pa. St. 157 (1861). Under the California Code, § 358, the regular incorporation of a *de facto* corporation cannot be questioned in an action by it for damages for an injury to property. Golden Gate, etc. Co. *v.* Joshua, etc. Works, 82 Cal. 184 (1890). In a suit by a water company to enjoin another company from diverting water, the legality of the incorporation of the plaintiff cannot be questioned where it is a *de facto* corporation. People's, etc. Co. *v.* '76 Land, etc. Co., 44 Pac. Rep. 176 (Cal. 1896). In a trial for embezzlement from a corporation, proof of a *de facto* corporation is sufficient. People *v.* Leonard, 106 Cal. 302 (1895). In a trial for receiving stolen goods belonging to a corporation, a corporate officer's testimony of its existence is sufficient if not contradicted. State *v.* Hahib, 18 R. I. 558 (1894). In Irvine Co. *v.* Bond, 74 Fed. Rep. 849 (1896). an owner of land in California incorporated a company under the laws of West Virginia, and transferred to it in payment for stock certain portions of his land. He owned all the stock and caused one share each to be issued to his lawyer, his wife, and three employees. The court held that the corporation was legal so far as the jurisdiction of the United States court was concerned. A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant. Lamming *v.* Galusha, 81 Hun, 247 (1894); aff'd, 151 N. Y. 648, where it was also claimed that the incorporation had been insufficient. Where two railroad companies claim a right of way, one cannot allege that the other's charter is forfeitable. Central, etc. R. R. *v.* Twenty-third, etc. R. R., 54 How. Pr. 168, 185 (1877). A religious corporation suing for its real estate cannot be met by a plea of dissolution, there having been no decree. Baptist House *v.* Webb, 66 Me. 398 (1877). A corporation suing for personal property is not defeated by a plea that it was not legally organized or is dissolved by non-user. Penobscot, etc. Corp. *v.* Lamson, 16 Me. 224 (1839). A grantee of a corporation's right to overflow land is not deprived of his right by dormancy and non-user of its franchises by the corporation. Heard *v.* Talbot, 73 Mass. 113 (1856). Attachment lies against the land of a foreign corporation though a receiver of it exists in the state creating it. Moseby *v.* Burrow, 52 Tex. 396 (1880). One corporation cannot enjoin a competing corporation from proceeding on the ground that the latter has subjected its charter to forfeiture by misuser or non-user. Elizabethtown Gaslight Co. *v.* Green. 46 N. J. Eq. 118 (1889). A county cannot seize a turnpike, although the company is guilty of misuser or non-user. A judgment of forfeiture is first necessary. Moore *v.* Schoppert. 22 W. Va. 282 (1883). A city seeking to lay out a road on a right of way cannot claim that the railroad company's right is forfeited by non-user. New Jersey R. R. *v.* Long Branch Com'rs, 39 N. J. L. 28 (1876). Service on a corporation cannot be made by service on a stockholder on the ground that it has forfeited its charter by non-user. Bache *v.* Nashville, etc. Soc., 10 Lea (Tenn.), 436 (1882). The forfeiture can exist only after a decree to that effect. Chesapeake, etc. Co. *v.*

the defense of irregular, incomplete, or defective incorporation of itself than are the persons who are suing it.[1]

Baltimore, etc. R. R., 4 G. & J. (Md.) 1 (1832). An agent sued for conversion of funds cannot allege that the corporation is guilty of a non-user of its franchises. Elizabeth, etc. Acad. *v.* Lindsey, 6 Ired. L. (N. C.) 476 (1846). A squatter on corporate land cannot dispute the corporate title by alleging that it was not legally incorporated or organized. Only the state can object. East, etc. Church *v.* Froislie, 37 Minn. 447 (1887). Statutory provisions as to notice of the first meeting are directory. They need not be observed if the stockholders acquiesce. Braintree, etc. Co. *v.* Braintree, 146 Mass. 482 (1881). See § 590, *supra.* Though the provision in the Kentucky statutes requiring publication of the charter is not complied with, yet the corporation is valid and complete, except that the state may proceed to annul the charter. No other party can raise the objection. Stutz *v.* Handley, 41 Fed. Rep. 531 (1890); rev'd on other grounds, 139 U. S. 417; Walton *v.* Riley, 85 Ky. 413, 421 (1887), overruling Heinig *v.* Adams, etc. Mfg. Co., 81 Ky. 300 (1883). A *de facto* corporation suffices where it seeks to enjoin a city from disturbing its property. Denver *v.* Mullen, 7 Colo. 345 (1884). Or where an assignment by the corporation was illegal and the assignee is sued by creditors. Rafferty *v.* Bank of Jersey City, 33 N. J. L. 368 (1869). Or where the president is sued by the company to recover its assets from him. Bank of Circleville *v.* Renick, 15 Ohio, 322 (1846). Or where an execution purchaser of the corporate property sues the mortgagee of the corporation. Morgan *v.* Donovan, 58 Ala. 241 (1877). Or where the corporation sues the sheriff for an illegal levy on its property. Dannebroge Min. Co. *v.* Allment, 26 Cal. 286 (1864). Or where the suit grows out of contracts with the corporation. Imboden *v.* Etowah, etc. Min. Co., 70 Ga. 86 (1883); Platte Valley Bank *v.* Harding, 1 Neb. 461 (1870). Or where a bank sues its correspondent bank. Bank of Toledo *v.* International Bank, 21 N. Y. 542 (1860). Or where a foreign corporation sues for a stipulated part of the oil taken from its land, and the defendant alleges that it is doing all its business outside of the state incorporating it. Newburg, etc. Co. *v.* Weare, 27 Ohio St. 343 (1875). See also §§ 237–239, *supra.* Or where a foreign corporation sues the sheriff for trespass. Persse, etc. Works *v.* Willett, 1 Rob. (N. Y.) 131 (1863). Or where the company sues for tolls. Smelser *v.* Wayne, etc. Turnp. Co., 82 Ind. 417 (1882). The case of Welland Canal Co. *v.* Hathaway, 8 Wend. 480 (1832), allowed a contractor to deny the existence of a corporation which sued to recover back money which had been overpaid to him.

[1] Dooley *v.* Cheshire Glass Co., 81 Mass. 494 (1860); Callender *v.* Painesville, etc. R. R., 11 Ohio St. 516 (1860); Holbrook *v.* St. Paul, etc. Ins. Co., 25 Minn. 229 (1878). See also Bommer *v.* American, etc. Co., 81 N. Y. 468 (1880), where the corporation sought to escape royalties by alleging that it incorporated after the contract by it to pay them was made. A corporation sued for work done cannot set up that it was not regularly incorporated. Merrick *v.* Reynolds, etc. Co., 101 Mass. 381 (1869). A corporation cannot defeat its taxes by alleging failure to comply with conditions subsequent in its charter. Baltimore, etc. R. R. *v.* Marshall Co., 3 W. Va. 319 (1869). The corporation cannot avoid a tax on the ground that it has ceased business. Bank of U. S. *v.* Commonwealth, 17 Pa. St. 400 (1851). A corporation receiving the stock of another corporation in consideration of certain agreements as to renting machines belonging to said latter company cannot, when enjoined from violating that agreement, set up that the latter com-

Where, however, a corporation is not even a *de facto* corporation, then, of course, it falls back into the category of copartnerships and cannot bring suit as a corporation.[1]

pany was not properly organized. Automatic, etc. Co. *v.* North American, etc. Co., 45 Fed. Rep. 1 (1891). Although there are less stockholders and less directors than the statute or charter require, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). It is no defense to a proceeding by a religious corporation to collect a legacy to allege that there were irregularities in its incorporation, and that there has been a non-user of its franchises. *Re* Cutchogue Congregational Church, 131 N. Y. 1 (1892). The California code provides that the existence of a *de facto* corporation shall not be called in question in private suits. Lakeside, etc. Co. *v.* Crane, 80 Cal. 181 (1889); Golden, etc. Co. *v.* Joshua, etc. Works, 82 Cal. 184 (1890). An insurance company when sued on a policy cannot deny its incorporation on the ground that its charter required that it be published in a certain way within a specified time after the charter itself was granted and that this was not done. Brady *v.* Delaware, etc. Co., 2 Pennewill (Del.), 237 (1899). In the case of Perine *v.* Grand Lodge, 48 Minn. 82 (1892), where an insurance policy was sued upon, the court held that it was immaterial that the defendant was not incorporated, inasmuch as it had held itself out as a corporation. Bon Aqua Imp. Co. *v.* Standard F. Ins. Co., 34 W. Va. 764 (1891). Even though the certificate of incorporation recites several purposes, where the statute allows but one purpose, yet a corporation exists and may be held liable as such. Marion Bond Co. *v.* Mexican, etc. Co., 65 N. E. Rep. 748 (Ind. 1902).

[1] See §§ 233, 236, 508, *supra.* A corporation to deal in bonds cannot be organized under a statute authorizing the formation of corporations to deal in merchandise and conduct mercantile operations. Such a corporation is not even a *de facto* corporation, inasmuch as such a *de jure* corporation is impossible under such a statute. Hence such a corporation cannot bring suit as a corporation. Indiana, etc. Co. *v.* Ogle, 22 Ind. App. 593 (1899). Where a proposed national bank is never authorized by the comptroller of the currency to commence business, and never does commence business, a lease made in its name cannot be enforced against it. McCormick *v.* Market Nat. Bank, 162 Ill. 100 (1896). Under the Georgia railroad act a company is not a corporation until directors have been elected, even though the certificate was issued by the secretary of state some time prior thereto. Watson *v.* Albany, etc. Ry., 111 Ga. 10 (1900). In a suit brought by a street railway to enjoin another street railway from interfering with an alleged exclusive right of the former, the corporate existence of the former may be questioned. Wilmington City Ry. *v.* Wilmington, etc. Ry., 46 Atl. Rep. 12 (Del. 1900). Where a copartnership in Connecticut proceeds to incorporate in that state, but fails to file the certificate with the secretary of state, as required by charter, and it appears that the intent to incorporate was abandoned, one partner, upon the death of the other, may claim possession of the assets as against the corporation. Card *v.* Moore, 68 N. Y. App. Div. 327 (1902). A corporation whose articles are not filed in the right county, and which has never had an organization meeting, is not *de jure* nor *de facto.* It cannot sue a director for preventing organization. Martin *v.* Deetz, 102 Cal. 55 (1894). In order to constitute a *de facto* corporation "there must at least be an organization under some existing charter or

Thus a corporation which files its certificate of incorporation with the secretary of state, but not with the county clerk, as required by statute, and transacts no business except to authorize the issue of stock for property, which issue is never made, is not even a *de facto* corporation, and hence the directors are not liable for failing to file a report as required by statute.[1] And where the statute authorizes incorporation for producing and selling electricity, and the certificate of incorporation includes this as well as manufacturing and selling electrical appliances, apparatus, and supplies, the corporation is not a *de jure* corporation, and hence is insufficient to support an action by one promoter against another, on a contract of the latter to convey land to a corporation to be formed and to take stock in payment, especially where the full capital stock of such corporation had not been subscribed for.[2] The mere fact that a person contracts with a party and designates the latter as a "company" will not estop the former from denying the incorporation of the latter. This is the law, and is reasonable, since many copartnerships do business and make contracts under the name of "company."[3] But where the party contracted with is a *de facto* corporation, then the rules given above apply. It is to be borne in mind, also, that a company which is supposed to be incorporated, but is not, may after incorporation ratify and enforce contracts made in its behalf.[4] The execution and delivery of an instrument to a corporation as a corporation raises a presumption that the company was regularly incorporated.[5]

Irregularities in the organization of a corporation created by a state will not be inquired into in the courts of another state, a

law. And such organization must be in good faith." Hence, where an attorney sues for his services, the supposed corporation may set up that it is not a *de facto* nor *de jure* corporation. Welch *v.* Old Dominion, etc. Ry., 10 N. Y. Supp. 174 (1890). A person who agreed to and did convey property to a company to be incorporated may subsequently repudiate the corporation and his conveyance as against his associates who shared in the stock received therefor. Doyle *v.* Mizner, 42 Mich. 332 (1879). The case of Boyce *v.* Trustees, etc., 46 Md. 359 (1876), allowed a corporation to deny its existence as against a director who sued it for moneys advanced to it. The failure of a railroad to cause to be paid in a certain amount of its capital stock before incorporation may defeat municipal bonds which are given to it. Farnham *v.* Benedict, 107 N. Y. 159 (1887).

[1] Emery *v.* De Peyster, 77 N. Y. App. Div. 65 (1902). An older New York case held that a director cannot escape his statutory liability by reason of the failure of the company to file its certificate of incorporation with the secretary of state. Meriden Tool Co. *v.* Morgan, 1 Abb. N. Cas. 125, n. (N. Y. Super. Ct. 1875).

[2] Burk *v.* Mead, 64 N. E. Rep. 880 (Ind. 1902). See also Carey *v.* Cincinnati, etc. R. R., 5 Iowa, 357 (1857), and § 638, *infra.*

[3] See § 243, *supra.*

[4] See § 707, *infra.*

[5] West Side, etc. Co. *v.* Connecticut, etc. Co., 186 Ill. 156 (1900).

charter having been issued to the company in the state where it was organized.[1]

§ 638. *Lapse of charter by failure to comply with conditions.*— Frequently a charter of a railroad corporation requires it to complete its road or a certain number of miles of road within a certain time, and the charter expressly declares that for failure to comply with this requisite the corporate powers and existence shall cease. There is a strong line of decisions to the effect that such a provision as this forfeits the charter absolutely upon non-compliance, and that no decree of a court is necessary to effectuate that forfeiture.[2]

[1] Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576 (1894).

[2] See Brooklyn, etc. Co. *v.* City, 78 N. Y. 524 (1879); *Re* Brooklyn, etc. R. R., 72 N. Y. 245 (1878); *Re* Brooklyn, etc. R. R., 75 N. Y. 335 (1878); Commonwealth *v.* Lykens, etc. Co., 110 Pa. St. 391 (1885); Farnham *v.* Benedict, 107 N. Y. 159 (1887). *Cf. Re* Kings County El. Ry., 105 N. Y. 97 (1887), rev'g 41 Hun, 425; People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1887); aff'd, 129 Ill. 618 (1889). A new state constitution may forfeit all charters previously existing, but which have not been used by the incorporators. Chinclecla-manche Lumber, etc. Co. *v.* Commonwealth, 100 Pa. St. 438 (1882), holding also that a constitutional provision that charters under which no organization has been made and business has been commenced shall lapse forthwith is constitutional and self-enforcing. In a condemnation proceeding by a street railway to obtain a right over a turnpike, the turnpike company may set up that the street railway charter has lapsed by reason of the company not having organized and commenced business within a certain time and that thereby the charter became void by reason of a constitutional provision. *In re* Philadelphia & M. Ry., 187 Pa. St. 123 (1898). A provision in a charter that it should become void unless a certain amount of railroad is constructed by a certain date is self-executory, and the company ceases to exist if construction is not so made within that time, and hence the company cannot maintain a suit after that time. Maine. etc. R. R. *v.* Maine, etc. R. R., 92 Me. 476 (1899). The defense may be set up that the company's time to complete its road had expired. Atlantic, etc. R. R. *v.* St. Louis, 66 Mo. 228 (1877). The provision in a street railway charter that the right should become void unless the line was completed within two years and the franchises were thereupon to wholly cease is self-executing. Williamson *v.* Gordon, etc. Ry., 40 Atl. Rep. 933 (Del. 1898). Where a charter, by its terms, is to be void unless the capital stock is subscribed within two years and business commenced, a failure to secure the whole subscription within that time renders the charter void, though business was commenced. *Quo warranto* lies. People *v.* National Sav. Bank, 11 N. E. Rep. 170 (Ill. 1887). The provision in the Railroad Act of New York of 1850 relative to forfeiture of the charter for failure to proceed with the enterprise was self-executing. Underground R. R. *v.* City of New York, 116 Fed. Rep. 952 (1902). In Putnam *v.* Ruch, 54 Fed. Rep. 216 (1893), the court, in a dictum, said that the repeal of a charter by a constitutional enactment may be self-executing, but that in the case before the court the judgment of the court was necessary. Where by its charter a street railroad is to be commenced within three years and completed within ten, but it does not even open books for subscriptions until nearly twenty years have elapsed,

But this drastic and dangerous construction of charters does not commend itself to law and justice. It adds one more to the perils which are attached to all great corporate enterprises. Even in New York, where the above doctrine seems to have had its origin, the courts are inclined to limit its application. The New York courts have held that a provision in a charter, that unless certain things are done within a certain time the company should "forfeit the rights acquired," does not work a forfeiture *ipso facto*,[1] and that a provision in a charter, that unless work shall be commenced within two years "all rights and privileges granted hereby shall be null and void," is not self-executing, and a judgment of the court is necessary before forfeiture takes place,[2] and the weight of

the corporation never came into existence, and an abutting property owner may enjoin the laying of tracks. Bonaparte *v.* Baltimore, etc. R. R., 75 Md. 340 (1892). *Contra*, New York, etc. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 274, 284 (1884). *Cf.* State *v.* Bull, 16 Conn. 179 (1844). In Texas the statute is self-executing, the words used being the same as in the New York statute. But the property rights survive for the benefit of creditors and stockholders. Sulphur Springs, etc. Ry. *v.* St. Louis, etc. Ry., 2 Tex. Civ. App. 650 (1893). A provision that, unless certain roads should be completed within a certain time, "its corporate existence and its powers shall cease, so far as it relates to that portion of said road then unfinished," is self-executing. Houston *v.* Houston, etc. Ry., 84 Tex. 581 (1892). A subscriber, sued on his subscription for stock, may defeat the suit by showing that by statute the charter was to be void if no work was commenced within two years, and that such two years have elapsed and no work has been done. Bywaters *v.* Paris, etc. Ry., 73 Tex. 624 (1889). Under the Virginia law requiring organization within two years or else the charter is void, the charter becomes void "without legal proceedings of any kind, from mere operation of law." Welch *v.* Old Dominion, etc. Co., 10 N. Y. Supp. 174 (1890); Silliman *v.* Fredericksburg, etc. R. R., 27 Gratt. (Va.) 119 (1876). A provision in the general statutes to the effect that the powers of a corporation shall cease if it does not organize within one year does not apply to a special charter the terms of which indicate that organization might be after one year. People *v.* Bowen, 30 Barb. 24 (1859); affirmed on other grounds, 21 N. Y. 517. In Bybee *v.* Oregon, etc. R. R., 139 U. S. 663 (1891), the court reviewed the conflicting decisions on the question whether a corporate charter could be made by the legislature to lapse and cease *ipso facto* and without judicial action. As to the effect on corporate mortgages, see § 792, *infra*.

[1] Consequently this is no defense to condemnation proceedings. *Re* Brooklyn, etc. R. R., 125 N. Y. 434 (1891).

[2] *Re* New York, etc. Bridge Co., 148 N. Y. 540 (1896). The attorney-general cannot enjoin a gas company from laying its pipes on the ground that the charter was void by reason of the company not having commenced work within the prescribed time. The local authorities are fully competent to raise the question if they wish. People *v.* Equity Gas Light Co., 141 N. Y. 232 (1894). Failure to commence work within a time specified in the charter, and a penalty that therefor the company should be dissolved, does not effect dissolution. A judgment is necessary. Day *v.* Ogdensburg, etc. R. R., 107 N. Y. 129 (1887).

authority, as well as logic and public policy, favor such a rule.[1] A statute that after a year's suspension of business the franchises

[1] In condemnation proceedings the defense that the corporation has ceased to exist for failure to complete its road within ten years is not good, inasmuch as the corporate existence can be attacked only in a direct proceeding for that purpose. Morrison *v.* Forman, 177 Ill. 427 (1898). The question of whether or not a charter has been forfeited by a provision that its rights should revert to the state, in case certain work was not done within two years, cannot be raised by a party litigating with such company, but can be raised only by a proceeding instituted by the state. Olyphant, etc. Co. *v.* Borough of Olyphant, 196 Pa. St. 553 (1900). A statutory provision that a corporation, for purposes of enforcing the stockholder's statutory liability, shall be deemed dissolved one year after it ceases to do business does not cause such dissolution as to prevent the corporation being sued thereafter. Whitman *v.* Citizens' Bank, 110 Fed. Rep. 503 (1901). A provision that a railroad charter shall be null and void unless certain things are done within two years is not self-executing. Brown *v.* Wyandotte, etc. Ry., 68 Ark. 134 (1900). Even though a city has reserved the power to forfeit the right of a street railway company to construct its road on certain streets, if such construction is not completed within five years, this in itself does not work a forfeiture, but a forfeiture must first be declared. Louisville, etc. R. R. *v.* Bowling Green Ry., 63 S. W. Rep. 4 (Ky. 1900). Although a municipal grant to construct a street railway provides that it shall be forfeited and the rights shall cease without any action at law or otherwise unless the road is completed within a specified time, yet the court will not enforce the provision if there was a legal excuse for the delay or a waiver of the provision. Dusenberry *v.* New York, etc. Co., 46 N. Y. App. Div. 267 (1899). A provision in a street railway charter that, if certain things are not done within a certain time, the "act of incorporation shall be void" as to streets not then covered, is not self-executing, and delay in insisting thereon will constitute a waiver. Dern *v.* Salt Lake, etc. R. R., 19 Utah, 46 (1899). The act of congress granting lands to railroad companies, and providing that if any section of the road is not completed within five years after its location the land grant shall be forfeited, is not self-executing, and no forfeiture takes place except by judicial proceedings or an act of congress assuming title. Utah, etc. R. R. *v.* Utah, etc. Ry., 110 Fed. Rep. 879 (1901). Although the charter states that it shall be forfeited unless the corporation is organized within two years, yet a stockholder cannot set up such a forfeiture in a suit involving a lien of the corporation on his stock. Boyd *v.* Redd, 120 N. C. 335 (1897). Where land has been condemned by a railroad corporation, the grantee of the party whose land has been so condemned, the grant having been made prior to the condemnation, but the grantee being represented in the proceedings, cannot maintain ejectment therefor on the ground that the railroad charter provided "that the rights, privileges, and powers of said corporation shall be null and void," unless certain work was done within a certain time, even if the work had not been done within the prescribed time. Only the state can question the corporate existence on this ground. New York & N. E. R. R. *v.* New York, N. H. etc. R. R., 52 Conn. 374, 284 (1884). See also Briggs *v.* Cape Cod Land Co., 137 Mass. 71 (1884). In this case the charter of a corporation required it to deposit with the state treasurer within four months from its date the sum of $200,000 as security for certain purposes,

shall be deemed surrendered and the corporation be adjudged dissolved is not self-executory, but requires the judgment of the court.[1]

Where by a charter a bridge is to revert to the state after forty years, the state, upon the expiration of the forty years, may, by an information, enforce the reversion of the bridge to the public.[2] Proof of a charter and user is sufficient without proving organization within the time allowed by law.[3] Where a bank charter provided that it should be void unless the company should organize and proceed to business within two years, and the company organized, but failed to transact any business for fifteen years, a judgment of ouster against it will not be disturbed.[4] The failure of a street railway company to perform a condition of its charter may enable a city to make a new grant to another company.[5]

§§ 639, 640. *Repeals of charters — Right of stockholders to object.* The repeal by the state of a charter before the expiration of the time it was to exist, or the repeal at any time where the charter is perpetual, is an unconstitutional breach of the contract between the state and the corporation and the stockholders.[6] Where, how-

among others for the payment of damages for taking land, and the corporation did not deposit the $200,000 in cash, but in bonds of the United States of the par value of $200,000, and of the market value of $230,000. *Held*, a sufficient compliance, as the object of the provision was to provide security to various interests. Also held that the question whether a corporation has ceased to exist for non-compliance with charter provisions could only be judicially determined in a suit to which the commonwealth was a party. The corporation itself, when sued for taxes, cannot set up this defense. Baltimore, etc. R. R. *v.* Marshall Co., 3 W. Va. 319 (1869). An owner of land which a railroad has taken cannot reclaim possession by reason of the failure of the company to complete its road within the time limited by charter. Cincinnati, etc. R. R. *v.* Clifford, 113 Ind. 460 (1888); Bravard *v.* Cincinnati, etc. R. R., 115 Ind. 1 (1888). A provision that if the road is not completed within a certain time "the charter shall be forfeited" is not self-executing. Galveston, etc. Ry. *v.* State, 81 Tex. 572 (1891). Such also is the rule where the statute merely limits the term of existence of the corporation. Elizabethtown Gaslight Co. *v.* Green, 46 N. J. Eq. 118 (1889). A provision in the charter that the corporate powers should cease and become void unless certain things were done within a certain time does not work a forfeiture *ipso facto*. A judicial proceeding is necessary. State *v.* Spartanburg, C. etc. R. R., 51 S. C. 129 (1897). See also Hardy Lumber Co. *v.* Pickerel Co., 29 Can. S. C. Rep. 211 (1898).

[1] Mylrea *v.* Superior, etc. Ry., 67 N. W. Rep. 1138 (Wis. 1896).

[2] A subsequent act of the legislature waiving the reversion upon condition does not prevent the reversion if the condition is not performed. State *v.* Old Town Bridge Corp., 85 Me. 17 (1892).

[3] St. Louis, etc. R. R. *v.* Belleville City Ry., 158 Ill. 390 (1895).

[4] Henderson, etc. Assoc. *v.* People, 163 Ill. 196 (1896).

[5] Santa Rosa, etc. R. R. *v.* Central St. Ry., 112 Cal. 436 (1896). See also § 634, *supra*, and §§ 913, 931, *infra*.

[6] Greenwood *v.* Freight Co., 105 U. S. 13 (1881). "A grant of corporate privileges for a specified period cannot be resumed by the state within such pe-

ever, the right of repeal is reserved by the legislature, then such reservation becomes a part of the contract, and the repeal of the charter rests in the discretion of the legislature.[1] Upon a repeal the corporate property becomes a fund to be applied, first to the payment of the debts of the corporation, and the balance to be distributed among the stockholders.[2] The question as to the right of

riod. If the charter be without limitation as to time it is forever irrepealable." Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856). The legislature cannot forfeit a charter. Forfeiture can be decreed only by the courts. It is not a legislative function unless reserved. Allen *v.* Buchanan, 9 Phila. (Pa.) 283 (1873). Congress may repeal a charter granted by a territory. Mormon Church *v.* United States, 136 U. S. 1 (1890). A forfeiture of land by the government for non-compliance with the terms of the grant may be by legislative enactment. Farnsworth *v.* Minnesota, etc. R. R., 92 U. S. 49 (1875). The legislature cannot repeal a charter granted by the constitution of the state. New Orleans *v.* Houston, 119 U. S. 265 (1886). The legislature may repeal the charter of a fire-engine company, such company being in the nature of a municipal corporation. State *v.* Washington, etc. Co., 76 Miss. 449 (1899). See § 913, *infra.*

[1] Under a reserved power to repeal at the pleasure of the legislature the courts cannot question the necessity or the legislative motives leading to a repeal. Greenwood *v.* Freight Co., 105 U. S. 13 (1881); Lothrop *v.* Stedman, 42 Conn. 583 (1875); Lothrop *v.* Stedman, 13 Blatchf. 134 (1875). See Sinking Fund Cases, 99 U. S. 700, 720 (1878); Northern R. R. *v.* Miller, 10 Barb. 260 (1851); Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287, 302 (1856); Miners' Bank *v.* U. S., 1 Greene (Iowa), 553 (1848); McLaren *v.* Pennington, 1 Paige, 102 (1828); Crease *v.* Babcock, 40 Mass. 334, 344 (1839). If the power of repeal arises only upon an abuse of franchise the court may review the question whether there was an abuse. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856); Baltimore *v.* Pittsburgh, etc. R. R., 1 Abb. (U. S.) 9 (1865). Hence the legislature cannot forfeit a charter merely because the corporation has been incorporated elsewhere and has brought suits in the federal courts. Commonwealth *v.* Pittsburgh, etc. R. R., 58 Pa. St. 26 (1868). See, in general, Flint, etc. Plank-road Co. *v.* Woodhull, 25 Mich. 99 (1872); Montgomery *v.* Merrill, 18 Mich. 338 (1869); State *v.* Noyes, 47 Me. 189 (1859); Canal Co. *v.* Railroad Co., 4 G. & J. (Md.) 122 (1832); University of Maryland *v.* Williams, 9 G. & J. (Md.) 365 (1838); Cooley's Const. Lim. 106; Mayor, etc. *v.* Twenty-third Street, 113 N. Y. 311 (1889). Under this reserved power the state may authorize one corporation to build its road on a route which a prior corporation has designated but not acquired. *Re* Cable Ry., 40 Hun, 1 (1886). A general statute or constitutional provision reserving the right to repeal, alter, or amend charters enters into all charters granted subsequent thereto as much as if actually inserted in such charters. *Re* Lee's Bank of Buffalo, 21 N. Y. 9 (1860); Commissioners, etc. *v.* Holyoke Water-power Co., 104 Mass. 446 (1870); Delaware R. R. *v.* Tharp, 5 Harr. (Del.) 454 (1854). See also § 2, *supra.* The repeal of a general incorporating act and the enactment of a new one does not repeal charters which have already been taken out under the old act. Freehold, etc. Assoc. *v.* Brown, 29 N. J. Eq. 121 (1878); United, etc. Assoc. *v.* Benshimol, 130 Mass. 325 (1881). *Contra,* Wilson *v.* Tesson, 12 Ind. 285 (1859).

[2] See § 641, *infra.*

a legislature to repeal a part of a charter, such as an exemption from taxation, is considered elsewhere.[1]

§ 641. *The assets upon dissolution — Distribution.*— Upon the dissolution of a corporation, all its property, both personal and real, is to be used to pay the debts of the corporation, and after the debts are paid the remainder is to be distributed among the stockholders.[2]

It was formerly believed to be the common law that upon the dissolution of a corporation all its assets belonged to the state, and all its debts were canceled, and that the creditors were not entitled to anything from the assets. This remarkable theory has been stated and restated in text-books and decisions of the courts for over one hundred years.[3] It is found in Blackstone's Commentaries and in the old works of Kyd on Corporations and Grant on Corporations. The courts, however, while upholding the rule theoretically, have quite uniformly refused to *apply* such a doctrine, and have invented various theories, fictions, and arguments for avoiding this supposed doctrine of the common law. Finally, in 1899, an English court denied that the common law ever

[1] See §§ 501, 572*b*, *supra*.

[2] Krebs *v.* Carlisle Bank, 2 Wall. (C. C.) 33 (1850); s. c., 14 Fed. Cas. 856: Heath *v.* Barmore, 50 N. Y. 302 (1872); Burrall *v.* Bushwick R. R., 75 N. Y. 211 (1878); James *v.* Woodruff, 10 Paige, 541 (1844); Frothingham *v.* Barney, 6 Hun, 366 (1876); Wood *v.* Dummer, 3 Mason, 308, 322 (1824); s. c., 30 Fed. Cas. 435. *Cf. Re* Hodges Distillery Co., L. R. 6 Ch. 51 (1870); Nathan *v.* Whitlock, 9 Paige, 152 (1841); Curran *v.* State, 15 How. 304, 307 (1853): Hastings *v.* Drew, 76 N. Y. 9 (1879), affirming s. c., 50 How. Pr. 254 (1887). The same rule prevails where the charter is repealed by the legislature. Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); McLaren *v.* Pennington, 1 Paige, 102 (1828), by statute: Detroit *v.* Detroit, etc. P. R. Co., 43 Mich. 140 (1880); San Mateo County *v.* Southern Pacific R. R., 8 Sawyer, 238 (1882), per Field, J., holding that "the property of the corporation acquired in the exercise of its faculties is held independently of such reserved power, and the state can only exercise over it the control which it exercises over the property of individuals engaged in similar business" (p. 279). People *v.* O'Brien, 111 N. Y. 1 (1888). Where the capital stock is reduced and the corporate property over and above the reduced capital stock is distributed among the stockholders, this is not a dividend within the meaning of the New York tax statute. People, etc. *v.* Roberts, 41 N. Y. App. Div. 21 (1899).

[3] Hightower *v.* Thornton, 8 Ga. 486 (1850); Life Association *v.* Fassett, 102 Ill. 315 (1883); Commercial Bank *v.* Lockwood, 2 Har. (Del.) 8 (1835); State *v.* Rives, 5 Ired. L. (N. C.) 297 (1844); White *v.* Campbell, 5 Humph. (Tenn.) 38 (1844); Malloy *v.* Mallett, 6 Jones, Eq. (N. C.) 345 (1863), holding also that the stockholder's liability was extinguished; Port Gibson *v.* Moore, 21 Miss. 157 (1849); Bingham *v.* Weiderwax, 1 N. Y. 509 (1848); Owen *v.* Smith, 31 Barb. 641 (1860); State Bank *v.* State, 1 Blackf. (Ind.) 267, 282 (1823); Acklin *v.* Paschal, 48 Tex. 147 (1877); St. Philip's Church *v.* Zion, etc. Church, 23 S. C. 297 (1885); Coulter *v.* Robertson, 24 Miss. 278 (1852); Bank of Mississippi *v.* Duncan, 56 Miss. 166 (1878); Hamilton *v.* Accessory Transit Co., 26 Barb. 46 (1857).

countenanced such confiscation, and showed that in the seventeenth and eighteenth centuries many corporations were dissolved, and that in not a single case was any such doctrine applied.[1] It again may be said that, although the common law has its reproaches, this is not one of them. The American courts have always refused to follow the supposed common-law rule on this subject.[2] Where the statutes in existence at the time of incorporation provide for the extension of corporate charters, a stockholder cannot prevent the corporation from extending its existence in accordance with such statutes.[3] A deed made by a corporation after its charter has expired is a nullity.[4] The dissolution of a corporation after an execution has been levied upon its property does not prevent a sale.[5]

When the corporation owns a right of way or other franchise obtained from a municipality or by the exercise of the state's power

[1] *Re* Higginson and Dean, [1899] 1 Q. B. 325.

[2] Bacon *v.* Robertson, 18 How. (U. S.) 480 (1855); Heath *v.* Barmore, 50 N. Y. 302 (1872); Lum *v.* Robertson, 6 Wall. 277 (1867); Robinson *v.* Lane, 19 Ga. 337 (1856); Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); s. c., 15 Fed. Cas. 922; Blake *v.* Portsmouth, etc. R. R., 39 N. H. 435 (1859); *Re* Woven Tape Skirt Co., 8 Hun, 508 (1876); Mumma *v.* Potomac Co., 8 Pet. 281 (1834); Fox *v.* Horah, 1 Ired. Eq. (N. C.) 358 (1841); Bingham *v.* Weiderwax, 1 N. Y. 509 (1848); Curry *v.* Woodward, 53 Ala. 371 (1875); 2 Kent, Com. 307, n.; Powell *v.* North Missouri R. R., 42 Mo. 63 (1867); Wood *v.* Dummer, 3 Mason, 308 (1824); s. c., 30 Fed. Cas. 435. Land conveyed to a corporation in fee does not revert to the grantor or his heirs on the extinction of the corporation. Wilson *v.* Leary, 120 N. C. 90 (1897), overruling Fox *v.* Horah, 36 N. C. 358. Statutes are frequently enacted to this effect. Nevitt *v.* Bank of Port Gibson, 14 Miss. 513 (1846); McCoy *v.* Farmer, 65 Mo. 244 (1877); Owen *v.* Smith, 31 Barb. 641 (1860). A deed of property to a railroad for fifty years or so long as its charter continues, which by charter is fifty years, passes the land to a corporation which by legislative enactment succeeds to the rights of the first corporation. Davis *v.* Memphis etc. R. R., 87 Ala. 633 (1889). So far as land grants are concerned the consolidated company is the same as the old company. U. S. *v.* Southern Pac. R. R., 45 Fed. Rep. 596 (1891). A consolidated company succeeds to land owned by one of the consolidating companies. Cashman *v.* Brownlee, 128 Ind. 266 (1891). An agreement that upon dissolution of a telegraph company the telegraph line should go to the railroad is binding. Latrobe *v.* Western Tel. Co., 74 Md. 232 (1891). A deed duly authorized is good, though executed after the corporation is consolidated with another. Edison, etc. Co. *v.* New Haven, etc. Co., 35 Fed. Rep. 233 (1888).

[3] Smith *v.* Eastwood, etc. Co., 58 N. J. Eq. 331 (1899).

[4] Bradley *v.* Reppell, 133 Mo. 545 (1896); Marysville Inv. Co. *v.* Munson, 44 Kan. 491 (1890). Where by statute, after dissolution, the corporation continues for three years for the purpose of winding up, it may, during those three years, convey its real estate to a trustee in trust to wind up its business. Hanan *v.* Sage, 58 Fed. Rep. 651 (1893). A corporation cannot deed land after its charter has expired. Marysville Invest. Co. *v.* Munson, 44 Kan. 491 (1890).

[5] Boyd *v.* Hankinson, 83 Fed. Rep. 876 (1897).

of eminent domain, this right-of-way franchise is a corporate asset upon the dissolution of the corporation and may survive the death of the corporation. It does not revert to the state or municipality.[1]

This is the natural and logical result of the principle of law that a railroad company may make a contract to run longer than its chartered existence;[2] that a grant may be made by a city to a street railway for a period longer than the duration of the charter of

[1] Where a legislature, under its reserved right of repeal, repeals a street railroad charter, the right to use the streets and operate the road does not revert to the state, but passes as property to the receiver for the benefit of the creditors and stockholders of the corporation. People *v.* O'Brien, 111 N. Y. 1 (1888). See also § 792, *infra.* In Pennsylvania the franchise of the right of way of a railroad vests, upon its dissolution, in the state, and the state may grant it to another railroad. Erie, etc. R. R. *v.* Casey, 26 Pa. St. 287 (1856). See also Plitt *v.* Cox, 43 Pa. St. 486 (1862). In Ohio it seems that the right of way reverts to the owner of the fee. New York, etc. R. R. *v.* Parmalee, 1 Ohio C. C. Rep. 239 (1885). See also, as to the rule in New York, Heard *v.* Brooklyn, 60 N. Y. 242 (1875); People *v.* White, 11 Barb. 26 (1851); Hooker *v.* Utica, etc. Turnp. Co., 12 Wend. 371 (1834). There is no reversion of the right of way on the dissolution of the company after fifty years. Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1889). A lottery grant cannot be repealed, when mortgaged by the corporation, until the mortgage is paid. Gregory *v.* Shelby College, 2 Metc. (Ky.) 589 (1859). Compare, in general, Turnpike Co. *v.* Illinois, 96 U. S. 63 (1877). Where the stockholders of an old plank-road company are still operating the road, but under another charter, they cannot be ousted from the latter by an injunction suit against their operating under the former. The court stated that it did not favor such a confiscating suit. People *v.* De Grauw, 133 N. Y. 254 (1892). An unused right of way does not revert to the original owner. McConihay *v.* Wright, 121 U. S. 201 (1887). See also § 906, *infra.* The state may grant an unused street-railway franchise to another company. Henderson *v.* Central, etc. Ry., 21 Fed. Rep. 358 (1884). No reverter where the railroad takes a fee. Yates *v.* Van De Bogert, 56 N. Y. 526 (1874). See also, in general, Norton *v.* Walkill, etc. R. R., 42 How. Pr. 228 (1871); State *v.* Rives, 5 Ired. (N. C.) L. 297 (1844); Hopkins *v.* Whitesides, 1 Head (Tenn.), 31 (1858). Where a turnpike company is authorized to collect tolls only for fifteen years, the road is free after that date. People *v.* Anderson, etc. Co., 76 Cal. 190 (1888). The dissolution of a water-works company does not put an end to the contract between it and the city. Weatherly *v.* Capital, etc. Co., 115 Ala. 156 (1897). In Haffcke *v.* Clark, 50 Fed. Rep. 531 (1892), the court said in a dictum that inasmuch as a license is not assignable, the dissolution of a corporation, which is the licensee, puts an end to the license. See note 3, p. 1436.

[2] A contract between two railroad companies by which one is given the right to run its trains over the tracks of the other may be for a period beyond the duration of the charter of one of the companies, the court saying that the contingency that the company "will cease to exist and leave neither assigns nor successors is far too remote to have any influence upon the validity of this contract." Union, etc. Ry. *v.* Chicago, etc. Ry., 163 U. S. 564, 592 (1896). A corporation may lease its property for a hundred years, even though the statutes forbid any disposi-

the corporation;[1] that a corporation may take a deed of land in fee, although the company's duration is limited;[2] and may acquire a perpetual right of way under the same circumstances.[3] The liability of a corporation on a contract extending beyond the corporate existence is discussed elsewhere.[4] On the dissolution of a corporation having no stockholders, the common-law rules of reverter and appropriation apply.[5] Upon dissolution the stock-

tion of property which suspends the absolute power of controlling the same for more than two lives and twenty-one years, and may mortgage its interest as lessor. Sioux, etc. Co. *v.* Trust Co., 82 Fed. Rep. 124 (1897); aff'd, 173 U. S. 99 (1899). A bank may take a lease of land for ninety-nine years even though its charter will expire before that time. Brown *v.* Schleier, 118 Fed. Rep. 981 (1902).

[1] Detroit *v.* Detroit, etc. Ry., 184 U. S. 368 (1902). A street railway company may legally receive from a city a grant of street rights for a period extending beyond the chartered life of the corporation. Detroit Citizens' St. Ry. *v.* Detroit, 64 Fed. Rep. 628 (1894), rev'g Detroit *v.* Detroit City Ry., 56 Fed. Rep. 867, and 60 Fed. Rep. 161, a case where a thirty-year street easement was given to a corporation having only fourteen years of corporate life. To same effect, People *v.* O'Brien, 111 N. Y. 1 (1888). See also § 913, *infra.*

[2] Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854). See also § 694, note, *infra.*

[3] Miner *v.* New York, etc. R. R., 123 N. Y. 242 (1890); Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1889); Bailey *v.* Platte, etc. Co., 12 Colo. 230 (1889). See note 1, p. 1435. Dissolution does not terminate a lease to a corporation. People *v.* National Trust Co., 82 N. Y. 284 (1880). A contract between a city and an individual as to wharves which is assignable and is assigned by the individual to a corporation does not cease merely because the corporate existence ceases. Fleitas *v.* City of New Orleans, 51 La. Ann. 1 (1898); also § 642, *infra.* A gas company may receive a municipal grant for a term of years extending beyond the life of the gas company as fixed by its charter. Keith *v.* Johnson, 59 S. W. Rep. 487 (Ky. 1900).

[4] See § 642, *infra.*

[5] Upon the dissolution of a public or charitable corporation its property goes to the state and former owners, subject to the trust that the property shall still be used for similar purposes if those purposes be legal. Mormon Church *v.* U. S., 136 U. S. 1 (1890). Upon the dissolution to an eleemosynary corporation having no stockholders or creditors, the title of its land reverts to the donor. Danville Seminary *v.* Mott, 136 Ill. 289 (1891). A private corporation — a normal college — cannot by act of the legislature be converted into a public corporation and the property vested in the state. Bakewell *v.* Board of Education, 33 N. E. Rep. 186 (Ill. 1893). In California, on the dissolution of a corporation for literary purposes, its land goes to the state. People *v.* College of California, 38 Cal. 166 (1869). Upon dissolution of a mutual insurance company having no stockholders, its assets, after the payment of its liabilities, belong to the state. Titcomb *v.* Kennebec, etc. Co., 79 Me. 315 (1887). But where an insurance company is organized both on the stock and mutual plan, upon a dissolution of the stock part of the organization the guaranty accumulations belong to the stockholders. Traders', etc. Ins. Co. *v.* Brown, 142 Mass. 403 (1886). Land reverts to the former owner. Mott *v.* Danville Seminary, 129 Ill. 403 (1889). Distribution of funds of incorporated

holders are entitled to an immediate settlement of the corporate debts and a distribution of the residue.[1] Usually they are not obliged to accept the stock of another corporation as payment upon a final distribution, but may demand that the distribution be in cash.[2] They may also demand that the property be sold, unless the statutes provide otherwise.[3] The stockholders upon dissolution may make a contract as to the mode of distribution.[4] The company by unanimous consent may distribute the assets without a dissolution, provided all creditors are paid.[5]

association. Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). As to unincorporated associations, see ch. XXIX, *supra.* The members of a military corporation, which is dissolved under a statute, cannot by a suit in equity obtain control of its property which has been acquired by donation. Cummings *v.* Hollis, 108 Ga. 402 (1899). Where a police association receives gifts from the city and then dissolves, the money will be returned to the city. *In re* Minneapolis, etc. Assoc., 88 N. W. Rep. 977 (Minn. 1902).

[1] Frothingham *v.* Barney, 6 Hun, 366 (1876). A committee appointed by the stockholders to sell the property for stock in a new corporation and dissolve the old corporation and distribute the assets may be liable to the stockholders if, after making such sale, they delay in dissolving the old corporation and distributing the assets until the new stock becomes worthless. Their liability is a question of negligence for the jury. *In re* Lincoln, etc. Co., 190 Pa. St. 124 (1899).

[2] See § 671, *infra.*

[3] See § 670, *infra.* A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. Treadwell *v.* United, etc. Co., 47 N. Y. App. Div. 613 (1900). Where in a dissolution proceeding an injunction has been issued against a corporation doing any further business or disposing of its property, a sale or mortgage of its property to one of its stockholders is illegal and will be set aside by the court, especially where it is made to a director for an inadequate consideration. Grant *v.* Lowe, 89 Fed. Rep. 881 (1898). Upon dissolution a company may sell its good will and trade name. Townsend *v.* Jarman, [1900] 2 Ch. 698. In distributing the assets the court has no power to give certain parts of the property to some stockholders and other parts to others, without the value thereof being ascertained, even though such stockholders originally contributed that which the court decreed should be returned to them. Clow *v.* Redman, 57 Pac. Rep. 437 (Idaho, 1899).

[4] White *v.* Boreing, 45 S. W. Rep. 242 (Ky. 1898).

[5] A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability. People *v.* Barker, 141 N. Y. 251 (1894). See also § 546, *supra;* Rorke *v.* Thomas, 56 N. Y. 559 (1874). Although the state is prosecuting a suit to forfeit the charter for entering into a combination, yet a sale of part of the corporate property to a stockholder pending the suit is

Upon dissolution a stockholder may file a bill for distribution of the assets.[1] When corporate assets are placed in the hands of a corporate officer or other person for distribution, a stockholder may file a bill in equity for his part, but in such a suit the corporation is a necessary party.[2] The remedy in such a case is not at

legal, and the receiver cannot follow the property. A writ of prohibition will issue against him. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Where a corporation distributes all its assets among its stockholders without paying the debts, a corporate creditor may hold them liable; but he must first obtain a judgment against the corporation and execution must be returned unsatisfied. Lamar *v.* Allison, 101 Ga. 270 (1897). See also § 548, *supra,* and § 671, *infra.*

[1] Brown *v.* Mesnard M. Co., 105 Mich. 653 (1895). Where a corporation has been dissolved at the instance of the state, a stockholder may file a bill for the appointment of a receiver to administer the assets. Olmstead *v.* Distilling, etc. Co., 73 Fed. Rep. 44 (1895), the court holding also that the appointment could not be questioned collaterally. Where a charter has expired, a court of equity has power to take charge of its property and wind up its affairs at the instance of a stockholder upon a proper showing. Stewart *v.* Pierce, 89 N. W. Rep. 234 (Iowa, 1902). Where the stockholders have dissolved a corporation by resolution, under the West Virginia statute, the court will not interfere and appoint a receiver, unless it is shown that provision has not been made for payment of the debts. Mere cessation of business is not dissolution. Law *v.* Rich, 47 W. Va. 634 (1900). A corporation cannot appeal from a decree appointing a receiver of it, where the same decree dissolves the corporation, and no appeal is taken from that portion of the decree. State *v.* Fidelity, etc. Co., 113 Iowa, 439 (1901). Upon dissolution, if no receiver is appointed, the title to land vests in the stockholders as tenants in common, in Texas. Baldwin *v.* Johnson, 65 S. W. Rep. 171 (Tex. 1901). Where a corporation is dissolved by lapse of its charter, but the directors by statute continue for the purpose of winding up the business, a receiver will not be appointed. Anderson *v.* Buckley, 126 Ala. 623 (1900). After the state has caused a charter to be declared illegal, the duty of the state is finished, and a receiver will not be appointed, all the debts having been paid and all the parties in interest being satisfied, the stockholders having been declared personally liable the same as in a copartnership. State *v.* New Orleans, etc. Co., 32 S. Rep. 102 (La. 1902). Even though the time to wind up the affairs of a corporation after dissolution has expired, the stockholders may sue for the assets. Connecticut, etc. Co. *v.* Dunscomb, 69 S. W. Rep. 345 (Tenn. 1902).

[2] Young *v.* Moses, 53 Ga. 628 (1875). For the remedy and procedure when the directors on dissolution have divided the assets fraudulently, see Horner *v.* Carter, 11 Fed. Rep. 362 (1882). The minority may bring the officers to an accounting for an unfair distribution of the bonds, etc., owned by a construction company. Meyers *v.* Scott, 2 N. Y. Supp. 753 (1888). The corporation may file a bill to distribute a specific fund only, and need not in that bill have a general distribution of all its funds. Pacific R. R. *v.* Cutting, 27 Fed. Rep. 638 (1886). If the directors, who by statute are made trustees to wind up the corporation upon dissolution, delay in so doing, the court will appoint a receiver. *Re* Pontius, 26 Hun, 232 (1882). Although the charter is forfeited at the instance of the state, yet the directors are trustees to wind up the company under the statute unless a receiver is

law.[1] The stockholders may insist on the application of the statute of limitations as far as it is a bar to the claim of corporate creditors upon the assets.[2] The statute of limitations does not run as against the estate of a dissolved corporation.[3] Where the corporation has been dissolved, and its assets distributed, and its trustees discharged by a decree of court, a creditor who was a party to the suit cannot afterward maintain a bill against the trustees to reach unpaid subscriptions.[4] But often by statute, if the directors upon the dissolution of a corporation distribute the assets among the stockholders without paying the debts, they are personally liable for such debts.[5] The mode of distribution among corporate creditors, where some have other security and others not, is considered elsewhere.[6] The rights of the stockholders in the assets upon a dissolu-

appointed at the instance of a creditor or stockholder. Havemeyer *v.* Superior Court, 84 Cal. 327 (1890). Although the fund upon dissolution is small and the number of stockholders large, yet the directors cannot avoid their duty as to the distribution of the fund by turning it over to a court to administer. *Re* Centennial Board, 48 Fed. Rep. 350 (1891).

[1] Brown *v.* Adams, 5 Biss. 181 (1870); s. c., 4 Fed. Cas. 350. *Cf.* Pacific R. R. *v.* Cutting, 27 Fed. Rep. 638 (1886); Hodsdon *v.* Copeland, 16 Me. 314 (1839). It has been held that surplus assets ought to be distributed in proportion as the subscriptions to the stock have been paid. Krebs *v.* Carlisle Bank, 2 Wall. (C. C.) 33 (1850); s. c., 14 Fed. Cas. 856; Sheppard *v.* Scinde, etc. Ry., 56 L. T. Rep. 180 (1887); aff'd, 57 L. T. Rep. 585 (1887); aff'd, H. of L., 60 L. T. Rep. 641 (1889); *Re* Hodges, etc. Co., L. R. 6 Ch. App. 51 (1870). On winding up, stockholders who have advanced on the subscription price more than the calls required, under an agreement of repayment with interest, are entitled to repayment before a general dividend is made. So held where full-paid stock was issued for property, but other stock for cash was not fully paid up. Exchange, etc. Co., L. R. 38 Ch. D. 171 (1888).

[2] Johnston *v* Talley, 60 Ga. 540 (1878). On a bill to wind up an insolvent corporation the stockholder may prove that some claims against the company were not legally contracted. Crutchfield *v.* Mutual, etc. Co., 2 S. W. Rep. 658 (Tenn. 1886).

[3] Ludington *v.* Thompson, 153 N. Y. 499 (1897). The running of the statute of limitations is not suspended by the dissolution of the corporation. Bradley, etc. Co. *v.* Norfolk, etc. Co., 101 Fed. Rep. 681 (1900).

[4] Chavent *v.* Schefer, 59 Fed. Rep. 231 (1894). If a corporation has been dissolved, garnishee process does not lie against a stockholder at the instance of a corporate creditor to reach an unpaid subscription. Paschall *v.* Whitsell, 11 Ala. 472 (1847).

[5] Keen *v.* Maple, etc. Co., 50 Atl. Rep. 467 (N J. 1901), rev'g 61 N. J. Eq. 497. A solvent corporation does not hold its property in trust for its creditors, even though it is in process of liquidation, and hence a partial distribution of the assets of a bank to the stockholders during liquidation, when the bank was solvent and retained what seemed to be sufficient assets to pay its liabilities, cannot be recovered back subsequently by the receiver in an action at law, although it turned out that the remaining assets were not sufficient to pay all liabilities, no bad faith being involved. Lawrence *v.* Greenup, 97 Fed. Rep. 906 (1899). See also § 546, *supra.*

[6] See § 763, *infra.*

tion depend upon the law of the country creating the corporation.[1] And these rights cannot be taken from the stockholders by an act repealing the charter.[2] In winding-up proceedings an assessment may be levied upon stock which is not fully paid, in order to adjust the rights of the stockholders as between themselves.[3] Where increased capital stock is only partly paid up, and a dissolution is had, the court will order repayment of all that was paid on the original capital stock and on the increased capital stock, and then a distribution of the surplus on the whole capital stock.[4] In the

[1] Hamilton *v.* Accessory Transit Co., 26 Barb. 46 (1857).

[2] Lothrop *v.* Stedman, 13 Blatchf. 134 (1875); s. c., 15 Fed. Cas. 922.

[3] Welton *v.* Saffery, [1897] A. C. 299. Upon dissolution the court may and will call in unpaid subscriptions where this is necessary in order to make a proper distribution. *Re* Sheppard's, etc. Co., 70 L. T. Rep. 3 (1893). In *Re* Anglo, etc. of W. A., [1898] 1 Ch. 327, the court ordered a call as a matter of form on subscriptions, so as to equalize the amount already paid on such subscriptions with a view to distribution on dissolution. The assets, after paying the debts, are distributed in proportion as the stockholders have paid in their subscriptions. Connecticut, etc. Co. *v.* Dunscomb, 69 S. W. Rep. 345 (Tenn. 1902).

[4] *Re* Driffield Gas L. Co., [1898] 1 Ch. 451. Where the original stock is paid for in cash at par, and then increased stock is paid for at the rate of $3 on $10, and upon the winding up of the company a large surplus exists for distribution, the court ordered that the original stock should first receive $7 on each $10, and then that the remaining assets should be distributed *pro rata* on all the stock. *Re* Weymouth, etc. Co., [1891] 1 Ch. 66. Where there is a surplus remaining after paying back all that the stockholders have paid in, the common-law rule is that such surplus is divided *pro rata* among the stockholders, even though some of the stock had been paid up and other stock only partially paid up. This rule may be varied by the charter so as to divide the surplus in proportion to the paid-up capital, and not in proportion to the number of shares, irrespective of the amount paid thereon. *Re* Mutoscope, etc. Syndicate, Ltd., [1899] 1 Ch. 896. On a dissolution and winding up, where part of the stock is paid up and part not, each class of stockholders is repaid the amount paid upon that class of stock, and then the surplus is divided proportionately. *Re* Wakefield, etc. Co., [1892] 3 Ch. 165. On a winding up, if it turns out that the profits had been systematically overestimated for many years, thereby depriving common stockholders of the dividends, an account should be taken and such dividends be then paid. *Re* Bridgewater, etc. Co., [1891] 2 Ch. 317. Founders' shares are a species of preferred or deferred stock; and where, on dissolution, the founders' shares are to have one-fifth of the surplus assets, the words "surplus assets" were construed to be the assets remaining after paying the debts, and also paying back whatever the stockholders had originally paid in. *Re* New Transvaal Co., [1896] 2 Ch. 750. Even though there are different classes of stock, a reduction of the capital may be made on a different basis from the basis specified as applicable upon a dissolution and winding up. *Re* Credit Assurance, etc. Corp., 87 L. T. Rep. 216 (1902). Where stockholders in a national bank have been assessed irregularly, and a surplus remains after paying creditors, the stockholders who have paid the irregular assessments

distribution of the assets of a corporation upon its winding up, the accumulated profits will be considered separate from the capital, if some of the stock is held in trust for life tenants and remainder-men.[1] In Maine it has been held that while a corporation may pay an ordinary dividend to a stockholder of record, yet that a dividend paid in the liquidation and winding up of the corporation must be paid to the holder of the certificate, even though such holder be a transferee who has not been recorded as such on the books of the company, and that the company is liable to him for dividends in liquidation, even though it has paid them to the registered stockholder, and that this rule applies to a pledgee of a certificate of stock as well as a purchaser of a certificate of stock.[2] A contest between the preferred and common stockholders as to who shall be entitled to the surplus will not be decided in a foreclosure suit, but the surplus will be paid to the corporation for distribution.[3] In the distribution of the assets of an insolvent corporation citizens of other states cannot be discriminated against.[4]

Debts due from the stockholder to the corporation are to be deducted from his interest in the assets.[5] And an assignment or transfer of stock by a stockholder after the dissolution of the corporation is merely an equitable assignment of his interest in the assets of the concern as it may appear upon the settlement.[6] Where profits have been earned and properly entered as profits on the corporation books they belong to the stockholder, even though thereafter the corporation becomes insolvent and is wound up before

will first be repaid out of the surplus assets. *In re* Hulitt, 96 Fed. Rep. 785 (1899).

[1] *Re* Rogers, 22 N. Y. App. Div. 428, 435 (1897); aff'd, 161 N. Y. 108.

[2] Bath Sav. Inst. *v.* Sagadahoc Nat. Bank, 89 Me. 500 (1897).

[3] Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). On a foreclosure sale the court may order a distribution of any surplus remaining after the payment of the mortgage debt, and the court need not turn over such surplus to the insolvent corporation, but may decree that the surplus be divided among the stockholders after paying all general creditors who present their claims within a fixed time. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899).

[4] Blake *v.* McClung, 176 U. S. 59 (1900).

[5] James *v.* Woodruff, 10 Paige, 541 (1844); Nathan *v.* Whitlock, 9 Paige, 152 (1841); Purton *v.* New Orleans, etc. R. R., 3 La. Ann. 1932 (1848). Where a stockholder in an insolvent national bank does not pay the assessment levied by the comptroller, he cannot participate in a dividend to the stockholders after the debts are paid, such dividend being less than his assessment. Neither can his transferee, nor the purchaser of his stock at an execution sale. Richardson *v.* Wallace, 39 S. C. 216 (1893).

[6] James *v.* Woodruff, 10 Paige, 541 (1844); aff'd, 2 Denio, 574 (1845); Sewall *v.* Chamberlain, 82 Mass. 581 (1860). Money in the hands of the court on the liquidation of a company, even though it belongs to a stockholder, cannot be garnisheed for his debts under the English statute. Spence *v.* Coleman, [1901] 2 K. B. 199.

such profits are declared to be dividends. The creditors of the corporation are entitled to the *corpus* of the estate, but not to any profits. If there is preferred stock such profits go to that stock.[1]

A person who conveys property to the corporation in payment for stock may contract that upon dissolution he shall receive back that property.[2] A suit cannot be instituted in the name of a dissolved corporation, inasmuch as it is dead, but by statute it is often provided that such suits may be brought for purposes of liquidation.[3] Where the corporation is dissolved, but by statute suits may be brought during the three succeeding years, a stockholder must request the directors to sue before he sues to compel a creditor to restore property illegally taken.[4] A forfeiture of a charter by a state court does not affect the status of a receiver appointed by the United States court. Such receiver may proceed to administer the property.[5]

§ 642. *The liabilities upon dissolution, consolidation, or sale.*—As already seen, the old rule that upon dissolution all debts by or to the corporation are rendered unenforceable is no longer the law.[6] It has been held that the liability of a corporation to deliver goods,

[1] Bishop *v.* Smyrna, etc. Co., [1895] 2 Ch. 265.

[2] Fish *v.* Nebraska, etc. Co., 25 Fed. Rep. 795 (1885). Where one of the organizers of the corporation, who is also its president, sells goods to it for stock, the corporation is protected in its title, even though it turns out that he held part of the goods to sell on commission, but if he retains the stock and the company is dissolved, it is bound to respect the rights of the owner of the goods in distributing its assets. Wyeth *v.* Renz-Bowles Co., 66 S. W. Rep. 825 (Ky. 1902).

[3] Under the Nebraska statute a dissolved corporation may bring suit. Schmidt, etc. Co. *v.* Mahoney, 60 Neb. 20 (1900). Even though a Canadian corporation has been dissolved, yet if, under the statutes of Canada, it remains in force to wind up its business, it may bring suit in Rhode Island to recover a debt. Ham *v.* Banque Ville Marie, 22 R. I. 248 (1900). In the case of Singer, etc. Co. *v.* Hutchinson, 176 Ill. 48 (1898), the court held that the expiration of the two years prescribed by statute for a dissolved corporation bringing suits, etc., does not bar a writ of error sued out after the two years. Where by statute upon dissolution the directors are made trustees to wind up the affairs of the company, they may maintain a suit in another state, inasmuch as they are not receivers, but are successors of the corporation. Root *v.* Sweeney, 12 S. Dak. 43 (1899).

[4] General Electric Co. *v.* West Asheville Imp. Co., 73 Fed. Rep. 386 (1896). Even after dissolution a stockholder may file a bill to recover assets that have been wrongfully diverted. Boyd *v.* Hankinson, 92 Fed. Rep. 49 (1899).

[5] City, etc. Co. *v.* State, 88 Tex. 600 (1895). But where, after an injunction has been obtained in the federal court, the corporation is dissolved in the state court, the suit in the federal court falls. Lang *v.* Louisiana Tanning Co., 56 Fed. Rep. 675 (1893).

[6] See preceding section. But a judgment declaring a corporation illegal, void, and the association dissolved puts an end to a contract by it to pay certain parties its bonds and stock if they would build its road. Vinal *v.* Continental, etc. Co., 32 Fed. Rep. 345 (1887).

according to an executory contract, ceases upon such corporation passing into the hands of a receiver, where the receivership was accompanied by the usual injunction against the further transaction of business by the insolvent corporation. This conclusion is arrived at on the theory that the failure to perform was due to the operation of law, and hence that no damages could be recovered for breach of the contract.[1] The better rule, however, is that even at common law the obligations of a corporation do not cease by reason of its dissolution.[2] The dissolution of a company does not put an end to its executory contract to employ a person,[3] nor obli-

[1] Malcomson *v.* Wappoo Mills, 88 Fed. Rep. 680 (1898), the court following the case of People *v.* Globe, etc. Ins. Co., 91 N. Y. 174 (1883), and refusing to follow Spader *v.* Mural, etc. Mfg. Co., 47 N. J. Eq. 18 (1890). "Where an insolvent corporation is forced into liquidation and dissolution, all its executory contracts perish with it, for this is an implied condition of their execution." The rule is otherwise as to a solvent corporation. "A receiver is not bound to carry out executory contracts of the corporation, but he may disregard them." No damages can be recovered for failure of the insolvent corporation or receiver to carry out the contract. Griffith *v.* Blackwater, etc. Co., 46 W. Va. 56 (1899). In the case of Liverpool, etc. Co. *v.* McNeill, 89 Fed. Rep. 131 (1898), the court held that the appointment of the receiver of two insolvent corporations had the effect of dissolving all contracts between such two corporations.

[2] Shayne *v.* Evening Post, etc. Co., 168 N. Y. 70 (1901). Under the New Hampshire statutes, when a corporation is wound up under insolvency proceedings, all claims are allowed as of the same date, interest being added for those past due, and a rebate of interest made on those not yet due. An assignee in insolvency cannot agree that a trustee to whom the corporation pledged mortgages as security for debentures shall purchase such securities at a price named. Bank Com'rs *v.* New Hampshire, etc. Co., 69 N. H. 621 (1899).

[3] Tiffin Glass Co. *v.* Stoehr, 54 Ohio, 157 (1896). A contract made by a corporation to pay when it is in funds is not enforceable if the company abandons business. Zimmer *v.* Brooklyn Sub. Ry., 6 N. Y. Supp. 316 (1889). A contract of officers for salary ceases upon the corporation passing into a receiver's hands, since performance is rendered impossible by judicial action and not by the fault of the corporation. Lenoir *v.* Linville, etc. Co., 126 N. C. 922 (1900). A contract of employment with a corporation is terminated by dissolution, the same as if the employer was an individual and had died. Louchheim *v.* Clawson, etc. Co., 12 Pa. Sup. Ct. 55 (1899). A contract whereby a stockholder sells his stock to an individual who guarantees that the former will be employed at a stated salary by the corporation for two years is enforcible against the person so purchasing the stock, even though the corporation passes into the hands of a receiver before the expiration of the two years and the employment is thereby stopped. Kinsman *v.* Fisk, 37 N. Y. App. Div. 443 (1899). A merger of two insurance companies under the New York statute forms a new corporation, and a person under contract of employment in one of the companies is not bound to work for the new company and may recover damages for breach of the contract. Globe, etc. Co. *v.* Jones, 89 N. W. Rep. 580 (Mich. 1902).

gations which were created for a period longer than the duration of the corporate charter.[1]

Where a corporation is dissolved before a lease taken by it runs out, the lessor may hold its assets liable for the breach of contract.[2] Where a receiver is appointed he generally finds a number of executory contracts in force — contracts of employment, or for rental of premises, or for purchases of material, etc. He then must decide whether he wishes to adopt any of these contracts as his own. If he does not adopt a particular contract, then that contractor has no preferred claim against the receiver, as a part of the receiver's expenses or disbursements, but has merely a claim against the corporation and its general assets, and this claim may be for past sums due or for breach of contract, or both. On the other hand, if the receiver does adopt the contract, then as to sums becoming due before such adoption the contractor is a general creditor only, but as to sums becoming due after such adoption, they are a part of the receiver's expenses or disbursements and must be paid as such. The law is clear that a receiver may refuse to carry out an executory contract of the corporation. A receiver has no power, however, to cancel a lease except as to his own liability. The liability of the insolvent corporation itself on rent accruing after the receiver is appointed is not affected by the insolvency and receivership.[3] A lessor, as a general creditor, may file a claim for rent to become due in the future under the lease.[4] After a receiver is appointed interest ceases as between the creditors, but continues as against the corporation and its stockholders.[5] In distribution, debts not yet due participate with a rebate of interest for the unexpired time.[6] The liability of the corporation on indorsements is not considered in the distribution of assets by the receiver, except

[1] See §§ 641, *supra*, 913, *infra*.

[2] Kalkhoff *v.* Nelson, 60 Minn. 284 (1895); People *v.* National Trust Co., 82 N. Y. 284 (1880). Damages for breach of a contract should be allowed in liquidation, even though the time for the performance of such contract is not yet complete. Rosenbaum *v.* United States, etc. Co., 61 N. J. L. 543 (1898), rev'g 60 N. J. L. 294.

[3] New York, Pa. etc. R. R. *v.* New York, Lake Erie, etc. R. R., 58 Fed. Rep. 268 (1893); Chemical Nat. Bank *v.* Hartford Deposit Co., 161 U. S. 1 (1896).

[4] *Re* New Oriental Bank, [1895] 1 Ch. 753. As to a claim for rent to become due, see People *v.* St. Nicholas Bank, 151 N. Y. 592 (1897). Where the receiver continues in possession under an existing lease, he is liable for the rent for the time he occupies the premises, and the lessor may put in a claim as a general creditor for the remainder of the rent. Shackell *v.* Chorlton, [1895] 1 Ch. 378. In the bankruptcy court the landlord cannot prove a claim for rent not yet due, but which would accrue thereafter under the lease. *In re* Arnstein, 101 Fed. Rep. 706 (1899).

[5] People *v.* American, etc. Co., 172 N. Y. 371 (1902).

[6] Jones *v.* Arena Pub. Co., 171 Mass. 22 (1898).

so far as such indorsements have matured and have not been paid.[1] Dissolution may put an end to a guaranty of dividends on the stock of the company.[2] Where suit for dissolution is instituted against an insurance company, the claims against it are figured at their value at the commencement of the suit, even though an insured person dies thereafter and before distribution.[3] A railroad company, having statutory power to extend the period of its existence, may make a lease of its railroad for a period of time extending beyond the duration of its charter, and such lease is valid and binding upon the company for at least the period of its existence.[4] A corporation that owns stock in another corporation may vote such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists.[5] An important question arises in this connection where one corporation sells out all its property to another corporation leaving some of the debts of the former corporation unpaid. The rights and remedies of the creditors in such a case are fully considered elsewhere.[6] So also it frequently becomes important to know whether a consolidated company is liable for the debts of the constituent companies,[7] and whether a purchaser at a foreclosure sale is liable for the debts of the foreclosed corporation.[8]

Dividends paid to the stockholders out of the capital stock are

[1] Oyster *v.* Short, 177 Pa. St. 601 (1896).

[2] Lorillard *v.* Clyde, 142 N. Y. 456 (1894). *Cf.* § 775, *infra.*

[3] People *v.* Commercial A. L. Ins. Co., 154 N. Y. 95 (1897). In winding up an insolvent insurance company the court will ascertain the present value of executory obligations of the company. Taber *v.* Royal, etc. Co., 124 Ala. 681 (1899), the court saying that "When it falls out that the company is unable longer to keep its promises, and its assets are taken possession of by the court, for *pro rata* application to its debts, the court has a right to fix a day up to which engagements under contract may be regarded as continuing, but after which the creditors may regard them as terminated on account of the altered condition of the company, disabling it further to meet its reciprocal promises. That is an option afforded to creditors by the court, in view of the contract relations of the parties, and is strictly in the nature of a rescission by them, and the proof by them in such cases is in the way of damages, and is measurable by the present value of their contracts."

[4] Gere *v.* New York Central, etc. R. R., 19 Abb. N. C. 193 (1885). In this case the validity of a mortgage by the West Shore Railroad Company to become due four hundred and seventy-five years from its date, although the corporate existence of the company was only one hundred years, was not questioned, the court holding that a lease made at the same time for the same length of time by the company was legal. See also § 641, *supra.*

[5] Windmuller *v.* Standard, etc. Co., 114 Fed. Rep. 491 (1902), also 115 id. 748. See a criticism on this case on page 1391, *supra.*

[6] See ch. XL, *infra.*

[7] See ch. LIII, *infra.*

[8] See ch. LII, *infra.*

illegal as against corporate creditors whether paid before or at the time of dissolution.[1]

The question of liability where the corporation is a mere "dummy" is considered elsewhere.[2]

Another question is whether a person or corporation which owns all the stock of another corporation is ever liable for the debts of the latter on the ground that the latter is a mere "dummy" for the former. This subject also is considered elsewhere.[3]

At common law, upon dissolution of a corporation, all suits by or against it abate.[4]

Where a corporation is dissolved while an infringement suit is pending against it the suit may be revived against the receiver.[5]

[1] See § 546, *supra.*

[2] See §§ 6, *supra,* and 663, 664, 709, *infra.*

[3] See § 6, *supra,* and 663, 664, 709, *infra.*

[4] McCulloch *v.* Norwood, 58 N. Y. 562 (1874); *Re* Norwood, 32 Hun, 196 (1884); Greeley *v.* Smith, 3 Story, C. C. 657 (1845); Saltmarsh *v.* Planters', etc. Bank, 17 Ala. 761 (1850); Merrill *v.* Suffolk Bank, 31 Me. 57 (1849); Ingraham *v.* Terry, 11 Humph. (Tenn.) 572 (1851); Life Assoc. *v.* Fassett, 102 Ill. 315 (1882); Platt *v.* Ashman, 32 Hun, 230 (1884). A judgment against a corporation after its charter has been forfeited by decree of the court is void. Insurance Com'r *v.* United, etc. Co., 22 R. I. 377 (1901). Dissolution dissolves a pending attachment. Morgan *v.* New York, etc. Assoc., 73 Conn. 151 (1900). A judgment in Illinois rendered against a New York corporation after it has been dissolved is not evidence against the New York receiver, even though the suit was commenced before the dissolution, it appearing that the attorneys for the company had withdrawn their appearance before the judgment and the receiver had not appeared. People *v.* Mercantile, etc. Co., 65 N. Y. App. Div. 306 (1901). Where the attorney fails to call the attention of the court to the fact that his client, one of the parties in the case, has been dissolved, he may be liable for costs thereafter. Salton *v.* New Beeston, etc. Co., [1900] 1 Ch. 43. An action for tort abates upon the expiration of the corporate charter. Grafton *v.* Union Ferry Co., 13 N. Y. Supp. 878 (1891). Corporate suits end when the charter expires. Logan *v.* Western, etc. R. R., 87 Ga. 533 (1891). Where by consolidation a corporation ceases to exist, suits against it abate. Council, etc. Ry. *v.* Lawrence, 3 Kan. App. 274 (1896). A dissolution of a corporation puts an end to a suit at law for damages for personal injuries. Grafton *v.* Union Ferry Co., 19 N. Y. Supp. 966 (1892). Upon dissolution of a corporation all suits abate. Marion Phosphate Co. *v.* Perry, 74 Fed. Rep. 425 (1896). The dissolution of a foreign corporation ends a suit against it. Wamsley *v.* Horton, 12 N. Y. App. Div. 312 (1896); aff'd, 153 N. Y. 687. A judgment in Illinois against a New York corporation that has already been dissolved in New York is not good in New York. Rodgers *v.* Adriatic F. Ins. Co., 87 Hun, 384 (1895). An action in tort for personal injuries abates upon the dissolution of the company. *Re* Yuengling Brewing Co., 24 N. Y. App. Div. 223 (1897).

[5] Griswold *v.* Hilton, 87 Fed. Rep. 256 (1898). Even though a suit against a corporation for libel abates by reason of the dissolution of the corporation, yet it may be revived and continued against the former directors in order to reach assets in their hands as trustees, under the New York statute. Shayne *v.* Evening Post, etc. Co., 168 N. Y. 70

Suit does not lie against a corporation which has been dissolved.[1] But the statutes often contain a provision that the corporate existence shall be continued for a fixed time, pending the proceedings for dissolution, so that suits may be brought by and against the corporation for the purpose of closing the business and disposing of the assets.[2]

(1901). An action against a corporation may be continued against those who administer its assets where the corporation is dissolved pending the suit. Hepworth *v.* Union Ferry Co., 62 Hun, 258 (1891).

[1] Dobson *v.* Simonton, 86 N. C. 492 (1882); Gold *v.* Clyne, 58 Hun, 419 (1890); aff'd, 134 N. Y. 262. The legislature may provide for suits against corporations after dissolution, thus changing the common-law rule. Stetson *v.* City Bank, etc., 2 Ohio St. 167 (1853); Foster *v.* Essex Bank, 16 Mass. 245 (1819). Under the New York statute dissolution does not bar an action for damages. Marstaller *v.* Mills, 143 N. Y. 398 (1894). Even though a Connecticut corporation which owns a railroad in Kentucky is being wound up, in accordance with the statutes of Connecticut, and even though the company has assigned to the statutory receiver in Connecticut all its property, yet such an assignment is not an assignment for the benefit of creditors, and hence a creditor of the railroad may attach in Kentucky assets in that state. Huntington *v.* Chesapeake, etc. Ry., 98 Fed. Rep. 459 (1899). A suit to collect a debt against a corporation, the charter of which has expired, can be in a court of equity only. Stiles *v.* Laurel, etc. Co., 47 W. Va. 838 (1900). Suit does not lie against a dissolved corporation, and a statute authorizing suit against a domestic dissolved corporation does not apply to a foreign corporation. Fitts *v.* National, etc. Assoc., 130 Ala. 413 (1901). An irregular dissolution of a Connecticut corporation is no bar to a subsequent attachment against such corporation in New York state. Hammond *v.* National, etc. Assoc., 31 N. Y. Misc. Rep. 182 (1900). A statute authorizing a dissolved corporation to bring suit enables such corporation to sue in the federal courts. Dundee, etc. Co. *v.* Hughes, 89 Fed. Rep. 182 (1898). In the case of Hammond *v.* National, etc. Assoc., 58 N. Y. App. Div. 453 (1901), the court intimated that the dissolution of a foreign corporation did not prevent suit and attachment against such corporation in New York. Even after dissolution a stockholder may file a bill to recover assets that have been wrongfully diverted. Boyd *v.* Hankinson, 92 Fed. Rep. 49 (1899). A corporation may be sued as such for a tort committed by it after its charter has expired. Miller *v.* Newburg, etc. Co., 31 W. Va. 836 (1888). Where an attorney brings suit in the name of a corporation that has been dissolved before the action, he is liable for costs if beaten. Attleboro Nat. Bank *v.* Wendell, 64 Hun, 208 (1892). After dissolution has been decreed it is too late for a corporate creditor to bring an action to hold the directors liable for declaring dividends out of the capital stock, no fraud in obtaining the dissolution being alleged. Coxon *v.* Gorst, [1891] 2 Ch. 73. Upon dissolution, the directors becoming trustees by statute, the statute of limitations begins to run against claims against the secretary. Landis *v.* Saxton, 105 Mo. 486 (1891). A corporation may give a bond on appeal, even though the charter has been forfeited, an appeal having been taken from the judgment of forfeiture. Texas, etc. R. R. *v.* Jackson, 85 Tex. 605 (1893).

[2] Stetson *v.* City Bank of New Orleans, 12 Ohio St. 577 (1861); McGoon *v.* Scales, 9 Wall. 23 (1869); Mariners' Bank *v.* Sewall, 50 Me. 220 (1861); Muscatine

A contract made by the officers after the charter has been forfeited does not bind the stockholders.[1]

A director who is a creditor of the corporation may share proportionately with other creditors in the assets.[2]

Where a company owing debts allows a foreclosure of a mortgage and buys in the property and holds it secretly in the name of a trustee, an execution may be levied on it by a judgment creditor of the company.[3] The directors are not personally liable for attorney fees for services rendered in a voluntary dissolution of the company.[4]

Turn Verein *v.* Funck, 18 Iowa, 469 (1865); Thornton *v.* Marginal Freight Ry., 123 Mass. 32 (1877); Folger *v.* Chase, 35 Mass. 63 (1836); Crease *v.* Babcock, 51 Mass. 525, 567 (1846); *Re* Independent Ins. Co., Holmes, 103 (1872); s. c., 13 Fed. Cas. 13; Franklin Bank *v.* Cooper, 36 Me. 179 (1853); Nevitt *v.* Bank of Port Gibson, 14 Miss. 513 (1846). The life of the corporation is frequently extended by these statutes for three years. Herron *v.* Vance, 17 Ind. 595 (1861); Foster *v.* Essex Bank, 16 Mass. 245 (1819); Blake *v.* Portsmouth, etc. R. R., 39 N. H. 435 (1859); Von Glahn *v.* De Rosset, 81 N. C. 467 (1879); Michigan State Bank *v.* Gardner, 81 Mass. 362 (1860). Sometimes five years. Tuskaloosa, etc. Assoc. *v.* Green, 48 Ala. 346 (1872). *Cf.* Lincoln, etc. Bank *v.* Richardson, 1 Me. 79 (1820). A suit abates upon the expiration of the time limited, where by statute the corporation continues for five years after dissolution for the purpose of prosecuting and defending suits. Dundee, etc. Co. *v.* Hughes, 77 Fed. Rep. 855 (1896).

[1] Wilson *v.* Tesson, 12 Ind. 285 (1859).

[2] Thompson *v.* Huron Lumber Co., 4 Wash. St. 600 (1892).

[3] State *v.* McBride, 105 Mo. 265 (1891).

[4] Drew *v.* Longwell, 81 Hun, 144 (1894).

PART IV.

FRAUDS — ULTRA VIRES ACTS — INTRA VIRES ACTS — NEGLIGENCE AND IRREGULAR CONTRACTS OF DIRECTORS, STOCKHOLDERS, PROMOTERS, AND AGENTS.

CHAPTER XXXIX.

FRAUDULENT ACTS OF DIRECTORS, MAJORITY OF STOCKHOLDERS, AND THIRD PERSONS.

A. THE OCCASION, SCOPE, AND PURPOSE OF THE SUBJECT HEREIN.

§ 643. *The cause and occasion of this subject.*— Perhaps the most striking feature of the modern era of industrial development is the growth, wealth, and power of corporations. They have built the railways, dug the canals, established the factories, carried the ocean commerce, and assumed control of the industries of Europe as well as of America. They have absorbed a large part of the surplus wealth of the world, and have been the means of making great profits. But these gains and profits have not always been honestly preserved and administered for the benefit of those who are entitled thereto — the stockholders of the company. Corporations, with their vast capital stock and their great income, have proved to be a temptation to corporate officers. These companies have been found to be efficient instruments of fraud and illegal gain. Corporations have become insolvent, and stockholders have lost their investments, while individuals have become millionaires.

The expense, difficulty, and delays of litigation; the power and wealth of the guilty parties; the secrecy and skill of their methods; and the fact that the results of even a successful suit belong to the corporation, and not to the stockholders who sue, all tend to discourage the stockholders, and to encourage and protect the guilty parties.

In England, ever since the year 1720, when the "South Sea Bubble" exploded and unsettled the finances of the kingdom, there have been many instances of "bubble companies" and dishonest promoters.

In America the cases involving a breach of trust by the directors arise generally out of the management of corporations, and not in their formation.

It is the purpose of this part of this work to explain, so far as is possible, the methods of those frauds, and to point out the remedy for the wrong.

§ 644. *The three classes of stockholders' wrongs herein — The corporation is ordinarily the party to remedy these wrongs.*— Stockholders' wrongs, arising from a breach of trust by directors or a majority of the stockholders or third persons, are clearly divisible into three classes. They are: first, fraudulent acts;[1] second, *ultra vires* acts;[2] third, negligence of corporate directors.[3]

There is another class of grievances — that of internal dissensions in the corporation and dissatisfaction with its policy and acts. These, however, are *intra vires* of the directors or majority of the

[1] This is the subject of this chapter.

[2] See ch. XL, *infra*.

[3] See ch. XLII, *infra*.

stockholders. The law gives no remedy for such dissensions, since the stockholder has the corporate elections as a remedy. The majority are to rule so long as they do so without fraud and within the powers of the corporation.[1] So also the decision of the board of directors is binding as regards the usual suits which a corporation might bring against third persons.[2]

It is to be borne in mind that frauds, *ultra vires* acts, and acts of negligence are injuries to the corporation; and the corporation is naturally the party to bring suit to rectify them. These frauds, *ultra vires* acts, and negligence of directors do not affect the stockholder directly; but they affect the stockholders indirectly by decreasing the corporate assets, and thereby affecting the value of the stock. Accordingly it is the duty of the corporation to bring suit to remedy these wrongs, just as it is the duty and right of the corporation to bring suit to remedy an ordinary trespass, conversion, or fraud, whereby third parties injure the corporate property and interests. That a corporation may bring suit to remedy the frauds, *ultra vires* acts, or negligence of its trustees or directors was the decision of Lord Chancellor Hardwicke, in 1742, in the case of The Charitable Corporation against Sutton.[3]

§ 645. *But, the corporation failing to do so, a stockholder may bring the action.*— Notwithstanding this fact, however, that it was the duty and right of the corporation to bring suit to remedy these wrongs, it gradually became apparent that frequently the corporation was helpless and unable to institute the suit. It was found, where the guilty parties themselves controlled the directors and also a majority of the stock, that the corporation was in their power, was unable to institute suit, and that the minority of the stockholders were being defrauded of their rights and were without remedy; and it became apparent that there was a wrong which had no remedy. The time came when the minority of the stockholders of a defrauded corporation — the corporation itself being controlled by the guilty parties — were given a standing in court for the purpose of taking up the cause of the corporation, and, in its name and stead, of bringing the guilty parties to an account. Accordingly, in 1843, in the leading case of Foss *v.* Harbottle,[4] a stockholder brought suit in the name of himself and other defrauded stockholders, and for the benefit of the corporation, against the directors, for a breach of their duty to the corporation. This case was decided against the complaining stockholders on the ground

[1] See ch. XLI, *infra*.

[2] See § 750, *infra*.

[3] 2 Atk. 400. In this case the court said: "Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity." As to the power of the state to remedy such abuses, see § 635, *supra*.

[4] 2 Hare, 461.

that the complainant had not proved that the corporation itself was under the control of the guilty parties, and had not proved that it was unable to institute the suit. The court, however, broadly intimated that a case *might* arise when a suit instituted by the defrauded stockholders would be entertained by the court and redress given. Acting upon this suggestion, and impelled by the utter inadequacy of suits instituted by the corporation, defrauded stockholders continue to institute these suits and to urge the courts of equity to grant relief.[1] These efforts were unsuccessful in clearly establishing the rights of stockholders herein until the cases of Atwool against Merryweather, in England, in 1867,[2] and of Dodge *v.* Woolsey, in this country, in 1855.[3] These two great and leading cases have firmly established the law for both England and America, that where corporate directors have committed a breach of trust either by their frauds, *ultra vires* acts, or negligence, and the corporation is unable or unwilling to institute suit to remedy the wrong, a single stockholder may institute that suit, suing on behalf of himself and other stockholders and for the benefit of the corporation, to bring about a redress of the wrong done directly to the corporation and indirectly to all the stockholders.[4]

The rule as formulated therein has been repeated, applied, explained, and extended by subsequent cases and by text books until a system of jurisprudence may be said to be based upon it. In bringing that class of suits stockholders are not liable for libel and slander by reason of allegations in their suit against directors for fraud. Not even a director who was not a party can sue them for

[1] Mozley *v.* Alston, 1 Phil. Ch. 790 (1847), where the court said there was no reason assigned "why the corporation does not put itself in motion to seek a remedy;" Lord *v.* Copper Miners, 2 Phil. Ch. 740 (1848), where the court refused relief because the acts were capable of confirmation and had been confirmed by the majority; Gray *v.* Lewis, L. R. 8 Ch. App. 1035, 1050 (1873). See also MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875), in regard to the principle of law decided by these cases.

[2] L. R. 5 Eq. 464, *n.*

[3] 18 How. 331. The case of Hawes *v.* Oakland, 104 U. S. 450 (1881), is perhaps of even greater importance than Dodge *v.* Woolsey, and may take the place of the latter. See also Dickerman *v.* Northern T. Co., 176 U. S. 181, 188 (1900), where the above section is cited.

[4] It is to be noticed that long prior to these cases it had been held by the courts in various cases that a stockholder's action herein would lie, but the principle was not clearly established until the foregoing decisions were made. Thus, in New York, as early as 1832, in the case of Robinson *v.* Smith, 3 Paige, 222 (1832), the remedy was declared to exist. In the early case of Preston *v.* Grand Collier Dock Co., 11 Sim. 327 (1840), a bill by a stockholder in behalf of himself and others to render certain persons liable as stockholders, they having subscribed in order to get a charter, and then declared that they subscribed as trustees for the corporation, was sustained.

libel.[1] Nor does a suit by a stockholder against the corporation for an injunction and a receiver on the ground that the corporation is insolvent render the stockholder liable to a suit for malicious prosecution, even if his suit failed, there having been no arrest of the person or seizure of property.[2]

§§ 646, 647. *The facts and conditions which allow and sustain a stockholder's suit herein.*— Before a stockholder can sustain a suit to remedy the frauds, *ultra vires* acts, or negligence of directors, he should be certain that three distincts facts or conditions exist in his favor. These are: first, that the acts complained of are such as amount to a breach of trust, and such as neither a majority of the directors nor of the stockholders can ratify or condone;[3] second, that the complaining stockholder himself is free from laches, acquiescence, or ratification of the acts to remedy which the suit is brought;[4] third, that the corporation has been requested and has neglected or refused to institute the suit; that the suit is instituted by *bona fide* stockholders as complainants, and that the corporation and the guilty parties and other proper parties have been made defendants.[5]

B. FRAUDS OF CORPORATE DIRECTORS, OF A MAJORITY OF THE STOCKHOLDERS, OR OF THIRD PERSONS, TO REMEDY WHICH A STOCKHOLDER MAY BRING SUIT.

§ 648. *Directors as trustees.*— It is frequently said, both in the cases and in the text-books, that the directors of a corporation are practically trustees, with the whole body of the stockholders as *cestuis que trust.*[6] The New York court of appeals, however, has

[1] Runge *v.* Franklin, 72 Tex. 585 (1889).

[2] Cincinnati, etc. Co. *v.* Bruck, 61 Ohio St. 489 (1900).

[3] This subject is treated in the remainder of this chapter and in chapter XL, *infra.* See also as to such ratification, § 740, *infra.*

[4] See ch. XLIV, *infra.*

[5] See ch. XLV, *infra.*

[6] That directors occupy the position of trustees towards the stockholders, see European, etc. Ry. *v.* Poor, 59 Me. 277 (1871); Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862). See also Green's Brice, Ultra Vires (2d ed.), p. 478, citing many cases. *Cf.* Smith *v.* Anderson, L. R. 15 Ch. D. 247 (1880); Imperial Hotel Co. *v.* Hampson, L. R. 23 Ch. D. 12 (1882); Angell & A. Corp., § 312, etc.; Pierce, Railroads, 36-44; Wickersham *v.* Crittenden, 93 Cal. 17 (1892). In Wasatch Min. Co. *v.* Jennings, 5 Utah, 243 (1887), the court well said in reference to corporate directors: "Courts of equity have carefully refrained from defining the particular instances of fiduciary relations in such a manner that other and perhaps new cases might be excluded." The corporation, however, stands in no fiduciary relation towards its stockholders. Karnes *v.* Rochester, etc. R. R., 4 Abb. Pr. (N. S.) 107 (1867). As stated in Hoyle *v.* Plattsburgh, etc. R. R., 54 N. Y. 314 (1873), whether a director of a corporation is to be called a trustee or not, in a strict sense, there can be no doubt that his character is fiduciary.

recently said that directors are trustees in their relations towards the corporation, but not in their relations towards the stockholders.[1] And again, that "while courts of law generally treat the directors as agents, courts of equity treat them as trustees and hold them to a strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct."[2] The obligation of this trusteeship, whether to the corporation or to the stockholders, has been the basis of ascertaining what acts of directors constitute a fraud, and what remedies may be applied. A corporation may file a bill to compel its secretary and treasurer to account for funds coming into his hands, and need not resort to a suit at law. Such a suit is practically one to compel a trustee to account.[3]

§ 649. *Director or other corporate officer interested in construction company — Contracts between a director and his company.*— It has been held that a director cannot, as against the dissent of a single stockholder, become a contractor with the corporation, nor can he have any personal and pecuniary interest in a contract between a third person and the company of which he is a director.[4]

[1] Bloom *v.* National United, etc. Co., 152 N. Y. 114 (1897).

[2] Bosworth *v.* Allen, 168 N. Y. 157 (1901), 120 Fed. Rep. 440; 81 N. Y. App. Div. 10; 94 N. W. Rep. 171.

[3] Consolidated, etc. Works *v.* Brew, 112 Wis. 610 (1902). A treasurer sued by the corporation for money held by him as treasurer cannot offset a debt due from the corporation to him individually. Oregon, etc. Co. *v.* Schmidt, 60 S. W. Rep. 530 (Ky. 1901). A new treasurer may bring suit against a former treasurer to recover corporate funds, and such suit may be in equity. Hunter *v.* Robbins, 117 Fed. Rep. 920 (1902).

[4] Port *v.* Russell, 36 Ind. 60 (1871), where an injunction was granted against the payment by a plank-road company of money to a construction company of which a director of the former was a member. The court said that the three leading American cases on the subject of frauds by directors are Michoud *v.* Girod, 4 How. 503 (1846); Cumberland, etc. Co. *v.* Sherman, 30 Barb. 553 (1859); and s. c., 20 Md. 117 (1863); and Hoffman Steam Coal Co. *v.* Cumberland, etc. Co., 16 Md. 456 (1860); and in England the case of Aberdeen Ry. *v.* Blakie, 1 Macq. 461 (1854). Where two contractors cause a railroad corporation to be formed, in which one contractor becomes a director, and the other directors are clerks of the second contractor, and the construction contract is made with these two, by means of "dummy" intermediaries, at an improvident price, one of the contractors cannot compel the other to divide the profits. Jackson *v.* McLean, 36 Fed. Rep. 213 (1888). A president is personally liable on loans by his bank to an insolvent person with whom he has other interests. First Nat. Bank *v.* Reed, 36 Mich. 263 (1877). A waiver of the statute of limitations by the board of directors is illegal where the party benefited was a director and was present when the resolution was passed. Lowndes *v.* Garnett, etc. Co., 33 L. J. (Ch.) 418 (1864). Although the officers of a railroad company take in their names lands which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands. Case *v.* Kelly, 133 U.

"Constituted as humanity is, in the majority of cases duty would be overborne in the struggle." Where a construction company contracts with a corporation, the director cannot be interested in the construction company at the time the contract is made, nor subsequently; and it is immaterial that the contract was fair, or even to the advantage of the corporation. The corporation, upon discovering the fact that the director is interested in the construction company, may compel him to pay over to the corporation all profits that he has derived from the construction contract.[1] Again, if a

S. 21 (1890). Where a corporation gives a building contract to one of its directors on his representation that the price is the actual cost of the work, when in fact he had already arranged to subcontract it at a less figure, it is a question for the jury as to whether fraud was involved. Keystone, etc. Co. *v.* Bate, 187 Pa. St. 460 (1898). A contract between a director and a corporation whereby the former gets a commission for selling the product of the latter may be disregarded by a receiver of the corporation. Griffith *v.* Blackwater, etc. Co., 46 W. Va. 56 (1899).

[1] See § 662, *infra.* Quoted and approved in Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896). It is illegal for directors to be stockholders in a construction company to which a construction contract is let. Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875). See also Bayliss *v.* Lafayette, etc. Ry., 8 Biss. 193 (1878); s. c., 2 Fed. Cas. 1079; Paine *v.* Lake Erie, etc. R. R., 31 Ind. 283 (1869); Flint, etc. Ry. *v.* Dewey, 14 Mich. 477 (1866), where a director had become interested in the construction work after the contract had been given. To same effect, see Thomas *v.* Brownville, etc. R. R., 109 U. S. 522 (1883), rev'g 2 Fed. Rep. 877, where, however, it is held that bonds issued to a construction company in which a director is interested cannot be altogether repudiated, but are valid to the extent of the actual value of work done. See also Ryan *v.* Leavenworth, etc. Ry., 21 Kan. 365 (1879), holding also that a stockholder in a corporation which is a stockholder in the defrauded corporation may sue to remedy the wrong to the latter; European, etc. Ry. *v.* Poor, 59 Me. 277 (1871). See also Risley *v.* Indianapolis, etc. R. R., 62 N. Y. 240, 248 (1875); Whitman *v.* Bowden, 27 S. C. 53 (1887), where a building committee of a joint-stock company secretly contracted with themselves. Where the president, in order to get control of the corporation, causes a meeting of the board of directors to vote stock in payment for services and property whose value is much less than the par value of the stock, the stock being voted to outside parties, but thereafter secretly transferred to the president, a stockholder may compel him to return the stock to the corporation for cancellation. Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891). In Lewis *v.* Meier, 14 Fed. Rep. 311 (1882), the remarkable decision is made that the corporation cannot have such a contract set aside, since the corporation is responsible for the frauds of its directors, and hence both parties are *in pari delicto.* Where one of the common council and of the committee granting a street-railway franchise to individuals who convey the same to a corporation becomes a stockholder in that corporation as soon as it is formed, the franchise is void as having been fraudulently obtained. Finch *v.* Riverside, etc. Ry., 87 Cal. 597 (1891). Where three out of a board of five public officers give a contract for the supply of water to the town, and one of the three is interested in the contract, the contract is illegal. Santa Ana Water

company contracting with the corporation secretly gives to the contracting agent of the latter a subcontract for the construction work, the corporation may attack the whole contract and recover back the profits realized therefrom.[1] A contract is not valid and

Co. *v.* San Buenaventura, 65 Fed. Rep. 324 (1895). Under the Kentucky statutes a contract between a city and a printing company, in which company a member of the common council is a stockholder, is illegal. Nunemacher *v.* Louisville, 98 Ky. 334 (1895). Where two competing street-railway companies apply for the right to lay tracks, and the board of public works grants the right to a company in which one of the members of the board is a stockholder, the other company may have the grant set aside. Traction Co. *v.* Board of Public Works, 56 N. J. L. 431 (1894). Where one corporation buys a street railroad from another, a stockholder in the former cannot question the validity of bonds issued by the latter and expressly assumed by the former, nor can he raise the question of fraud in constructing the road. Smith *v.* Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897). The president of a gas company cannot let to a partnership of which he is a member a contract to erect a gas plant for the corporation. If the contract is abandoned and a suit brought on a *quantum meruit*, the value of the labor and materials used must be clearly proved. Sims *v.* Petaluma, etc. Co., 131 Cal. 656 (1901). Where an agent to sell is able to sell for more than he accounts for to his principal, the latter cannot recover the difference unless the sale was actually made. Edison *v.* Gilliland, 42 Fed. Rep. 205 (1890). Where the rolling-stock is purchased by the directors in the name of a trustee of a car trust, he being merely a figure-head, payments being made from the funds provided for the building of the road under the construction contract, the court held that there was such a mingling of the funds and of the interests of the directors as directors with their interests as purchasers of the rolling-stock that the title to the rolling-stock passed to the company, and the car trust was invalid. The court said: "Any arrangement by which the road is equipped with rolling-stock belonging to another corporation should be distinct, unequivocal, and above suspicion." McGourkey *v.* Toledo, etc. Ry., 146 U. S. 536, 567 (1892). Even though directors are interested in the construction company which takes the bonds, and the property is foreclosed and is bought in by the directors, yet the railroad company cannot set aside the transaction unless it offers to pay to the directors what they have expended or offers to take the property subject to such mortgage bonds. San Antonio, etc. Ry. *v.* San Antonio, etc. R. R., 60 S. W. Rep. 338 (Texas, 1900). A director who owns the assets of a business which is cognate to the business of his corporation may sell the same to his corporation at an advanced price, and he need not disclose what he paid for it, and a stockholder cannot compel the director to pay to the corporation the profit he has made. The sale may be rescinded, but the court has no power to force the director to sell at a lower price. Burland, etc. *v.* Earle, etc., [1902] A. C. 83.

[1] "According to my view of the law of this court, I take it to be clear that any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal cognizable in this court." Panama, etc. Tel. Co. *v.* India Rubber, etc. Tel. Works Co., L. R. 10 Ch. App. 515 (1875). In this case the secret subcontractor was the agent and engineer of the corporation. He received a commission for his work, and the work was to be accepted subject to his approval.

enforceable against the corporation where the parties contracting with the corporation have given to the directors of the corporation a secret interest in the profits of the contract.[1] In England it has been decided that even though it is legal under the statutes to provide that no calls shall be made on certain shares, except upon a winding up, yet where the directors are the subscribers for such shares and do not fully inform other subscribers of the situation, they may be compelled at the instance of a stockholder to pay at the same time that the others pay, even though there was no actual fraud, the parties having acted in good faith.[2]

Where a national bank and two of the directors of a corporation are secretly interested in the profit made by selling property to such corporation for stock, the corporation may hold them liable for such profit. The defense of *ultra vires* on the part of the bank is not good. Zinc, etc. Co. *v.* First, etc. Bank, 103 Wis. 125 (1899). The case of Currier *v.* New York, etc. R. R., 35 Hun, 355 (1885), goes still further, and holds that a stockholder may compel the contractors to disgorge when they obtain the contract with the corporation through their associates or hirelings being made directors. An agreement of an attorney to share his fees with a director who votes and aids him in getting the company's business is void. The courts will not compel the attorney to carry out the agreement. All parties are left as they are found. Attaway *v.* Third Nat. Bank, 93 Mo. 485 (1887). See also Lindley, Company Law, pp. 328, 368. Where the managing director of the Union Pacific Railroad caused a contract for its construction to be given to a person who acted as his agent, and the director then formed the Credit Mobilier company, a Pennsylvania corporation, and had the construction contract assigned to it, and all the stockholders of the railroad were invited to become stockholders in the latter company, and all the facts herein were more or less known to all parties, a court of equity refused to enjoin the Credit Mobilier from collecting the contract price of the construction work. Union Pac. R. R. *v.* Credit Mobilier, 135 Mass. 367 (1883). Although an assistant engineer of the company is secretly interested with the contractor in the profits of the construction, yet where the former had nothing to do with the letting the contracts or accepting the work, and merely testified in an arbitration in the settlement, but did not testify falsely, the parties need not give up their profits. Union R. R. *v.* Dull, 124 U. S. 173 (1888). In Fox *v.* Hale, etc. Co., 108 Cal. 369 (1895), the president was held liable for fraud in reducing ores belonging to the company.

[1] Quoted and approved in Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896); Wardell *v.* Railroad Co., 103 U. S. 651 (1880). A person who brings about a contract whereby the president obtains a secret profit in a corporate contract cannot recover for his services. Van Valkenburgh *v.* Thomasville, etc. R. R., 4 N. Y. Supp. 782 (1889). Where the directors appropriate the money of the corporation to themselves, a minority stockholder may bring them to account. Sage *v.* Culver, 71 Hun. 42 (1893); aff'd, 147 N. Y. 241. Where the directors are secretly interested in the construction contract and are to have a portion of the profits, bonds issued under the contract are void except in *bona fide* hands. Vanderveer *v.* Asbury Park, etc. Ry., 82 Fed. Rep. 355 (1897). See also § 650, *infra.*

[2] Alexander *v.* Automatic, etc. Co., [1900], 2 Ch. 56, rev'g [1899] 2 Ch. 302.

In Massachusetts, however, the supreme court, with characteristic independence and recognition of actual conditions, has said in regard to a contract between a corporation and one of its directors: "It was not illegal or void because made with a director,— the only person likely to be willing to make it. In this country it very generally has been deemed impracticable to adopt a rule which absolutely prohibits such contracts." [1]

In New Jersey the highest court has just decided that a director may contract with the corporation, *if the contract is a fair one*, and if it is made without concealment, and if it is approved by a majority of the stockholders in meeting assembled.[2] Such also seems to be the rule in New York.[3] On the other hand it has very prop-

[1] The court held that a director may be employed by a corporation to settle claims against it, he to receive five per cent. of the face value of the company's bonds used in settlement, and also to receive whatever discount he could get from the claims, where he did not vote on the question of his employment, and a jury has found that the contract was made in good faith and was not improvident, it being shown that the company was pressed and had no other way of raising money, and that the director advanced his own money. A receiver cannot recover back the amount so paid the director. Ft. Payne, etc. Mill *v.* Hill, 174 Mass. 224 (1899). Notwithstanding a resolution for the issue of stock in payment for a patent does not recite that the patentee is to have a salary, yet that fact may be shown by parol evidence, and the fact that the corporation re-assigned the patent as security for such salary is not necessarily proof of fraud, even though the patentee is president of the corporation. Gay *v.* Fair, 175 Mass. 521 (1900).

[2] Even though the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied the right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." The court further said: "In Leavenworth *v.* Chicago Railway Co., 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the case of Nye *v.* Storer, 168 Mass. 53, and Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders." Hodge *v.* United States Steel Corp., 54 Atl. Rep. 1 (N. J. 1903).

[3] Inasmuch as in New York an agreement of a contractor to divide with the officers of the company profits made in the construction of the railroad is legal, unless avoided by the corporation, and is not subject to collateral attack, such a contract will be sustained in Pennsylvania if the contract was made in New York and pertained to a New York corporation, even though such corporation was thereafter consolidated with a Pennsylvania corporation. Rumsey *v.* New York, etc. R. R., 53 Atl. Rep. 495 (Pa. 1902).

erly been decided in California that if the contract is an unfair one no amount of publicity or ratification by a majority of the stockholders can legalize it.[1] This seems to leave it with the court to decide whether the contract is a fair one or not, with power to set the contract aside, if it is manifestly unfair.[2]

Moreover, this principle of law is a shield and not a sword. The guilty party cannot avail himself of it.[3] Hence, even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground.[4] Where the president by secret agreement is to participate in a construction contract, he cannot enforce such contract, and hence bonds issued to the contractor are not affected by the Ohio statute prohibiting the sale, directly or indirectly, of bonds to an officer at less than par.[5] Even though the president has authority to make con-

[1] Where a majority of the directors of an irrigation company are members of an association which desires to obtain water from such corporation, a contract to that effect which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. Goodell *v.* Verdugo, etc. Co., 71 Pac Rep. 354 (Cal. 1903), the court saying, "the publicity alone of an illegal and unauthorized act of the directors of the corporation does not make it legal or valid."

[2] The court seems to have the same power that it has as to contracts between two corporations having directors in common. See § 658, *infra*.

[3] Where a railroad construction contract is assigned to trustees, to be carried out and the profits to be paid to the stockholders of a designated corporation, the stockholders may compel the trustees to pay over such profits. The trustees cannot set up that they were also directors of the railroad. Hazard *v.* Dillon, 34 Fed. Rep. 485 (1888). A person sued on a contract by a corporation cannot claim that the contract is unenforceable because another of the parties thereto was a director of the corporation. Stewart *v.* Lehigh Valley R. R., 38 N. J. L. 505 (1875), Where a corporation has assumed a personal contract between the president and one of the directors, if the president has accepted the corporation as liable on the contract, he cannot thereafter hold the director liable on such contract. Munson *v.* Magee, 161 N. Y. 182 (1900).

[4] Even if the promoters stated that a certain part of the plant was in full operation, yet if there was no fraud, and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial, if that fact is made known to the parties. Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate Ltd., [1899] 2 Ch. 392.

[5] Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898). Although the president is secretly to participate

tracts, yet he cannot cancel a contract which he is personally interested in having canceled.[1] Where a director of a construction company compels an iron concern to agree to give a bonus to the construction company under threat that otherwise the railroad would be run on another route, the contract cannot be enforced.[2] Where one corporation owns stock in another corporation, and a committee of the board of directors of the former, in selling such stock, provide for the purchaser purchasing also similar stock owned by the directors and their friends, but not providing for similar stock owned by other stockholders, the contract is illegal.[3] However, there are many cases in which the above rules do not apply. Thus, where the director was a surety for the contractor, and the latter failed, the former, who finished the construction work under compulsion by the company, may set up its acquiescence as a bar to its suit to recover from him the profits of the transaction.[4] Again, where a director purchased an interest in the construction contract after it had been entered into, but sold that interest before any work was done thereunder, the illegality of his connection with the construction company cannot affect the legality of his sale of that interest.[5] Even though a director prevents a removal of the company's business to another location on advantageous terms, his reason being that he did not get a secret bonus, yet he is not personally liable for damages for so doing, it appearing that the information which he gave to the parties who were about to deal with the corporation was correct.[6] Where the business of a lumber railroad has been exhausted, it is legal for the majority of the directors to vote to extend the road, even though the extension is to enable them to market their own timber.[7] Upon the consolidation of two companies, it is legal for one of the companies to pay the president and vice-president of the other company a sum of money in consideration of their agreeing not to engage individually in the same business during the period of ten years within a defined territory. A stockholder in the company in which

in the construction contract, yet if the company does not rescind the contract on this ground, and the corrupt relation is terminated before the completion of the contract, bonds issued under the contract are valid. Continental Trust Co. *v.* Toledo, etc. R. R., 86 Fed. Rep. 929 (1898); aff'd in Toledo, etc. R. R. *v.* Continental T. Co., 95 Fed. Rep. 497 (1899).

[1] Wallace *v.* Oceanic, etc. Co., 25 Wash. 143 (1901). An officer of a bank cannot legally compromise a claim in which he is interested on the other side. Leonhardt *v.* Citizens' Bank of Ulysses, 56 Neb. 38 (1898).

[2] Woodstock Iron Co. *v.* Richmond, etc. Co., 129 U. S. 643 (1889).

[3] Kelsey *v.* New England, etc. Ry., 62 N. J. Eq. 742 (1901).

[4] Kelley *v.* Newburyport, etc. R. R., 141 Mass. 496 (1886).

[5] Barnes *v.* Brown, 80 N. Y. 527 (1880).

[6] Hale *v.* Mason, 160 N. Y. 561 (1899).

[7] Bucksport, etc. R. R. *v.* Edinburgh, etc. Co., 68 Fed. Rep. 972 (1895).

such persons were officers cannot compel the officers to account for the money if the consolidation itself was acquiesced in and the transaction was honest in fact.[1] But a settlement between a corporation and its creditors, made by a board of directors of whom a majority are interested in the matter adversely to the corporation, is voidable as against the corporation and non-assenting stockholders, even though the settlement may have been for the best interests of the corporation at the time.[2] In England it is customary to insert in the by-laws a provision that if a director is interested in a corporate contract without declaring his interest, his office is thereby vacated.[3] A person dealing with a director, and taking from him notes or securities which the corporation has issued, must investigate as to the legality of the issue of such securities.[4]

A contract between a director and the corporation is voidable, and not void. Accordingly, if none of the stockholders object to such a contract it is legal.[5] Where the directors own all the stock

[1] Bristol *v.* Scranton, 57 Fed. Rep. 70 (1893); aff'd, 63 Fed. Rep. 218 (1894).

[2] Higgins *v.* Lansingh, 154 Ill. 301 (1895). A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid, and may be set aside by a judgment creditor of the selling corporation. Summers *v.* Glenwood, etc. Co., 86 N. W. Rep. 749 (So. Dak. 1901).

[3] See Turnbull *v.* West Riding, etc. Co., 70 L. T. Rep. 92 (1894).

[4] See § 293, *supra*, and § 727, *infra*.

[5] If all parties assent to a guaranty by the company of bonds and stock in another company owned by directors of the first company, such guaranty, being in consideration of a lease, will not be set aside. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). Creditors cannot object to a contract between the corporation and a director where the stockholders have assented thereto and the contract is a fair one. Welch *v.* Importers', etc. Bank, 122 N. Y. 177 (1890). Where neither the corporation nor any stockholder objects, it is legal for the directors to have an interest in the profits of a contract for the construction of the road, and they may compel the contractor to pay over to them their part of the profits. The contract was voidable, not void. Robison *v.* McCracken, 52 Fed. Rep. 726 (1892); aff'd, 57 Fed. Rep. 375, *sub nom.* McCracken *v.* Robison. Bonds issued at their full par value to the president in payment for work done by him under a contract between himself and his company are valid and enforceable where all the stockholders assented to such contract. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). The letting of a construction contract to one who owns ninety-nine one-hundredths of the stock, in payment for such stock, is legal, although he as president issues it to himself, where a *bona fide* board of directors ordered it in the usual discharge of their duties. The fact that the contractor received stock and bonds four times in par value the value of the work is not fatal

of a corporation, the usual rules preventing a director from contracting with the corporation do not apply.[1] A stockholder may be interested in the construction company, and bonds may be issued to him, even though he owns a majority of the stock and thereby has control.[2] A stockholder who is also secretary of the board, but not a member of the board, may contract with the company.[3] Where the manager, in order to continue a profitable contract which he has with the corporation, keeps up a dead-lock in the board of directors, due to there being a vacancy, he is bound to prefer the interests of the company, or else to terminate his employment and rely on his contract.[4]

where no fraud is alleged and the actual cost of the work is not alleged. But where the contractor then entered into a contract whereby the mortgage was to be foreclosed, and he was to participate at the sale, all for the purpose of cutting off other creditors, he is liable to them. Cleveland, etc. Co. *v.* Crawford, 9 Ry. & Corp. L. J. 171 (Chicago, 1891). In McGourkey *v.* Toledo, etc. Ry., 146 U. S. 536 (1892), the court, speaking of a contract in which the directors were interested, said: "Did the vice of these contracts lie in an attempted concealment of the actual facts, as is frequently the case where preferences are secretly reserved in assignments, there would be much force in this suggestion; but if it inheres in the very nature of the contract,— if there be a thread of covin running through the web and woof of the entire transaction,— in other words, if the purpose be unlawful, it is not perceived that an open avowal of such purpose make it the less unlawful. We do not wish to be understood as saying that the transaction in question necessarily involved actual fraud on the part of those participating in it." A contract between the president and a third party from whom the company buys lumber, that such third party shall pay him a commission, is not illegal *per se*. The president may collect such commissions unless it is shown that the agreement was concealed from the corporation, or that the president was exercising some discretion or trust. Jameson *v.* Coldwell, 23 Oreg. 144 (1892). Bondholders cannot sustain a bill in equity to remove a trustee who holds the stock of various gas companies as collateral security for the payment of their bonds, even though such trustee has voted such stock in favor of directors who have made improvident contracts in which such directors were personally interested, it appearing that by the terms of the trust agreement the trustee was to vote such stock as the pledgors directed, until default on the bonds, and it not being shown that the trustee knew that such default had been made. Moreover, such removal will be denied when the trust agreement itself provides for the removal of the trustee by vote in writing of one-third in interest of the bondholders at a meeting called for that purpose, and no reason is shown for disregarding this mode of changing the trustee. Dillaway *v.* Boston, etc. Co., 174 Mass. 80 (1899). See also ch. XLIV, *infra*.

[1] McCracken *v.* Robison, 57 Fed. Rep. 375 (1893).

[2] Porter *v.* Pittsburg, etc. Co., 120 U. S. 649, 670 (1887). *Cf.* § 662, *infra*.

[3] Hitt *v.* Sterling, etc. Co., 111 Iowa, 458 (1900).

[4] Kane *v.* Schuylkill, etc. Co., 199 Pa. St. 198 (1901).

§ 650. *Secret gifts to directors from persons contracting with the corporation.*— It is a well-established principle of law that a director commits a breach of trust in accepting a secret gift or secret pay from a person who is contracting or has contracted with the corporation, and that the corporation may compel the director to turn over to it all the money or property so received by him.[1] Thus, an agreement of a third person to pay a certain sum to a director if a certain location of a railroad is adopted, or an agreement to allow him to participate in the profits derived from such location, is not an enforceable contract.[2] So also where a director receives a commission from one who obtains a loan from the corporation through the director's influence, the latter may be compelled to pay over the commission to the corporation.[3] A treasurer who receives a secret commission from a party selling to a corporation must turn the same over to the corporation.[4]

A similar rule was applied where a director of an insolvent insurance company accepted a secret gift for re-insuring the company's risks in another insurance company.[5] And, in general, whenever an officer or agent of the corporation accepts a secret

[1] Quoted and approved in McClure *v.* Trask, 161 N. Y. 82 (1899).

[2] Wardell *v.* Railroad Co., 103 U. S. 651 (1880); Bestor *v.* Wathen, 60 Ill. 138 (1871); Linder *v.* Carpenter, 62 Ill. 309 (1872); Fuller *v.* Dame, 35 Mass. 472 (1836), holding that a promissory note given therefor is void. See also Union Pac. R. R. *v.* Durant, 3 Dill. 343 (1874); S. C., 24 Fed. Cas. 628, holding that where the president uses his power oppressively and by threats to compel citizens to convey lands to him for the company, the court will decree a reconveyance to the grantors; Holladay *v.* Patterson, 5 Oreg. 177 (1874), where the agreement to pay money to a director and president of a railway if a depot was located in a certain place was held unenforceable. A subscription, however, conditioned upon the location of a depot is valid. See § 83, *supra*. *Cf.* § 681, *infra*. In Cook *v.* Sherman, 20 Fed. Rep. 167 (1882), the court refused to enforce specifically a contract whereby corporate officers agreed to purchase lands, the purpose of all the parties being to influence thereby the location of the railroad. A note for $5,000 given to a general manager to use his influence to have the company remove its mill is illegal. Lum *v.* McEwen, 56 Minn. 278 (1894). An agreement to convey land to a person in consideration of his endeavoring to have a depot located on the land is illegal and not enforcible, where such person already had an agreement with the officers of the railroad by which they were to receive a part of such land. Reed *v.* Johnson, 27 Wash. 42 (1901).

[3] Farmers', etc. Bank *v.* Downey, 53 Cal. 466 (1879); Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873).

[4] In this case the commission was received by an outside party in the way of stock issued at par which he immediately and secretly turned over to the treasurer. Rutland, etc. Co. *v.* Bates, 68 Vt. 579 (1896).

[5] Bent *v.* Priest, 86 Mo. 475 (1885); Gaskell *v.* Chambers, 26 Beav. 360 (1858), where the director received a secret gift for bringing about a consolidation. *Contra*, if all assented. Southall *v.* British, etc. Assoc., L. R. 6 Ch. App. 614 (1871).

gift or participates in the profits of a contract with the corporation, without the assent of the stockholders, the corporation is entitled to the gifts or profits, and a stockholder may bring the suit to compel the officer or agent to pay over.[1]

[1] "All persons who stand in a fiduciary relation to others must account for all the profits made upon moneys in their hands by reason of such relation. . . . Agents, guardians, directors of corporations, officers of municipal corporations, and all other persons clothed with a fiduciary character, are subject to this rule." Perry on Trusts (3d Ed.), § 430. In Chandler *v.* Bacon, 30 Fed. Rep. 538 (1887), the president and secretary were held liable for stock received by them secretly from a patentee to whom all the capital stock had been issued for his patent. Directors receiving stock as a gift from one who sells property to the company for stock will be compelled to give it up to the company. So also will an outside party who aided in the bribe and took some stock himself. Paducah, etc. Co. *v.* Mulholland, 24 S. W. Rep. 624 (Ky. 1894). Where the party selling property to the company for stock gives part of the stock to directors, a person who afterwards becomes president and takes a part of this stock as a gift is liable for it or its value to the company, even though he did not know of the fraud until after he took the stock. Paducah, etc. Co. *v.* Hays, 24 S. W. Rep. 237 (Ky. 1893). In Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101 (1894), a promoter and director was compelled to restore to the corporation the cash or stock which he had received secretly as a gift from a party who had sold patents to the company. The same case holds that such a contract cannot be enforced by the promoter against the patentee. Where the incorporating act required all the proceeds of sales of lots by a cemetery company to be used for embellishments, and the directors proceed to buy land for a consideration of $500,000 in bonds, of which bonds $480,000 were turned back by the vendor to the directors, who divided them among themselves, the bonds are void in the hands of directors. The directors in this case had erected over the entrance to the cemetery a statue of Immortality, and had done so "with great pomp and solemnity." Campbell *v.* Cypress Hills Cemetery, 41 N. Y. 34 (1869). In Tyrrell *v.* Bank of London, 10 H. L. Cas. 26 (1862), a solicitor was compelled to repay with interest a secret gift; General Exch. Bank *v.* Horner, L. R. 9 Eq. 480 (1870), where the manager was paid a large sum in order to obtain his aid to a consolidation scheme. Where the company pays to its solicitor a commission for stock which he induces the president to take, he must repay the commission on the winding up. *Re* Stapleford Colliery Co., 49 L. J. (Ch.) 253 (1880). A manager who takes secret gifts from parties with whom he contracts for his company must disgorge the same. He also may be dismissed and his contract salary stopped. Boston, etc. Co. *v.* Ansell, L. R. 39 Ch. D. 339 (1888). Where corporate agents organize local branch companies on a basis prescribed by the parent company, and the agents demand and obtain from the local company more than the parent company prescribed, the excess belongs to the parent company. Sheridan *v.* Sheridan, etc. Co., 38 Hun, 396 (1886). Directors borrowing money from the corporation and giving notes therefor cannot defend against the notes on the ground that a discount thereon was to be allowed to them. Alford *v.* Miller, 32 Conn. 543 (1865). See Western U. Tel. Co. *v.* Union Pac. Ry., 3 Fed. Rep. 721 (1880); and *quære*, as to the effect of the contract between the complainant and defendant where one of the minor pro-

The contract being illegal it cannot be enforced by the guilty officer or agent as against the party with whom it is made.[1]

The party paying the bribe may also be held liable in damages to the defrauded party.[2] An agreement to turn over the control

visions was that the railway officers were to have free telegraph service for themselves and families. Although the purchasing agent of a railroad company buys coal from a coal company in which such agent owns one quarter of the stock, the dividends received by such agent on such stock may be retained by him, although the railroad company was ignorant of the fact that he was such stockholder, there being no proof of fraud and the coal being sold cheaper than the going rate. Clark *v.* American Coal Co., 86 Iowa, 436 (1892). Nine years' delay on the part of a minority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. Cullen *v.* Coal Creek, etc. Co., 42 S. W. Rep. 693 (Tenn. 1897).

[1] A person suing for services rendered in procuring a construction contract cannot collect if he was not instrumental in obtaining the contract, or if he gave a secret commission to the agent of the party who was to pay the whole commission, unless the principal ratified the contract with knowledge of such commission to the agent. Smith *v.* Seattle, etc. Ry., 72 Hun, 202 (1893). The officers cannot recover secret commissions on sales to the corporation where the corporation repudiated the purchase by reason of such commissions and then bought from the same parties at a lower figure. Jameson *v.* Coldwell, 25 Oreg. 199 (1894). A secret commission paid to the agent of the other party to the contract invalidates the contract. Findlay *v.* Pertz, 66 Fed. Rep. 427 (1895). "It seems to be illogical to contend that a contract can be avoided as between the officer and the corporation, and yet be held to be valid in favor of the officer against the party with whom he has contracted." Gillig *v.* Barrett, N. Y. L. J., Jan. 6, 1891. A general manager of a road cannot enforce a contract by which he was to receive stock in another road for aiding the latter in procuring municipal bonds, his aid being due to his influence as general manager. Sargent *v.* Kansas Mid. R. R., 48 Kan. 672 (1892). A contract whereby a party who is about to sell his business to a corporation to be organized agrees secretly to give $5,000 of stock to a party who agrees to subscribe openly for $5,000 of the stock is not enforcible, it appearing that the party who was thus to get the extra stock objected to the amount of stock to be issued to the vendor, and withdrew his objection only upon this agreement, and it appearing also that he afterwards became a director and voted to purchase the property at the price demanded by the vendor. Koster *v.* Pain, 41 N. Y. App. Div. 443 (1899). Even though the agent of a corporation represents to it that a party owns certain property and will sell it to the corporation for $7,500 in bonds and $30,000 in stock, and the purchase is made on those terms, and the vendor keeps the bonds and gives the stock to such agent, and the agent sells a portion of the stock to a *bona fide* purchaser, yet the latter cannot rescind the sale on the ground of fraud. Foushee *v.* Snyder, 54 S. W. Rep. 730 (Ky. 1900). The agreement of a person who sells property to a corporation that he will divide the profits with the manager does not invalidate the sale where such agreement was made after the sale itself had been made, and was made under threat of the manager to repudiate the contract. Yellow, etc. Co. *v.* Daniel, 109 Fed. Rep. 39 (1901).

[2] The president and managing agent

of a co-operative insurance company is illegal, and money received therefor may be recovered back by a receiver of the company.[1]

There is another large class of cases, particularly in England, wherein persons who desire to form a company for the purpose of purchasing and working certain property, such as patents and mines, cause their friends to accept the position of directors or agents, and then give them money or stock in compensation therefor. This is still a common practice in business, but the courts have uniformly held that a stockholder or the corporation or a receiver on the winding up may compel such directors or agents to pay over to the corporation the money received, or, if stock was received, then to pay to it the value of such stock.[2]

renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Even though a person does not know that a promoter to whom he has given an option on his property is a director in the company which proposes to buy it, yet if he discovers this fact before he closes the transaction he must pay to the company the commission which he agreed to pay to the promoter; and even though the company has recovered from the promoter such part of the commission as the promoter actually received, yet the company may recover the balance from the vendor of the property, although such balance had been waived by the promoter in consideration of what was actually paid to him. It is unnecessary to rescind the contract. Grant *v.* Gold, etc. Syndicate, [1900] 1 Q. B. 233. Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the person so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. Smith *v.* Smith, etc. Co., 125 Mich. 234 (1900). Even though a director prevents a removal of the company's business to another location on advantageous terms, his reason being that he did not get a secret bonus, yet he is not personally liable for damages for so doing, it appearing that the information which he gave to the parties who were about to deal with the corporation was correct. Hale *v.* Mason, 160 N. Y. 561 (1899).

[1] McClure *v.* Law, 161 N. Y. 78 (1899). Money received by a director of a co-operative insurance company for substituting other directors and transferring its business to another company can be recovered back on the ground of fraud, and such director is chargeable with notice of the facts which he knew or might have learned by the exercise of reasonable care. McClure *v.* Wilson, 70 N. Y. App. Div. 149 (1902). Directors who have been held liable for moneys paid to directors of another company to induce the latter to resign and turn over the assets of such company cannot recover back such money from the parties who received it. Gilbert *v.* Finch, 173 N. Y. 455 (1903).

[2] *Re* Westmoreland, etc. Co., [1893] 2

A vendor of property to a corporation may, however, pay the officers of the corporation for services in promoting and organizing

Ch. 612. A gift by a promoter to a director of a company whilst there are any questions open between the company and the promoter must be accounted for by the director to the company; and the company is entitled to the highest value of the gift at any time between the wrongful act and the time when it came to their knowledge. Eden *v.* Ridsdales, etc. Co., L. R. 23 Q. B. D. 369 (1889); Pearson's Case, L. R. 5 Ch. D. 336, aff'g L. R. 4 Ch. D. 222 (1876), the court saying: "Whether the purchase was or was not an advantageous one for the company . . . is a question wholly immaterial for us to consider; he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances;" Leeke's Case, L. R. 6 Ch. App. 469 (1871); De Ruvigne's Case, L. R. 5 Ch. D. 306 (1877); Ormerod's Case, 25 W. R. 765 (1877), where the director was elected and the gift received even after the contract was made. The court said: "If it is lawful that a man may be bought as a director, it must be decided by some one else. I never will decide it;" Weston's Case, L. R. 10 Ch. D. 579 (1879), where the director was held liable for the full price of the stock less what he paid therefor; *Re* Eskern Slate, etc. Co., 37 L. T. 222 (1877), where the articles of association allowed the gift, but were held to be fraudulent; McKay's Case, L. R. 2 Ch. D. 1 (1875), where the secretary of the corporation was compelled to pay over; Hay's Case, L. R. 10 Ch. App. 593 (1875), where the court said: "No agent can in the course of his agency derive any benefit whatever without the sanction or knowledge of his principal;" *Re* Englefield Colliery Co., L. R. 8 Ch. D. 388 (1878); Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396 (1879), where the mining experts of the corporation were compelled to disgorge; *Re* Carriage, etc. Assoc., L. R. 27 Ch. D. 322 (1884); *Re* Drum, etc. Co., 53 L. T. 250 (1885), where the party gave money to the directors. See also Madrid Bank *v.* Pelly, L. R. 7 Eq. 442 (1869), where the directors were held liable for the money received by them, but for no more; Nant-y-Glo, etc. Co. *v.* Grave, L. R. 12 Ch. D. 738 (1878), holding that the corporation may sue herein the same as a liquidator; Mitcalfe's Case, L. R. 13 Ch. D. 169 (1879), where a director was held liable for the market value of stock given to him by the person to whom the stock was issued as full paid in consideration of property. There was no evidence that the director acted unfairly or acted as a promoter. He was held liable, although he had sold part of the stock. The secretary need not give up a profit which he made as one of the promoters. Sale, etc. Gardens, Ltd., 78 L. T. Rep. 368 (1898), rev'g 77 L. T. Rep. 681. Where the directors vote money to a promoter, and he invests it in the company's debentures and divides them among the directors, the latter must refund the money so voted, and cannot offset a debt due to them from the company. *Re* Anglo-French Co-op. Soc., L. R. 21 Ch. D. 492 (1882). Money paid to directors by the person selling to the company, in order to induce them to become directors, cannot be retained. *Re* Brighton Brewery Co., 37 L. J. (Ch.) 278 (1868). Where the company's agent, in negotiating a contract, procures a larger sum for the company than it demands, on a secret agreement that it should pay him the increase, he cannot collect it. *Re* Owens, Ir. Rep. 7 Eq. 235, 424 (1873). Where the owners of property, the promoters, the directors, and the solicitor sold to the company property the title to which was bad, and divided the proceeds, each was made to repay the amount received by him. Phos-

the company and procuring the purchase of his lands, there being no fraud or concealment in the matter.[1]

Even though a party purchases property and makes a partial payment thereon, yet, where he then proceeds to form a corporation and controls the corporation, and acts as a director in taking over the property at a largely increased price, the corporation may compel him to turn over to it all the profit he has made by the transaction.[2] In any case, unless all persons interested are fully informed

phate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394 (1877). And see many English cases in Healey, Company Law and Pr., pp. 543, 544. Directors will be compelled, upon the dissolution of the company, to pay to it the par value of stock which has been presented to them by the promoters in order to induce them to act as directors, even though the arrangement was known to all stockholders, it appearing that stock had been offered to the public without mention of these facts, although the public did not subscribe for any of the stock. So far, however, as the contract between the promoter and the company disclosed the facts, the directors were protected. *Re* Postage Stamp, etc. Co., [1892] 3 Ch. 566. Where a director is required to hold a certain amount of stock, and he takes that stock with a secret agreement by which the promoter is to purchase the stock from the director at a certain price whenever the director so desires, and after the company becomes insolvent the director sells the stock to the promoter at such price and receives the money, the director may be compelled to turn in the money to the corporation. *Re* North Australian, etc. Co., [1892] 1 Ch. 322. Directors who have been obliged to repay money which they and others received for turning over the assets of the company to another company, they having no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. There can be no contribution demanded by a joint tort-feasor. Gilbert *v.* Finch, 173 N. Y. 455 (1903).

[1] Dexter *v.* McClellan, 116 Ala. 37 (1897). Where one company buys out another, the former may agree to pay a certain sum to the directors and secretary of the latter "as compensation for loss of office." This agreement is legal if the stockholders of the selling company ratify the same. The notice of a meeting of the stockholders, however, to ratify such an agreement, must specify such payment, in addition to stating that the object of the meeting is to ratify the agreement generally. A circular subsequently sent to the stockholders referring to the payment to the directors and secretary is not sufficient, even though it was sent before the meeting was held. Kaye *v.* Croydon, etc. Co., [1898] 1 Ch. 358. Even though the purchaser of land from a corporation has agreed to pay a director one-half of the net profit such purchaser might make in case the director resold the land, yet if the director did not vote for the sale and a full disclosure was made to the board, and the price received is the full value thereof, and the company was in liquidation, a profit thereafter received by the director does not belong to the corporation. Tenison *v.* Patton, 67 S. W. Rep. 92 (Tex. 1902). A commission paid to a director on the purchase of land by the company does not invalidate a purchase-money mortgage where there was no fraud and the fact was known to the directors. Blood *v.* La Serena, etc. Co., 134 Cal. 361 (1901).

[2] The only way he could have avoided this result would have been by making a full disclosure of all the facts, and by

of the facts and assent thereto, the promoter, director, or vendor may be brought to account.[1] Thus, a person who agrees with the owner of patent-rights to form a corporation to buy them is a pro-

furnishing the company with a board of directors capable of forming a competent and impartial judgment as to the wisdom of the purchase and the price to be paid. The company may enjoin him from voting or selling stock. Plaquemines, etc. Co. *v.* Buck, 52 N. J. Eq. 219 (1893).

[1] Where the promoters paid to a person who was to act as chairman of the directors, and his firm who underwrote 10,000 shares, a commission of 12,000 shares, the court held that 10,000 of the 12,000 was for the use of his name, and only 2,000 shares for the commission, and hence he was liable, at the instance of an investor in the stock, to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there "may" be various trade contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. Cackett *v.* Keswick, 85 L. T. Rep. 14 (1901). As regards the duties and liabilities of a promoter, pure and simple, see the next section. That a director is disqualified to buy for the corporation from himself, see § 652, *infra.* The cases now under consideration involve a combination of frauds. Thus, where the owner of property agrees with two persons that if they form a company to purchase the property he will secretly pay them a certain amount, and they form a company and act as a minority of the directors, and it purchases the property even at a fair valuation, the court, upon corporate insolvency, will refuse to allow the two persons their salaries and will declare their agreement to be a fraud. *Re* Hereford, etc. Co., L. R. 2 Ch. D. 621 (1876). Where the directors, who were also promoters, had purchased property before the company was formed, and then sold to the company at an advance, and induced the public to subscribe by representations that the price paid was the original price paid by them to the original vendors, they must pay the secret profit to the company. Simons *v.* Vulcan, etc. Co., 61 Pa. St. 202 (1869). Where the directors had purchased property before the company was formed, and then as directors bought it for the company at an advance, the title passing direct from the first vendor to the company, and the directors' interest being concealed, the court held the directors liable to the company for their profit, the suit being brought by stockholders. Hichens *v.* Congreve, 1 Russ. & M. 150 (1829). Under similar facts and to same effect, Benson *v.* Heathorn, 1 Y. & C. 326 (1842). A stockholder cannot rescind a subscription for fraud where a person purchased a patent outright on condition that he could resell it, and then proceeded to promote and organize a company and to sell to it the patent at an advanced price, even though he was a director, it being clearly known to all that he owned and sold the patent as his own. Gover's Case, L. R. 1 Ch. D. 182 (1875). Where parties purchase property and agree absolutely to pay therefor themselves, and not by the issue of the stock of a corporation to be formed, or by the money of that corporation, the fact that they intend to and do then form a company to buy the property from themselves at an advance does not render them liable to the company for the profit. If they had formed the company partially or completely before they purchased, the case might be different. The court referred to the word "promoters," but only to refuse

moter, and is liable to give up a secret gift given to him by the patentee, especially where such promoter was a director when the purchase was made by the company.[1] A secretary is not liable as a promoter even though he accepts a gift from the promoter.[2]

§ 651. *Promoters' frauds on the corporation.*— A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.[3] The supreme court of the United States says: "The

to use it on account of its indefiniteness. One of the parties purchasing the mine and afterwards selling to the company was a director in the latter at the time of purchase. The right to rescind was barred by the fact that the company had lost the property, a leasehold, by non-payment of rent. Ladywell Min. Co. *v.* Brookes, L. R. 35 Ch. D. 400 (1887). It is to be borne in mind in all transactions of this kind that the objections mentioned above may be obviated by the unanimous consent of the stockholders or by their acquiescence or participation with knowledge, all of which is considered in § 662 and ch. XLIV, *infra.*

[1] Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101 (1894).

[2] *Re* Sale, etc. Co., 78 L. T. Rep. 368 (1898).

[3] Quoted and approved in Burbank *v.* Dennis, 101 Cal. 90 (1894). An interesting description of the "promoter" is given by Judge Lurton, in McMullen *v.* Ritchie, 64 Fed. Rep. 253, 260 (1894), as follows: "He was a man of great ability, enormous energy, and a towering ambition for great enterprises. As a promoter or 'boomer' he seems to be unrivaled; a man of large general information and robust constitution, extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution whatever. His ambition was to make millions." Great difficulty is experienced in determining who is and who is not a promoter. An old English statute defined a promoter as "every person acting, by whatever name, in the forming and establishing of a company at any period prior to the company" being fully incorporated (7 & 8 Vict., c. 110, § 3). Other definitions are, "one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose." Twycross *v.* Grant, L. R. 2 C. P. D. 469, 541 (1877); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371, 381, 382, 407 (1877). See also New Sombrero Co. *v.* Erlanger, L. R. 5 Ch. D. 73, 118 (1877); Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218, 1268 (1878); Whaley Bridge, etc. Co. *v.* Green, L. R. 5 Q. B. D. 111 (1879); Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396, 407 (1879), where Lindley, J., said: "The term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it), and also the idea of some duty towards the company imposed by or arising from the position which the so-called promoter assumes towards it." See also *Re* Great Wheal Polgooth, 32 W. R. 107 (1883), holding that the solicitor was not a promoter; *Re* Great Western, etc. Co., L. R. 31 Ch. D. 496 (1886), practically overruling *Ex parte* Valpy, L. R. 7 Ch. App. 289 (1872). But see Tyrrell *v.* Bank of London, 10 H. L. Cas. 26 (1862). An agent of a person selling property to the corporation may also be a promoter of the latter and liable as such. Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886), reversing L. R.

promoter is the agent of the corporation and subject to the disabilities of an ordinary agent. His acts are scrutinized carefully, and he is precluded from taking a secret advantage of the other stockholders."[1] A person who procures subscriptions and aids in organizing the company and frames the papers and manages the procuring of options and the vesting of title is a promoter, even though he is also a subscriber.[2] A trust company may be liable in connection with the issue of stock, where it issues receipts for the same and it turns out that by reason of liens on the stock the stock itself is worthless.[3]

It is legal for persons to contract to form a corporation and to provide for its future management and control.[4] But it is not legal for promoters to cause the board of directors to vote stock to such promoters for services already performed.[5] A promoter is considered in law as occupying a fiduciary relation towards the corporation. He is an agent of the corporation, and is subject to the disabilities of such. There are two classes of cases in which he may be guilty of a breach of his duties to the company.

First, where he sells property to the corporation. If he purchased the property before he began promoting the company, he may sell to the company at an advance without disclosing his profit.[6] But

31 Ch. D. 328. For other definitions, see Ladywell Min. Co. *v.* Brookes, L. R. 35 Ch. D. 400 (1887); Healey, Company Law and Pr. (3d ed.), p. 35. In Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879), a promoter is defined as "a trustee, agent, or person in a fiduciary position as regards the company; one who has undertaken a duty towards the company of such a character as incapacitates him from making a secret profit at the expense of the company." No doubt a very little will make people promoters of a company, if it can be seen that they were really doing something in the way of speculation for their own interest and not acting merely as agents for others. Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889). A banker is not a promoter. *Re* Imperial Land Co., L. R. 10 Eq. Cas. 298 (1870). Where a mining company is practically reorganized by selling out to a new and larger company having the same directors, and the stock is sold to the public, if the prospectus discloses all the facts excepting the amount of profit which one of the directors made as a stockholder in the former company, he is not liable to the new company for such profit as a promoter thereof, although it might have been ground for rescinding the contract of purchase. *Re* Lady Forrest, etc., [1901] 1 Ch. 582.

[1] Dickerman *v.* Northern T. Co., 176 U. S. 181, 204 (1900), citing § 651, *supra*.

[2] Woodbury, etc. Co. *v.* Loudenslager, 55 N. J. Eq. 78 (1896).

[3] McClure *v.* Central Trust Co., 165 N. Y. 108 (1900).

[4] King *v.* Barnes, 109 N. Y. 267 (1888).

[5] Where a company issues fully paid-up stock to parties in payment for services rendered to the company in its formation, and in establishing its business, such persons are liable on such stock as unpaid stock, if the company becomes insolvent. *Re* Eddystone, etc. Ins. Co., [1895] 1 Ch. 771. See also § 46, *supra*.

[6] A person who buys property at a foreclosure sale and then organizes a company to take it over, and who discloses the price which he paid at such sale, should disclose the fact that he had previously bought a part of the

where the promoter obtains merely an option on property and then causes a company to be formed to which he sells it at a profit, without disclosing the amount of that profit, he is liable in damages to subscribers for the stock.[1] He is liable also to the corporation itself,

mortgage bonds of the bankrupt company and had made a profit thereby. *Re* Olympia, Limited, [1898] 2 Ch. 153. A person who purchases land and partly pays therefor may afterwards cause a corporation to be organized to purchase the land at a higher figure, and is not liable to the corporation for the profit if there was no concealment of the fact. He may also legally pay a commission to parties to induce them to subscribe for stock. The fact that he was a director in the corporation does not necessarily change the rule. Milwaukee, etc. Co. *v.* Dexter, 99 Wis. 214 (1898). Persons owning land may form a corporation and may sell such land to the corporation for more than they paid for it. Spaulding *v.* North Milwaukee, etc. Co., 106 Wis. 481 (1900); 54 Atl. Rep. 254.

[1] In Brewster *v.* Hatch, 122 N. Y. 349 (1890), the plan adopted was as follows: The promoters took an option for which they gave $5,000, and by which they had the privilege of purchasing certain mines at any time within four months for $135,000. This agreement is set forth in the case. They then issued a prospectus to the public, soliciting subscriptions to a corporation thereafter to be formed to purchase the mines for all its capital stock, which was to be $1,500,000. The stock was offered to the public at forty cents on the dollar. Subscriptions for $610,000 par value were received, netting $244,000. The corporation was then formed, the promoters making themselves directors, and the above plan carried out. A subscriber then sued the promoters for damages. The court held that the plaintiff could recover. The defendants were not mere vendors of the stock. The fatal defect seems to have been in the fact that the promoters did not buy the property before offering the stock. On the contrary they merely obtained options, and would have abandoned them if the stock had not been taken. Moreover they placed the stock before the corporation was organized. All this made them fiduciary agents of the subscribers. If they had been intrinsically vendors of the stock, it was admitted that they would not have been liable. In the case of Franey *v.* Warner, 96 Wis. 222 (1897), where promoters purchased land for $32,727 and sold it to the corporation for $45,000 without divulging the profit, the court held that a stockholder could not rescind his subscription, inasmuch as the corporation was innocent, but that he might have a judgment against the promoters for his *pro rata* share of the profit. See also Franey *v.* Wauwatosa Park Co., 99 Wis. 40 (1898). A person holding an option right to purchase land for $6,000 may cause a corporation to be organized to purchase such land for $8,500, thereby giving a profit to the promoter, for which the company may issue to him its stock, it being known in advance that such promoter was the owner of such option and would sell the same at that price. Richardson *v.* Graham, 45 W. Va. 134 (1898). In South Joplin Land Co. *v.* Case, 104 Mo. 572 (1891), it was held that a person who secures an option on a property with a view to organizing a corporation and selling the property to it, and who, together with another person employed by him, forms the company and places the stock on representations that the property cost $2,000 more than it actually did, and also that certain notes would be included in the sale, but after the company is organized informs the stockholders that the notes were not included, though they were received by himself, is accountable to

and this liability may be even greater than any actual profit received by him, especially where stock was issued to him and the corporation has become insolvent. He may then be liable for the actual original value of the stock.[1] So also if he purchased after

the corporation for the profits thus realized by himself, as he occupied a position of trust towards the subscribers, and could not make secret profits out of the transaction. The court said that persons who "project and form a corporation, by soliciting and procuring others to subscribe for and take shares of stock, for the purpose of selling or turning over to the company property which they own, or have a right to acquire by executory contract, do occupy a double position. On the one hand they represent their own interest in respect of the disposition of the property; on the other, they represent the proposed corporation." The court also said that a vendor is a promoter, and is bound to protect the interests of those who ultimately constitute the company "if he assumes to act for them, or if he induces them to trust him, or to trust persons who are under his control and who are practically himself in disguise. He also assumes such duty if he calls the company into existence in order that it may buy what he has to sell; but he does not assume such duty by negotiating with persons who have themselves assumed that duty, and who are in no way under his influence." Where the person holding an option for the purchase of a mine represents that he is to pay a certain price for the mine, and induces parties to form a corporation and to have the corporation purchase the mine at that price, the corporation may rescind the contract if the actual price paid by such person was much less. But the corporation cannot recover back its expenses. Cortes Co. *v.* Thannhauser, 45 Fed. Rep. 730 (1891). An owner of land who gives an option thereon to an irresponsible party and then aids the latter in forming a corporation to take over the land for stock and acts as one of the directors, is a promoter of the corporation and is liable to parties who purchase the stock on misrepresentations as to the transaction, but is to be credited with the actual value of the property. Hayden *v.* Green, 71 Pac. Rep. 236 (Kan. 1903). Where promoters having an option on land obtain subscribers to the stock of a proposed corporation on a prospectus stating that the land was worth $250,000, and that it would only cost $175,000, and it turns out that the promoters realized a secret profit of $30,000 from the $175,000, a subscriber to the stock is not bound to pay unless he has ratified the transaction with full knowledge of the facts, even though the facts do not come to his knowledge for a long time. West End, etc. Co. *v.* Nash, 41 S. E. Rep. 182 (W. Va. 1902); 88 L. T. Rep. 123.

[1] Where promoters pay out less than $30,000 to secure options on land and then sell the options to a corporation for $700,000 of stock of the latter, the corporation assuming the purchase price of the land, and then issue a prospectus which is misleading and does not state the facts about the issue of stock, and the corporation becomes insolvent, they are liable to the corporation for the fair market value of the stock at the time the stock was issued, or as soon thereafter as it had a market value. The liability is not for unpaid stock, but for fraud as promoters in making a secret profit in services and not making a full disclosure to the stockholders. The promoters owe a duty to future stockholders. The land need not be tendered back. The promoters are to be credited with their actual disbursements and to be charged with the fair market value of the stock, with interest, and also with dividends. The suit should be

he began promoting and then sold to the company, the sale is valid only when he informs the directors that the property belongs to him, and when, also, the directors are competent and impartial judges as to whether the purchase ought or ought not to be made.[1]

brought by the corporation itself and not by its receiver, according to the Massachusetts decisions. Hayward *v.* Leeson, 176 Mass. 310 (1900). A promoter who obtains an option on land, and then forms a corporation to purchase the land at an advanced price without disclosing his profit, is liable to the corporation for such profit, and if the corporation refuse to sue for it a stockholder may bring suit, even though other stockholders are not in a position to complain. Exter *v.* Sawyer, 146 Mo. 302 (1898). A corporation may hold liable in damages a person who has sold property to it in payment for stock where the corporation was induced to make the purchase by false representations, even though such false representations were made not to the corporation but to its promoters before the incorporation took place. Schoefield, etc. Co. *v.* Schoefield, 71 Conn. 1 (1898). Where a person obtains an option on land at $2,500 an acre and then with other persons forms a corporation and sells it to the corporation at $2,700 an acre, payable partly in cash and partly by mortgage, the profit being concealed from the other subscribers to the stock, and the promoter being a director at the time of the purchase, he and those who co-operated with him are liable to return to the corporation such profit, but such liability cannot be enforced in a suit against the sureties on his bond as treasurer. First, etc. Co. *v.* Hildebrand, 103 Wis. 530 (1899). In a suit against promoters for selling to a corporation land on which they had an option and receiving stock in payment, in such a manner that they pay nothing for the stock, a defendant who is not clearly alleged to have received some of the stock is not liable. Pietsch *v.* Krause, 112 Wis. 418 (1901). Promoters who obtain an option and then sell the property to a corporation at a secret profit in payment for stock may be held liable by the receiver upon the insolvency of the corporation for the difference between what they paid and what they received, without regard to the actual value. Central T. Co. *v.* East Tennessee, etc. Co., 116 Fed. Rep. 743 (1902); 66 N. E. Rep. 427.

[1] Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218 (1878); New Sombrero Co. *v.* Erlanger, L. R. 5 Ch. D. 73 (1877); *Re* Coal, etc. Co., L. R. 20 Eq. 114 (1875); s. c., L. R. 1 Ch. D. 182; Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874). Promoters of a corporation are bound to the exercise of good faith toward all the stockholders, to disclose all the facts relating to the property, and to select competent persons as directors, who will act honestly in the interest of the stockholders, and are precluded from taking a secret advantage of other stockholders. Dickerman *v.* Northern T. Co., 176 U. S. 181 (1900). Even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground. Even if the promoters stated that a certain part of the plant was in full operation, yet, if there was no fraud and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. Lagunas, etc. Co. Ltd.

Where the promoters misrepresent the price paid by them for property sold by them to the company, they are liable to the company

v. Lagunas Syndicate, Ltd., [1899] 2 Ch. 392. But where a person purchases property for the sole purpose of creating a corporation to take it over from him and to pay him therefor an excessive price in cash and stock, netting a large profit to him, the stock being offered to the public, and he causes the incorporation to be made and directors to be named who are his dummies, he is a promoter and can be held liable by such corporation for the profit he has made, unless he fully disclosed in a prospectus the fact that he had formed the corporation and that he had made such profit. Especially is this the rule where the prospectus gave a false impression. He occupies a fiduciary relation towards the purchasers of the stock. It is immaterial that the directors approved of the transaction with full knowledge. Non-disclosure in such a case is a misfeasance in the nature of a breach of trust. *Re* Leeds, etc., 87 L. T. Rep. 488 (1902). In Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879), the promoter was compelled to disgorge a gift given to him by the vendors of a mine to the corporation, but he was allowed to retain therefrom his disbursements. It is immaterial that the sale was a fair one. The court said: "He must let his company know what profit he has taken, and deal with them, so to say, at arms' length;" South Durham Iron Co. *v.* Shaw, 14 W. N. 159 (1879); Beck *v.* Kantorowicz, 3 K. & J. 230 (1857); Whaley Bridge, etc. Co. *v.* Green, L. R. 5 Q. B. D. 109 (1879), holding also that if the vendor has not yet paid the money to the promoter the corporation may recover it from the former; Twycross *v.* Grant, L. R. 2 C. P. D. 469 (1877), disapproving Craig *v.* Phillips, L. R. 3 Ch. D. 722 (1876); Kent *v.* Freehold, etc. Co., L. R. 4 Eq. 588 (1867). Where a person who is the owner of land buys options on adjoining lands and takes deeds for the whole for $66,000 (the deeds reciting the consideration as $80,000), and then sells the same to a corporation, which he forms, for $80,000 cash and $40,000 stock, and then divides the stock among the stockholders, keeping the cash himself, he is liable to refund to the corporation his profit, the court holding open the question as to whether he was liable for the profit of the others. Woodbury, etc. Co. *v.* Loudenslager, 55 N. J. Eq. 78 (1896). In *Re* Hess Mfg. Co., 23 S. C. of Can. 644, 658 (1894), the court said of a promoter: "It was incumbent upon him to sell the land for no excessive price; he was bound to misrepresent nothing which could influence the company in determining whether to buy or not; to conceal nothing that it was material should be known in order to enable them to form a sound judgment on that question, and to put them in possession of all material information. Further, it was, above all, the duty of Dr. Sloan, as a vendor selling property to a company towards which he stood in a fiduciary relation, to see that the executive management of the company was in the hands of a thoroughly independent board of directors, a board over which he could exercise no influence, and which would, as the expression is, keep him at 'arms' length' in making the bargain." But the court held that the promoter is not liable unless the company rescinds and restores whatever it has received. In this case the court stated that although the promoter stands in a fiduciary relation to the company, yet that he is not necessarily a trustee of property which he acquires to sell to the company: and that even if he were, the remedy is rescission and the turning back of the property to him. In Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43 (1870), the court refused to hold the de-

for their profits, even though the property is worth all that the company paid for it.[1]

If the promoter conceals the fact that he is selling his own property to the company, the latter may rescind the sale;[2] or, if the

fendants liable who owned property and formed a company, and sold the property to the company at a profit, without disclosing the original price, but without misrepresenting that price, The court said, however, "that where persons form such an association, or begin or start the project of one, from that time they do stand in a confidential relation to each other, and to all others who may subsequently become members or subscribers; and it is not competent for any of them to purchase property for the purpose of such a company, and then sell it at an advance without a full disclosure of the facts. They must account to the company for the profit, because it legitimately is theirs." Where a promoter, after the company is formed, buys land for $6,000 and sells it to the company at $12,000, and represents to a subscriber for stock that the land cost $12,000 originally, the stockholder may recover from the promoter the amount paid for his stock. Short *v.* Stevenson, 63 Pa. St. 95 (1869). In Rice's Appeal, 79 Pa. St. 168 (1875), where a promoter elected the directors and sold property to the corporation at an exorbitant price, taking payment in money, stock, and bonds, the court refused to allow the bonds upon the winding up. In McElhenny's Appeal, 61 Pa. St. 188 (1869), where a person bought land for $2,000, and then induced others to join him in organizing a company to purchase it for $40,000 after he had sold it to them for $12,000, is liable to account to the company for his part of the $28,000 profit, but not for his $10,000 profit. A person may purchase property and then proceed to form a corporation and sell the property to it at an advanced price. He is not bound to disclose his profit, nor is he liable therefor unless he makes misrepresentations. Lungren *v.* Pennell, 10 W. N. Cas. 297 (Pa. 1881).

[1] Burbank *v.* Dennis, 101 Cal. 90 (1894). Where promoters obtain an option on property for $75,000, and organize a company for $100,000 capital stock, and, as directors of the company, with other friendly directors, purchase the option for $100,000, and sell $75,000 of the stock at par and thereby have the remaining $25,000 of stock as profit, and the purchasers of the $75,000 of stock supposed that the actual price paid was $100,000, the corporation may compel such promoter to return and cancel the $25,000 of stock, and it is immaterial that the property was worth $100,000, the actual facts not having been disclosed to the corporation or its stockholders. The court said: "The promoter of a company stands in the relation of a trustee to it and those who become subscribers to its stock so long as he maintains the power of control over it." Yeiser *v.* United States, etc. Co., 107 Fed. Rep. 340 (1901).

[2] Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874); Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218, aff'g New Sombrero Phosphate Co. *v.* Erlanger, L. R. 5 Ch. D. 73 (1877); *Re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390 (1880); *Re* Cape Breton Co., L. R. 29 Ch. D. 795 (1885). But not if the company is unable to restore the property, where the disability to restore it is due to the company and not the promoter. Western Bank *v.* Addie, L. R. 1 H. L. Sc. 145 (1867); Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394 (1877); Head *v.* Tattersall, L. R. 7 Exch. 7 (1871); *Re* Cape Breton Co., L. R. 29 Ch. D. 795 (1885). The company may rescind as to part if the transaction is severable. Maturin *v.* Tredinnick, 2 N. R. 514 (1863); s. c., 4 N. R. 15. Where

promoter was a promoter at the time he purchased the property, the company may recover from the promoter the profit made by him.[1] If the promoter owns the property at the time of forming the company, and sells it to the company at an advance over its cost to him, and then induces persons to subscribe by stating that he made no profit thereby, he is liable in equity to account to them for the injury they have sustained.[2]

a mine was sold to a company for $30,000, the promoters representing that they did not have any interest therein, and it afterwards was discovered that they received $20,000 of the price, the corporation succeeded in having the whole purchase set aside and the $30,000 and interest and expenditures refunded. St. Louis, etc. Co. *v.* Jackson, 5 Cent. L. J. 317 (1877, St. Louis Ct.).

[1] *Re* Cape Breton Co., L. R. 26 Ch. D. 221 (1884); Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328; Tyrrell *v.* Bank of London, 10 H. L. Cas. 26 (1862); Benson *v.* Heathorn, 1 Y. & C. Ch. 326 (1842); Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879); *Re* Ambrose Lake, etc. Co., L. R. 14 Ch. D. 390 (1880).

[2] Getty *v.* Devlin, 54 N. Y. 403 (1873); S. C., 70 N. Y. 504 (1877); Getty *v.* Donelly, 9 Hun, 603 (1877); Brewster *v.* Hatch, 10 Abb. N. Cas. 400 (1881); aff'd, 123 N. Y. 349. See also chs. IX and XX, *supra.* In the important case of Ex-Mission, etc. Co. *v.* Flash, 97 Cal. 610 (1893), where persons purchased land at $5 an acre and subsequently proceeded to organize a corporation to purchase it at $25 an acre, representing to the stockholders that $25 an acre was the lowest price at which the land could be purchased, it being concealed from the stockholders that one of their number, a large subscriber, was interested in the contract, and that the organizers of the corporation were his agents, the corporation caused to be set aside a mortgage and foreclosure thereof which was given to the promoters in part payment for such land, and the notes were ordered canceled. In this case it appears that the representation was made that $25 per acre was the lowest price for which the land could be purchased, and that the subscribers came "in on the ground floor at bedrock figures." Where a prospectus contained a material misrepresentation which induced a person to subscribe he may maintain a suit to rescind the subscription, even though the prospectus stated that there were certain contracts not mentioned in the prospectus and that the subscribers would be held to have had notice of the same, and even though the subscription contract contains a provision that the subscriber has notice of that which in fact is concealed from him. The misrepresentation in this instance was a misleading and ambiguous statement and also the non-disclosure of an agreement to which the promoter was a party, such agreement not relating to the formation of the company or his subscription to its stock. The court rescinded the subscription and held the directors personally liable for loss sustained by the subscriber. Greenwood *v.* Leather, etc. Co. Ltd., [1900] 1 Ch. 421. The Solicitors' Journal (vol. 31, p. 740) has summarized the law on this subject: "Where the promoter had originally bought, not for himself, but for a company to be afterwards formed, in such a case it was an ordinary instance of purchase by an agent, and the company would be entitled both to keep the property and to call upon the promoter to repay the profit he had made. But it is for the company to prove this relationship of principal and agent, and also that it existed at the

Second, a promoter may commit a breach of trust by accepting a commission or bonus from a person who sells property to the cor-

time of the original purchase. Hence, where this is not shown, the above rule does not apply, not even although the promoter subsequently becomes a director of the company. In this case it is his duty to inform the company of the profit he is making; and in default they are entitled, if they so choose, to a rescission of the contract. But they cannot affirm the contract and also claim the profits; and if rescission of the contract has become impossible, they seem to have no remedy at all." Where a promoter to whom nearly the entire stock has been issued sells a part of it on the fraudulent representation that the stock belongs to the company, and then causes the company to be wound up and himself to be released from certain subscriptions, and the property to be sold by a trustee named by him, the court will appoint a receiver at the instance of the party so defrauded, for the purpose of recovering back the property of the company. Du Puy *v.* Transportation, etc. Co., 82 Md. 408 (1896). Where the promoters represented that property cost them $23,000, at which price they turned it in to the corporation, and as a fact it cost them $13,000, they are each liable for the $10,000 profit, even though they did not personally make the representations, a conspiracy being shown. Fountain, etc. Co. *v.* Roberts, 92 Wis. 345 (1896). Where promotors have a right to purchase land for $31,000, and induce persons to join with them to form a corporation to purchase the land at $55,000, and represent to such persons that $55,000 is what the land actually costs, the persons so induced to subscribe may have the purchase of the land rescinded. Hebgen *v.* Koeffler, 97 Wis. 313 (1897). Where a promoter misrepresents to subscribers the cost of property which is to be and is sold to the corporation for cash, the corporation may rescind. Limited Inv. Assoc. *v.* Glendale Inv. Assoc., 99 Wis. 54 (1898). In Franey *v.* Wauwatosa Park Co., 99 Wis. 40 (1898), the subscription was held to be binding, although the promoters were individually liable to the subscribers for the profit made by the promoters. Where promoters represent that the territorial rights which they sell to a corporation cost a certain sum, when in fact one-half of that sum went to them, the corporation may compel them to pay to it such one-half. Cook *v.* Southern, etc. Co., 75 Miss. 121 (1897). Statements that a large part of the capital stock had been taken by the parties themselves, and that the parties themselves would continue the management of the concern; concealment of the fact that a large quantity of the stock was to be issued for the good-will of the business; and statements leading to the conclusion that all subscribers for stock stood on an equal footing,— constitute material misrepresentations, and will sustain a rescission of the subscription if untrue. Such statements and concealments made to agents or brokers who are selling stock are the same as though made to the subscribers for the stock. Hence, where partners organize a corporation to take over their business, each of the partners is liable for misrepresentations and concealments of the others committed while engaged in promoting and bringing out the enterprise. They are liable as promoters. Walker *v.* Anglo-Am. etc. Trust Co., 72 Hun, 334, 341 (1893). Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that $75,000 of stock should be subscribed for within a certain time and then proceeds to organize the company, he, himself, subscribing for $25,000 of the stock, and the corpora-

poration. The company may compel a promoter to turn his profit into the corporate treasury,[1] or the company may rescind its purchase of the property.[2]

If the commission or bribe paid to the promoter consisted of shares of stock, then the company may recover from him the amount received by him upon a sale of the shares and all dividends previously received, together with interest;[3] or, if he still holds the shares, the company may recover the value of the stock together with interest.[4] The party who sells the property to the corpora-

tion then purchases certain worthless patents and agency contracts and issues therefor $63,250 of full-paid stock, including the $25,000 subscribed for by him, and afterwards the corporation collects $4,000 of such donations and borrows money from such promoter and gives him a mortgage therefor, his mortgage is not good as against the parties who donated the $4,000. Moore *v.* Universal, etc. Co., 122 Mich. 48 (1899); 189 U. S. 260.

[1] Where the promoters receive pay from the contractor, such pay being in excess of their disbursements, the company may compel them to turn in the amount to the company, although all the original stockholders and directors knew of the transaction. Mann *v.* Edinburgh, etc. Co., [1893] A. C. 69; Hichens *v.* Congreve, 4 Russ. 562 (1828); Beck *v.* Kantorowicz, 3 K. & J. 230 (1857); Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. D. 394 (1877); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371 (1877); Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879); Whaley Bridge, etc. Co. *v.* Green, L. R. 5 Q. B. D. 109 (1879), holding also that, if the bonus has not yet been paid to the promoter, the company may claim it from the person contracting with it. *Cf.* Arkwright *v.* Newbold, L. R. 17 Ch. D. 301, 319 (1881); Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886), reversing L. R. 31 Ch. D. 328; Albion, etc. Co. *v.* Martin, L. R. 1 Ch. D. 580 (1875). The promoter is allowed a reasonable sum for disbursements. Lydney, etc. Co. *v.* Bird, L. R. 33 Ch. D. 85 (1886). *Cf.* Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371 (1877); South Durham Iron Co. *v.* Shaw, 14 W. N. 159 (1879). The promoter must disgorge, though by his efforts the company paid for the property less than it was worth. Emma Silver Min. Co. *v.* Grant, L. R. 11 Ch. D. 918 (1879). The statute of limitations bars the suit. Metropolitan Bank *v.* Heiron, L. R. 5 Exch. D. 319, 325 (1880). But only from the time when the facts are known to the directors, or, if the directors are also implicated, to the stockholders. *Re* Fitzroy, etc. Co., 50 L. T. 144 (1884). Where promoters, in collusion with the owner of a mine, pay him $20,000 therefor, and cause him to transfer it to a corporation for $100,000 of the capital stock, and then induce third persons to buy such stock at par on representations that the mine cost the promoters $90,000, and then receive from the owner of the mine the proceeds from the sale of the stock, less the $20,000, the corporation may compel them to pay over the profits to it. Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307 (1889).

[2] Munson *v.* Syracuse, etc. R. R., 103 N. Y. 58 (1886); Erlanger *v.* New Sombrero Co., L. R. 3 App. Cas. 1218 (1878); Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221 (1874); Bagnall *v.* Carlton, L. R. 6 Ch. D. 371 (1877). *Cf.* Smith *v.* Sorby, L. R. 3 Q. B. D. 552, n. (1875).

[3] Emma Silver Min. Co. *v.* Lewis, L. R. 4 C. P. D. 396 (1879); 88 L. T. Rep. 123.

[4] McKay's Case, L. R. 2 Ch. D. 1 (1875); Pearson's Case, L. R. 4 Ch. D. 222, L. R. 5 Ch. D. 336 (1877); *Re* Fitzroy, etc. Co.,

tion through the promoter may also be liable to the corporation for the promoter's profits.[1] If, however, the vendor had nothing to do with the formation of the corporation he is not liable.[2] The vendor of land to a corporation is not responsible for the misrepresentations of his agent to a party who purchases stock of the corporation, such vendor not having taken part in organizing the corporation or selling its stock.[3] A promoter may be liable to parties whom he induces to sell property to the corporation, a secret profit having been taken by him.[4]

50 L. T. 144 (1884); Nant-y-glo, etc. Co. *v.* Grave, L. R. 12 Ch. D. 738 (1878); and see § 650, *supra;* Chandler *v.* Bacon, 30 Fed. Rep. 538 (1887), where promoters were compelled, at the option of the corporation, to transfer stock back to it or pay over the amount received by them for stock sold, or to pay to it the market value of stock which they as promoters had received from him to whom all the capital stock had been issued in payment for a patent. The agent of the person who deals with the corporation may recover his compensation from that person, but he cannot recover compensation for improperly influencing the agents of the corporation to make the contract. Lydney, etc. Co. *v.* Bird, L. R. 31 Ch. D. 328 (1885); Arkwright *v.* Newbold, L. R. 17 Ch. D. 301 (1881); Davison *v.* Seymour, 1 Bosw. (N. Y.) 88 (1857), where the court said: "There was secrecy, applications to individuals, a concealed promise of compensation, and utter ignorance and recklessness as to the competency of the party whose cause he was promoting and whose reward he was to receive."

[1] Even though a person does not know that a promoter to whom he has given an option on his property is a director in the company which proposes to buy it, yet if he discovers this fact before he closes the transaction he must pay to the company the commission which he agreed to pay to the promoter, and even though the company has recovered from the promoter such part of the commission as the promoter actually received, yet the company may recover the balance from the vendor of the property, although such balance had been waived by the promoter in consideration of what was actually paid to him. It is unnecessary to rescind the contract. Grant *v.* Gold, etc. Syndicate, [1900] 1 Q. B. 233.

[2] Even though the agent of a land-owner forms a corporation, which purchases the land at a profit to the owner, and even though such agent receives a part of the profit, yet if the vendor did not contemplate and had nothing to do with the formation of the corporation he cannot be held liable for the profit. Forest, etc. Co. *v.* Bjorkquist, 110 Wis. 547 (1901). Although a person owning land employs an agent to sell it, and the agent, without the principal's knowledge, organizes a company and turns in the land at an advanced price, yet neither the corporation nor its stockholders can have the sale rescinded on the ground that the owner of the land was guilty of a promoter's fraud. Godfrey *v.* Schneck, 105 Wis. 568 (1900).

[3] Hoyer *v.* Ludington, 100 Wis. 441 (1898).

[4] Promoters who cause some thirty-nine owners of paper mills to turn their property into a single corporation in exchange for bonds and stock of the latter are bound to disclose to such property owners the profit made by themselves as promoters. Promoters are entitled to a reasonable sum for their services and expenses, but are not entitled to a large profit which they realize without the knowledge of the parties "who represented the substan-

The subscriber for stock may sue the directors for fraudulent representations if they knew that the promoter was secretly receiving large illegal profits.[1] Bondholders cannot complain of promoters in the same way that the corporation may.[2]

Under the English statute prohibiting commissions for underwriting, a plan by which a company sells its property to an individual and he agrees to organize a new company to take over the property and pay him a profit is illegal.[3] A sale of the assets at foreclosure sale, and purchase thereof by a reorganized company, does not carry a cause of action against promoters for fraud.[4]

A plaintiff may, upon the trial, be compelled to elect whether he sues to hold the promoters liable for fraud, or whether he sues in behalf of all stockholders and for the benefit of the corporation.[5]

tial interests in the new corporation," being the parties whom the promoters induced to sell their properties to the corporation in exchange for bonds and stock. But even though a large number of owners of paper mills are induced to turn their property into a single corporation in exchange for bonds and stock of the latter, and the promoters secretly receive a large quantity of additional profit, and even though the total amount of bonds and stock issued is about twice the price actually paid to the owners for the properties, yet this does not invalidate the mortgage securing the bonds, and the remedy of the parties who so turned in their properties is against the promoters and not in defense of a suit to foreclose the mortgage. Dickerman *v.* Northern T. Co., 176 U. S. 181 (1900). A contract between the owner of property and a promoter, by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. Brehm *v.* Sperry, 92 Md. 378 (1901). The vendors of a mine to a corporation, the title not to pass until full payment, are not estopped from reclaiming possession, even though they knew that the vendee had assigned his interest to a corporation and stock of the corporation sold to the public. Wiser *v.* Lawler, 62 Pac. Rep. 695 (Ariz. 1900).

[1] Persons induced to subscribe by a prospectus stating that a certain price was paid for a business, when in fact a large part of that price went as a bonus to promoters, may sue the directors for fraudulent misrepresentations. Capel *v.* Sim's, etc. Co., 58 L. T. Rep. 807 (1888). Where a promoter induces a person to subscribe and pay for stock by representing that property conveyed by the promoter to the company cost the promoter $20,000, when in fact it cost him $14,000, the subscriber may sue the promoter for damages for false representations. Teachout *v.* Van Hoesen, 76 Iowa, 113 (1888). See also ch. XX, *supra*. *Cf.* Glasier *v.* Rolls, L. R. 42 Ch. D. 436 (1889), where merely deceit was involved.

[2] Banque, etc. *v.* Brown, 34 Fed. Rep. 162. 196 (1888). *Cf.* §§ 42, 43, *supra*, and § 735, *infra;* 121 Fed. Rep. 587.

[3] Booth *v.* New Afrikander, etc. Co., 87 L. T. Rep. 509 (1902).

[4] Central T. Co. *v.* East Tennessee, etc. Co., 116 Fed. Rep. 743 (1902).

[5] Brewster *v.* Hatch, 122 N. Y. 349

A compromise and settlement of suits between promoters and the corporation will be upheld by the court.[1]

A provision in a contract of subscription to the stock of the company whereby the subscriber waives notice of all contracts between the promoters and the company is not binding on the stockholders, if such waiver is tricky and fraudulent.[2] A secretary is not liable as a promoter even though he accepts a gift from the promoter.[3]

§ 652. *Sales of property by corporate officers to the corporation.*— It is well said in the case of Michoud *v.* Girod[4] that a person cannot legally purchase on his own account that which his duty or trust requires him to sell on account of another, nor purchase on account of another that which he sells on his own account. He is not allowed to unite the two opposite characters of buyer and seller. Especially is this the rule with corporate directors.[5] If they make sales to the corporation they may be compelled to pay over to the corporation the profit realized by such sales,[6] or the corporation may refuse altogether to complete the contract.[7] Generally the director

(1890). A suit by a stockholder against a promoter in behalf of the corporation, to require him to pay for his stock, and also to recover damages for false representations inducing the plaintiff to purchase stock, and also to enjoin a proposed sale of plaintiff's stock, in order to pay an assessment, is multifarious. Pietsch *v.* Krause, 93 N. W. Rep. 9 (Wis. 1903).

1 Coburn *v.* Cedar Valley, etc. Co., 138 U. S. 196 (1891).

2 Greenwood *v.* Leather, etc. Co. Ltd., [1900] 1 Ch. 421.

3 *Re* Sale, etc. Co., 78 L. T. Rep. 368 (1898).

4 4 How. 503 (1846).

5 Quoted and approved in Stanley *v.* Luse, 36 Oreg. 25, 32 (1899).

6 Where the directors buy property for $2,500 and sell it to the company for $8,000, they can collect only $2,500 from the corporation, although the corporation has sold the land for $17,000. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Directors who purchase land in the name of one of them and then cause the corporation to purchase it at an advance, the real price being concealed, may be compelled to pay over their profit to the corporation. Spaulding *v.* North Milwaukee, etc. Co., 106 Wis. 481 (1900); Albion Steel, etc. Co. *v.* Martin, L. R. 1 Ch. D. 580 (1875), holding the directors liable to refund profits on contract made subsequent to incorporation, but not on those made previous to incorporation; Dunne *v.* English, L. R. 18 Eq. 524 (1874), where two brokers, having agreed to divide the profits on a mine to be bought by one and sold by the other, the former compelled the latter to divide a secret profit which the latter had obtained; Benson *v.* Heathorn, 1 Y. & C. (Ch.) 326 (1842), § 650, *supra*, and other cases therein. Concerning the right of the corporation to confirm the sale and sue the director at law or in equity for the profit made by him, see "The remedial rights of corporations against their directors," by Judge Fenn, 3 Yale L. J. 111. See also § 660, *infra.*

7 Coleman *v.* Second Ave. R. R., 38 N. Y. 201 (1868). A contract by a corporation to buy land of a director is not enforceable by the latter where it was authorized by only three out of five directors, and two of those three were interested in the contract. Hill *v.* Rich Hill, etc. Co., 119 Mo. 9 (1893). *Cf. Re* Cape Breton Co., 19 W. N. 54 (1884),

has purchased the property for the express purpose of selling it to the corporation. When such is the case the company may ratify and confirm the transaction, or it may keep the property and recover from the director the profit realized by him, or the company may repudiate the whole transaction, return the property, and recover back the purchase-money.[1] But where the director already

where the court declined to hold a director responsible for profits made by a sale of property from himself to the company, and declined to rescind the sale, since the corporation could not restore the property. Where the corporation is insolvent, a director cannot turn in his property in payment of his debt due to the corporation. White, etc. Co. *v.* Pettes, etc. Co., 30 Fed. Rep. 864 (1887). A purchaser of corporate assets at a receiver's sale cannot claim a leasehold which the president holds to premises which were used by the corporation. Crooked Lake Nav. Co. *v.* Keuka Nav. Co., 37 Hun, 9 (1885). Directors cannot purchase machinery and then sell it to the company at an advance. Redmond *v.* Dickerson, 9 N. J. Eq. 507 (1853). In Great Luxembourg Ry. *v.* Magnay, 25 Beav. 586 (1858), where the director purchased for the corporation property secretly owned by himself, the court refused to interfere after the corporation had resold the property without loss. Under the above principle of law the court refused to enforce a contract by a director to furnish railway chairs to his corporation. Aberdeen Ry. *v.* Blakie, 1 Macq. 461 (1854). And in Flanagan *v.* Great Western Ry., L. R. 7 Eq. 116 (1868), the court refused to enforce a corporate agreement to lease property to a director. A stockholder's bill does not lie to enjoin an execution sale of the corporate franchise and property on a judgment obtained against the corporation by a director for property sold to it by him, there being no actual fraud, nor proof of directorship at the time of the sale. Ward *v.* Salem St. Ry., 108 Mass. 332 (1871). School directors may be enjoined from selling their property to the district. Witmer's Appeal, 15 Atl. Rep. 428 (Pa. 1888).

[1] Parker *v.* Nickerson, 112 Mass. 195 (1873), where the directors were held liable for the profit on a price paid by the corporation for a boat purchased from another corporation, in which the directors were also the directors and sole stockholders. They were held liable to refund all profit above the cost of the boat to the vendor corporation. If the corporation has made improvements on land purchased from the director, it cannot compel him to take the land and pay it the price paid him and also the cost of the improvements. Paine *v.* Irwin, 16 Hun, 390 (1878). Where the corporation secretly agrees to give a subscriber extra stock if he will subscribe for a certain amount, and he subscribes and intends that his subscription shall be used to induce others to subscribe without knowledge of the secret gift, and they do subscribe, he cannot receive from the corporation such extra stock. The contract is void as against public policy. Nickerson *v.* English, 142 Mass. 267 (1886). A sale of mortgaged property, under a power to sell, by the mortgagee, to a newly-formed corporation in which he holds stock, does not invalidate the sale, though he could not sell to himself. Farrar *v.* Farrars, L. R. 40 Ch. D. 395 (1888). The president of a stockyard company, who takes a lease of property in his own name, and then assigns the lease to the company on a guaranty of a large stockholder in the corporation that said president shall have one-fifth of the profits from the use of the property, cannot enforce that guaranty. Robinson *v.* Jewett, 14 N. Y. St. Rep. 223; aff'd, 116 N. Y. 40 (1889). A director

owns the property in good faith, the court, while it may set the sale aside, cannot compel the director to take a less price than that already agreed upon.[1] A person who sells property to a director to be paid for partly in the stock of a corporation cannot afterwards object that the director was disqualified from selling the property to the corporation.[2] Where the president of a railroad corporation secretly owns land in the name of another person, and causes the corporation to purchase it and issue stock and bonds in payment, without disclosing his interest in the land, he is liable to the corporation for the difference between the actual market value of the stock and bonds and the actual value of the land.[3]

Where, however, the directors sell to the corporation at a profit to themselves, but with a full and fair disclosure thereof to the stockholders, and without participating in the acceptance of the property by the corporation, and no objection is made, the transaction cannot be impeached afterwards.[4] In most cases a disclosure

cannot be a partner with the corporation in sharing profits. Rudd *v.* Robinson, 54 Hun, 339 (1889), rev'd on another point in 126 N. Y. 113. It is illegal for directors to buy from themselves lots for the corporation. Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895). Where a person obtains an option on land at $2,500 an acre, and then with other persons forms a corporation and sells it to the corporation at $2,700 an acre, payable partly in cash and partly by mortgage, the profit being concealed from the other subscribers to the stock and the promoter being a director at the time of the purchase, he and those who co-operated with him are liable to return to the corporation such profit, but such liability cannot be enforced in a suit against the sureties on his bond as treasurer. First, etc. Co. *v.* Hildebrand, 103 Wis. 530 (1899).

[1] A director who owns the assets of a business, which is cognate to the business of his corporation, may sell the same to his corporation at an advanced price, and he need not disclose what he paid for it, and a stockholder cannot compel the director to pay to the corporation the profit he has made. The sale may be rescinded, but the court has no power to force the director to sell at a lower price. Burland, etc. *v.* Earle, etc., [1902] A. C. 83. *Cf.* 54 Atl. Rep. 460.

[2] Mackey *v.* Burns, 64 Pac. Rep. 485 (Cal. 1901). It is not for the purchaser of land from a company to raise the objection that the company purchased it from one of its directors. Farnham Brewery Co. *v.* Hunt, 68 L. T. Rep. 440 (1893).

[3] Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa. 1898).

[4] Where a director sells a plant to the corporation, and the sale is ratified unanimously at the stockholders' meeting, a stockholder cannot subsequently cause it to be set aside, especially where a great majority of the stockholders still object to its being set aside. The terms of the sale were held by the court to be reasonable. Barr *v.* Pittsburgh Plate-Glass Co., 57 Fed. Rep. 86 (1893). Even though a director sells property to the company and overvalues it, yet if the company caused an independent valuation to be made, and for three years acquiesced in the purchase, it cannot then complain. Stetson *v.* Northern Inv. Co., 104 Iowa, 593 (1898); Chesterfield, etc. Co. *v.* Black, 37 L. T. Rep. 740 (1877), where the court refused to hold liable for profits a director and a promoter where they had purchased a mine before incorporation and had sold

to the board of directors alone is insufficient. Acquiescence or ratification by the stockholders is necessary.[1]

However, it is within the power of the majority of the stock-

it to the company at a profit, it being clearly stated to the company that a profit was being made, but the amount of that profit not being divulged; Battelle *v.* Northwestern, etc. Co., 37 Minn. 89 (1887). Even though directors sell property to the corporation in exchange for treasury stock which is issued to them at twelve and a half cents on a dollar, yet, if they offer to allow all the stockholders to purchase their proportion of the stock at that price, and they all take the stock excepting one director, the latter cannot object to the transaction where he had himself moved that the stock be so issued. Mackey *v.* Burns, 64 Pac. Rep. 485 (Cal. 1901). Even though all the directors of a corporation organize another company to buy out the first-named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal, and the new company cannot repudiate the sale on that ground. Even if the promoters stated that a certain part of the plant was in full operation, yet, if there was no fraud and that part of the plant was put in operation soon afterwards, the court, instead of setting aside the sale, may give damages for the delay. Misrepresentations, although not fraudulent, are sufficient ground for relief. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate, Ltd., [1899] 2 Ch. 392. It is no defense to a subscription that the insolvency of the company is due to debts incurred in buying land from the directors, such contract being voidable instead of void and being subject to the ratification of the majority of the stockholders. Urner *v.* Sollenberger, 89 Md. 316 (1899). In St. Louis, etc. R. R. *v.* Tiernan, 37 Kan. 606 (1887), it is held that a sale, by the directors, of a road-bed to the corporation is legal where all the facts are known to all except a few nominal holders of stock. But a partial disclosure is insufficient. Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873), rev'g L. R. 6 Ch. App. 558. Where the president, by fraudulent representations, induces the corporation to buy property from himself, a minority stockholder may cause the purchase to be set aside, even though all had consented to the purchase. Gerry *v.* Bismarck Bank, 19 Mont. 191 (1897). See also ch. XLIV, *infra*.

[1] A director who assigns a contract to the company at a profit of $40,000 to himself must refund his profit to the company, but will be allowed such sums as he paid out for commissions. It is immaterial that all of the original directors knew all of the facts and assented to the transaction. *Re* George Newman Co., [1895] 1 Ch. 674. The vice-president and manager may lease property to the corporation, and may execute the lease for the corporation, where the lease is fair and the other officers approve. Louisville, etc. Ry. *v.* Carson, 151 Ill. 444 (1894). The fact that the president of an iron manufacturing company purchases iron for the company through his firm, which takes a commission, does not render the contract invalid unless it was actually unfair and fraudulent, there being no concealment of the facts, and especially where there was evidence that the contract was reported to and discussed by the board of directors. Salem, etc. Co. *v.* Lake Superior, etc. Mines, 112 Fed. Rep. 239 (1901). A purchaser of property in which a director is interested is not necessarily illegal, although such director voted for the same, it being shown that all the other directors also

holders to ratify and confirm such a transaction where there is no *actual* fraud involved. The fraud is not an *actual* one if the director sold at a fair price and did not use his position to induce the corporation to purchase. Such a sale, however, is always a constructive fraud, and unless legally ratified is voidable at the option of any director or stockholder.[1]

There is some difficulty in determining what will constitute a confirmation of such a transaction. If a majority of the directors and of the stockholders, without counting the votes controlled by the director who is interested, favor a confirmation of the transaction, a dissenting stockholder cannot bring suit to set it aside unless he can show the existence of some fraud other than the mere fact that the vendor was a director when he made the sale. If, however, a majority of the stockholders, excluding the votes owned directly or indirectly by the guilty parties, are in favor of bringing the directors to an accounting, greater difficulty arises. The weight of authority holds that the votes of the director as a stockholder are to be counted. If, however, *actual* fraud is involved, this question is immaterial, since no majority, however large, can ratify actual fraud.[2]

§ 653. *Sales of property by the corporation to corporate officers, and purchases by corporate officers at foreclosure and execution sales.*— One of the most frequent frauds perpetrated upon a corporation and its stockholders is where one or more of the directors purchase property from the corporation directly or indirectly, or participate in the profits of such a purchase. The law is well settled that a director's purchase of property from the corporation is voidable at the option of the corporation, even though the directors paid fully as much as the property is worth.[3] This principle of law was fully established by the cases of Cumberland Coal Company against Sherman[4] and Hoffman Steam Coal Company against Cumberland Coal and Iron Company.[5] There are exceptions, how-

voted for such purchase. Porter *v.* Lassen County, etc. Co., 127 Cal. 261 (1899). *Cf.* §§ 649, 662, and ch. XLIV.

[1] Quoted and approved in Stanley *v.* Luse, 36 Or. 25, 33 (1899).

[2] See § 662, *infra.*

[3] Quoted and approved in Morgan *v.* King, 27 Colo. 539, 555 (1900).

[4] 30 Barb. 553 (1859). The court also held that the purchase by the directors could be ratified only by the unanimous vote of all the stockholders, and that a ratification by proxy would not bind the stockholder himself. See also Cumberland Coal Co. *v.* Sherman, 20 Md. 117 (1863).

[5] 16 Md. 456 (1860), where a minority of the directors purchased part of the corporate property at an undervaluation and then sold it to the Hoffman Company, in which they were large stockholders. The court held that the latter was chargeable with notice of the voidable act. This case and the preceding one grew out of the same transaction. See also Buell *v.* Buckingham, 16 Iowa, 284 (1864), holding that the purchase is voidable, but not void.

ever, to this rule, especially where the corporation is insolvent, or

It may be avoided, however, without proving any actual fraud on the part of the director or injury to the corporation. It is fraudulent *per se*. A sale of the corporate property to one of the directors is a constructive fraud, even if not an actual fraud, and may be set aside at the instance of a minority stockholder. Stanley *v.* Luse, 36 Or. 25 (1899). A sale of valuable mining stock by a bank to some of the directors is illegal, especially where the stock paid for itself within six years. Morgan *v.* King, 27 Colo. 539 (1900). Where the manager of a co-operative grain elevator company sells the grain to himself he must account for the profits, even though the fixed price of the company for handling the grain has been duly paid. Goodhue, etc. Co. *v.* Davis, 81 Minn. 210 (1900). Where trustees hold stock as security for various debts of various parties, the stock to be sold if the debts are not paid, it is illegal for one of the trustees to resign and for the remaining trustees to sell the stock in a way calculated not to bring its full value, and for the resigning trustee to purchase the same at a very low price for the benefit of himself and the other trustees. The sale will be set aside. Jenkins *v.* Hammerschlag, 38 N. Y. App. Div. 209 (1899). Where a director has been director for three years and then resigns and purchases property from the corporation and then is re-elected, the purchase is the same as though he had been director during the whole period, and he may be held liable for the difference between the price paid by him and the actual value of the property. Millsaps *v.* Chapman, 76 Miss. 942 (1899). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the persons so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. Smith *v.* Smith, etc. Co., 125 Mich. 234 (1900). A stockholder may file a bill to set aside a transfer of real estate of the corporation to a director without consideration. Mobile, etc. Co. *v.* Gass, 129 Ala. 214 (1901).

A director may be the trustee in a trust deed executed by his corporation. Bassett *v.* Monte Christo, etc. Co., 15 Nev. 293 (1880). Although a company is insolvent, a lease of its property to a director on fair terms is legal, especially where for many years there is no complaint. Pneumatic Gas Co. *v.* Berry, 113 U. S. 322 (1885). A sale of the property of an insolvent foreign corporation, for an insufficient consideration, by the executive committee to two of the trustees, is voidable. Third Nat. Bank *v.* Elliott, 42 Hun, 121 (1886); aff'd, 114 N. Y. 622. See also Reilly *v.* Oglebay, 25 W. Va. 36 (1884). Where a sale of land is made by the corporation to a director, in order to raise funds to pay debts due to mismanagement, the corporation itself may subsequently cause the sale to be set aside. Crescent City, etc. Co. *v.* Flanner, 44 La. Ann. 22 (1892). Where a director buys land of the corporation at one-tenth of its value, a stockholder may cause the transaction to be set aside. Woodroof *v.* Howes, 88 Cal. 184 (1891). Where a contract is made by a corporation to sell coal to one of its directors, and the corporation does not fulfill, the director cannot recover damages where the money for the coal was to pay a personal debt of the president, and the director has relieved the corporation from liability. Main Jellico, etc. Co. *v.* Lotspeich, 20 S. W. Rep. 377 (Ky. 1892). A

the sale is a public sale.[1] Corporate creditors cannot cause to be set aside an old sale of land by the corporation to the directors through "dummies," even though the sale was at an inadequate price.[2]

receiver may replevy corporate personalty fraudulently sold to a director. Mish *v.* Main, 81 Md. 36 (1895). Where a board of directors, consisting of six, sell corporate property to two of them, the sale being authorized at a meeting at which five were present, including the two, the remaining three do not constitute a quorum and the sale is illegal. Leary *v.* Interstate, etc. Bank, 63 S. W. Rep. 149 (Tex. 1901). Even though the cashier of a bank, with the consent of the directors, takes a part of the profit realized by the purchaser of land from the bank, yet a stockholder may compel him to repay that amount to the bank, although the purchaser has not yet paid the amount to the cashier. Tenison *v.* Patton, 64 S. W. Rep. 810 (Tex. 1901). A deed of the corporate assets to the directors personally will be set aside at the instance of a stockholder, even though the consideration was adequate and full and no actual injury was done to the corporation. Barnes *v.* Lynch, 9 Okl. 156 (1899).

[1] A corporation having a leasehold with the privilege of purchasing the fee may sell the latter to a director where the company has neither the money nor credit to exercise such privilege. Hannerty *v.* Standard Theater Co., 109 Mo. 297 (1892). And a sale of an insolvent corporation's property to a director for its full value is upheld when *bona fide* and advantageous to all. Ashhurst's Appeal, 60 Pa. St. 290 (1869). A sale of corporate bonds to a syndicate of which three of the directors are members is valid, the price being fair. Du Pont *v.* Northern Pac. R. R., 18 Fed. Rep. 467 (1883). Where an insolvent corporation sells its assets for bonds and stock in another corporation, it may sell such bonds and stock to one of its directors at a fair price, no actual fraud being involved. Graham *v.* Carr, 41 S. E. Rep. 379 (N. C. 1902). A solvent corporation may sell a note to its president. Blake *v.* Ray, 62 S. W. Rep. 531 (Ky. 1901). Where the stockholders of an insolvent corporation have authorized the directors to sell the property and public sale is thereupon made, the court will not set the sale aside, although directors who were creditors of the corporation purchased at such sale at a low figure. Patterson *v.* Portland, etc. Works, 35 Or. 96 (1899). Even though a railroad which owns stock in another railroad sells such stock to a copartnership in which one of the directors is a partner, yet the court will not enjoin the sale if it is a fair one. Ryan *v.* Williams, 100 Fed. Rep. 172 (1900). A title is not bad merely because in the chain of title was a deed from a corporation to its president. Jones *v.* Hanna, 24 Tex. Civ. App. 550 (1900). A sale of property to a syndicate, of which a director is a member, will not be set aside when the full value was received by the corporation, and the sale was made in order to protect the parties who were sureties for the price to be paid by the corporation for the property. Hill *v.* Nisbet, 100 Ind. 341 (1884). Where all the assets of a corporation are transferred for stock of another corporation and such stock is sold by trustees of the former to pay its debts, the fact that one of the trustees subsequently buys a portion of the stock does not render him liable for such debts. Wing *v.* Charleroi, etc. Co., 112 Fed. Rep. 817 (1902).

Perry on Trusts (3d ed.), § 428, states the rule as follows: "A trustee, exec-

[2] Graham *v.* Railroad Co., 102 U. S. 148 (1880). A deed from the corporation to the president's firm is not void. It is voidable by the corporation or its stockholders only. Fudickar *v.* East, etc. Dist., 109 Cal. 29 (1895).

Where all the stockholders and directors assent to a lease of corporate property to a director, a receiver appointed at the instance of a foreclosing mortgagee cannot have the lease declared void, it not being shown that he represents other creditors or is vested with equities to maintain the suit. Leases to a director "will be sustained if they are fair, and have been entered into in good faith, and no advantage has been taken of the fiduciary relation."[1] More difficult questions arise in regard to a director's purchases of cor-

utor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase. But if a trustee buys up an outstanding debt for the benefit of the *cestuis que trust*, and they refuse to take it or to pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves. Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust*. The better opinion, however, is, that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity. So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside, or to claim all the benefits and profits for the sale himself."

[1] Tyler *v.* Hamilton, 62 Fed. Rep. 187 (1894). Where the directors of an insolvent corporation lease the property to themselves, they must account to corporate creditors for the profits, but the creditors cannot claim material which the directors have purchased and manufactured by means of the property. Hutchinson *v.* Bidwell, 24 Oreg. 219 (1893). A corporation cannot hold the directors liable on stock which the corporation issued to them for services, being taken by the directors at five cents on the dollar in lieu of salary, where all the stockholders assented thereto, such stock so issued to them being treasury stock, that is, stock which was issued for property as full paid and then donated to the corporate treasury. The evidence showed that the stock represented a patent-right and was purely speculative and had no market value. Divine *v.* Universal, etc. Co., 38 S. W. Rep. 93 (Tenn. 1896). A lease to a director is not necessarily illegal, even though a stockholder objects thereto, where a majority of the stockholders have ratified the lease. The court refused, at the instance of a dissenting stockholder, to set aside such a lease, in the case of Nye *v.* Storer, 168 Mass. 53 (1897). Even though the board of directors have leased all the corporate property to a minority of the directors, yet the minority stockholders cannot have a receiver appointed unless it is shown that the lease was unfair, especially where one of the complaining stockholders has ratified the transaction. Farwell *v.* Babcock, 65 S. W. Rep. 509 (Tex. 1901), a case involving a corporation owning 3,000,000 acres of land and 120,000 head of cattle valued at $10,000,000. See also §§ 649, 662, as to the effect of the transaction being fully stated to the stockholders and approved by a majority.

porate property at foreclosure sale thereof. The old rule was that he could not be a purchaser, either directly or indirectly, at the foreclosure sale. This was the rule whether the foreclosure was instituted by those interested in the corporation or by third parties. If the director purchased at such a foreclosure sale he held the property as trustee for the benefit of the corporation and the stockholders. Upon being repaid the price he gave therefor, he was bound to make over the property to the corporation.[1] The supreme court of the United States, however, has held in regard to the president that if the foreclosure is not brought about by the president "in violation of his duties as an officer of the company, his official relations to the company prior to the foreclosure did not prevent him from bidding for the property or from being interested in its purchase" by another.[2]

[1] Harts *v.* Brown, 77 Ill. 226 (1875). To same effect, Hope *v.* Valley City Salt Co., 25 W. Va. 789 (1885), where the directors resold the property at three times its cost to himself. See also Jackson *v.* Ludeling, 21 Wall. 616, 625 (1874), where the directors were part of those who purchased at a foreclosure sale of the corporate property; also, Munson *v.* Syracuse, etc. Ry., 29 Hun, 76 (1883), where the directors purchased for the purpose of reorganizing the corporation; s. c., 103 N. Y. 58 (1886), where Munson was a director in an insolvent railroad corporation, and also a director in a corporation that wished to purchase said railroad, and in behalf of the latter company contracted to purchase the said railroad from the bondholders after the latter should purchase the same at a foreclosure sale. The court refused to enforce the contract; Raleigh *v.* Fitzpatrick, 43 N. J. Eq. 501 (1887), where the directors of a corporation owning the land subject to a mortgage allowed a foreclosure to be made, and then purchased at the sale. See Foster *v.* Oxford, etc. Ry., 13 C. B. 200 (1853). See also Allen *v.* Jackson, 122 Ill. 567 (1887), holding a director who had purchased corporate property at a foreclosure sale liable to former purchasers of that property from the corporation, subject to the mortgage. Where a director purchases property from an insolvent corporation, "it devolves on the directors to show that the transaction was made in good faith, and that the sale produced the full value of the property. If they fail to show these facts, creditors are entitled to compel them to account for the full value of the property." Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886); Jones, etc. Co. *v.* Arkansas, etc. Co., 38 Ark. 17 (1881), involving a scheme where a director purchased at a foreclosure sale and reorganized. A stockholder who did not come in caused the purchase to be set aside. See also Dennis *v.* Kennedy, 19 Barb. 517 (1854). Where the directors had purchased corporate property after its sale on a lien, and the purchase by them was held to be fraudulent, the passive connivance of a director renders him liable the same as though he participated. Weetjen *v.* Vibbard, 5 Hun, 265 (1875). A director who purchases the property at foreclosure sale is bound to turn the property over to the corporation on being repaid the price he paid therefor. Kroegher *v.* Calivada, etc. Co., 119 Fed. Rep. 641 (1902).

[2] McKittrick *v.* Arkansas Central Ry., 152 U. S. 473, 497 (1894). In Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587 (1875), a director loaned money to the cor-

Again, it has been held that where the directors find it necessary to extend the plant in order to meet competition, and the cost is greater than expected, and bonds are offered to the stockholders and not taken, and the directors loan money to the company on the bonds at par, and then on foreclosure buy in the property, their purchase will be upheld, there being no actual fraud in the trans-

poration, took bonds therefor, and had the bonds secured by a mortgage running to a third person as a trustee, and upon a sale by the trustee the director purchased for himself. Laches barred any remedy. Directors may purchase at a foreclosure sale, under some circumstances. Saltmarsh *v.* Spaulding, 147 Mass. 224 (1888). A director may own bonds and may purchase at the foreclosure sale. The sale is valid even though allowed by the directors from corrupt motives, and this was known to the purchasing trustee. At least the stockholders must offer to redeem before they can do anything. Harpending *v.* Munson, 91 N. Y. 650 (1883). The president of the company may purchase at the foreclosure sale. He does not thereby become a trustee for the bondholders. Credit Co. etc. *v.* Arkansas Cent. R. R., 15 Fed. Rep. 46 (1882). Where all the capital stock is deposited with a bank as security for certain debts of the corporation and is sold under a decree of the court for the amount of such debts, the sale is valid, although the president of the bank purchased the stock at such sale, and although he had already purchased the debts so secured, it being shown that he had been one of the creditors from the beginning. Harrison *v.* Mulvane, 62 Kan. 454 (1901). A director in an insolvent corporation may purchase the property at the receiver's sale at public auction, but the court will carefully scrutinize the purchase. Janney *v.* Minneapolis, etc., 79 Minn. 488 (1900). A liquidating trustee of a national bank may purchase at the sale of the assets, notice of such sale having been given to all parties interested. Shappard *v.* Cage, 19 Tex. Civ. App. 206 (1898). A director who owns bonds may purchase the property at foreclosure sale. Rawlings *v.* New Memphis, etc. Co., 60 S. W. Rep. 206 (Tenn. 1900). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought the road in, is fatal. Burgess *v.* St. Louis County R. R., 99 Mo. 496 (1889). At a reorganization sale a director may purchase in behalf of a part of the stockholders, and the transaction will be upheld if the price is a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth, and was badly in debt, and required large expenditures, and there was no possible means of raising more money, and the stockholders knew of the condition of things, but made no effort to prevent a sale, and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. Osborne *v.* Monks, 21 S. W. Rep. 101 (Ky. 1893). An insurance company cannot refuse payment of a loss on the ground that the insurer was a director and had bought the corporate property at a foreclosure sale. Caraher *v.* Royal Ins. Co., 63 Hun, 82 (1892); aff'd, 136 N. Y. 645. As to the purchase of the property by the president and others on a foreclosure, with a view to reorganization, see also ch. LII, *infra.*

action.[1] In Michigan it is held that as against a stockholder a director may purchase the property at foreclosure sale.[2] Judgment creditors cannot complain where, upon the foreclosure sale of the corporate property, the president purchases the property at its full value.[3] Where the directors are sureties on corporate notes secured by mortgage they may buy in the property at the foreclosure sale for their own protection.[4] There is a limit, however. Thus, where a director who practically controlled the board of directors caused all the earnings of the railroad to be used in improving the property, thereby preventing a payment of interest on the corporate indebtedness and bringing about a foreclosure of the mortgage, the director himself having purchased the bonds secured by the mortgage and having purchased the railroad at the foreclosure sale, the court held that the purchase at the foreclosure sale by the director was voidable. Upon repayment to him of the purchase price he was compelled to retransfer the property to the corporation, even though another foreclosure would be the result. Third persons who had purchased the road from him with notice stood in no other position than the director himself.[5]

The same general rules apply to execution sales. A director is

[1] Foster *v.* Belcher's, etc. Co., 118 Mo. 238 (1893).

[2] Lucas *v.* Friant, 111 Mich. 426 (1897).

[3] Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454 (1888). A corporate creditor cannot hold a director liable for a profit which he has made in purchasing a property at a foreclosure sale even though the corporation was the equitable mortgagor of such property. Ready *v.* Smith, 70 S. W. Rep. 484 (Mo. 1902). A sale of property by an insolvent corporation to one of its directors is valid as against its creditors where a full consideration was paid therefor. Webb *v.* Rockefeller, 71 Pac. Rep. 283 (Kan. 1903). A creditor of an insolvent corporation who causes its property to be sold under execution cannot complain that a director purchased at the sale at a low price. Potvin *v.* Denney Hotel Co., 26 Wash. 309 (1901). Where a director purchases the corporate assets at a mortgage sale for much less than their value, a creditor of the corporation may hold him liable for profits made by him. Fishel *v.* Goddard, 69 Pac. Rep. 607 (Colo. 1902). A creditor cannot complain that the corporation sold some of its property to two directors in consideration of their paying certain of the debts; neither can he claim that the transaction was not duly authorized by the board of directors or signed by the proper officers, where he has participated in the results of their action. Swentzel *v.* Franklin, etc. Co., 168 Mo. 272 (1902). *Cf.* 72 S. W. Rep. 675.

[4] College, etc. Line *v.* Ide, 15 Tex. Civ. App. 273 (1897).

[5] Covington, etc. R. R. *v.* Bowler, 9 Bush (Ky.), 468 (1872). In Kitchen *v.* St. Louis, etc. Ry., 69 Mo. 224 (1878), the court said: "Whatever is sufficient to put a person on inquiry is notice; that is, when a man has sufficient information to lead him to a fact, he shall be deemed cognizant of it." So also where a director agrees to redeem from an execution sale certain corporate property, on an understanding that he does it for the corporation, and his payment is to be a preferred corporate debt, the corporation may redeem long subsequently, even though the director had, after a time, treated the property as

disqualified from purchasing corporate property sold under execution.[1] Where a director causes the property to be sold on an execution issued on his own debt, and buys in the property, he must allow other creditors to participate in the price paid at the execution sale.[2] He cannot be interested in the purchase of corporate property sold for the non-payment of taxes.[3] The corporation may reclaim the property upon payment to the director of the amount he paid therefor. A similar rule applies where a director allows or brings about a forfeiture of a lease which the company holds as lessee, and then takes a new lease of the same property in his own name.[4] But a corporate officer may purchase property at an exe-

his own. Wasatch Min. Co. *v.* Jennings, 5 Utah, 243, 385 (1887). Where a corporation is liable to an officer on a debt, the officer may purchase at a foreclosure sale property upon which the corporation has a subsequent lien; may pay the prior lien out of the corporate funds; and may hold the title to secure the debt due him. Smith *v.* Lansing, 22 N. Y. 520 (1860).

[1] Hoyle *v.* Plattsburgh, etc. R. R., 54 N. Y. 314 (1873). Where the president and a director purchase the corporate property at an execution sale, and agree to convey it to the corporation upon repayment of the amount paid, the corporation may redeem it long subsequently upon payment and reimbursement for improvements made. Wasatch Min. Co. *v.* Jennings, 5 Utah, 243, 385 (1888). Where in a joint-stock company one member buys all the company's property at an execution sale, though he owes the company more than the price paid, the company is entitled to the property and an accounting lies. Bradbury *v.* Barnes, 19 Cal. 120 (1861). Where the director of an insolvent corporation buys its property at an execution sale to which he is not a party, he is liable to the corporation for the value of the property less the amount he paid for it. Tobin Canning Co. *v.* Fraser, 81 Tex. 407 (1891). The purchase of a boat at judicial sale by the manager of the corporation owning such boat, for himself and other stockholders, may not cut off the maritime lien of another person. Crosby *v.* The Lillie, 42 Fed. Rep. 237 (1890). Where a director and treasurer buys corporate land at an execution sale brought about by himself, he cannot maintain an action of forcible entry and detainer against the company. Hoffman *v.* Reichert, 147 Ill. 274 (1893), aff'g 31 Ill. App. 558. Where a director purchases for $8,400 property of the company sold on an execution on a judgment obtained by him against the company, and within a year sells the property for $23,000, he must pay over the profit to the company. *Re* Iron, etc. Mfg. Co., 19 Ont. Rep. (Can.) 113 (1889). Where the president turns over claims against the corporation to his wife, even for value, and the corporate property is sold out to her on judgments on the notes, although the corporation was doing a good business and in no danger, the court will set the transaction aside. Butler, etc. Co. *v.* Robbins, 151 Ill. 588 (1894).

[2] Kittel *v.* Augusta, etc. R. R., 78 Fed. Rep. 855 (1897).

[3] Smith *v.* Fagan, 17 Cal. 178 (1860). Where the president of the mortgagor corporation allows the property to be sold for non-payment of taxes and buys in the property himself, the mortgagee may recover such property from him. Appleton, etc. Co. *v.* Central Trust Co. etc., 93 Fed. Rep. 286 (1899).

[4] Bengley *v.* Wheeler, 45 Mich. 493 (1881); Smith *v.* Bank of Victoria, 41 L. J. (P. C.) 34 (1872). In the latter case the director reorganized and allowed

cution sale where he does so in good faith and pays the full value of the property.[1] The disability of directors to purchase property from the corporation may restrict their right to subscribe for unissued stock of the corporation.[2] There is some difficulty in determining whether this disqualification of a corporate officer to purchase property from the corporation extends to officers other than the president and directors. It has been held to affect the treasurer of the corporation[3] and also the cashier of a bank.[4] It has also been intimated that a superintendent of the corporation is under

part of the old stockholders to come in. A dissenting stockholder caused the whole transaction to be set aside.

[1] Horbach *v.* Marsh, 37 Neb. 22 (1893). Where directors are joint indorsers of corporate notes and one of them buys the property at public sale in good faith and pays the notes, he may sue the others for contribution and need not account for profits he made in such purchase. Weeks *v.* Parsons, 176 Mass. 570 (1900). In a stockholders' suit to set aside an execution sale of all the property for a debt due to the directors and a purchase at the sale by the directors, it is not necessary for the court to order an accounting, but the court may hear the entire case and decide it. Davis *v.* Hofer, 38 Or. 150 (1900).

[2] Where a director takes for himself the right of the corporation to subscribe for new stock he is liable in damages. Greenfield Sav. Bank *v.* Simons, 133 Mass. 415 (1882). Where the directors cause treasury stock to be sold to themselves at less than its real value, and for the purpose of carrying an election, the court will set the transaction aside as fraudulent. Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). Where, long after the company has commenced business, it has disposed of its property and is ready to declare a five per cent. dividend, the directors' issuance to themselves at par of that part of the original capital stock which never had been issued is a fraud on the remaining stockholders. Arkansas, etc. Soc. *v.* Eichholtz, 45 Kan. 164 (1891). Where a director issues to himself at par stock belonging to the corporation, and which is worth more than par, the transaction is voidable; but if all the stockholders acquiesce therein for a long time, the acquiescence of the executors of a deceased stockholder binds the estate. St. Croix Lumber Co. *v.* Mittlestadt, 43 Minn. 91 (1890). But see Sims *v.* Street R. R., 37 Ohio St. 556 (1882). See also §§ 65, 70, 286, 614, *supra*. *Cf.* Charleston Ins. & T. Co. *v.* Sebring, 5 Rich. Eq. (S. C.) 342 (1853), where the directors purchased from the corporation stock which the corporation had previously issued and had purchased for itself. See also Parker *v.* McKenna, L. R. 10 Ch. App. 96 (1874), and York, etc. Ry. *v.* Hudson, 16 Beav. 485 (1853), holding that upon an increase of the capital stock the directors have no right to make a secret profit in its disposal.

[3] McAllen *v.* Woodcock, 60 Mo. 174 (1875), holding that the treasurer's purchase of the corporate property at an execution sale thereof is a purchase for the benefit of the corporation. See also Parker *v.* Nickerson, 112 Mass. 195 (1873). Where the general manager sells goods to himself under another name, the corporation may compel him to pay over to it the profit made by him, the board of directors having no knowledge of the character of such sales. Steward Mfg. Co. *v.* Steward, 70 S. W. Rep. 808 (Tenn. 1902).

[4] First Nat. Bank *v.* Drake, 29 Kan. 311 (1883); Torrey *v.* Bank of Orleans, 9 Paige, 649 (1842); aff'd, Bank of Orleans *v.* Torrey, 7 Hill, 260.

the same disability.[1] A stockholder, however, even though he owns a majority of the stock of the corporation, may at a *public* sale of its property buy such property. "He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves."[2] Where a reorganization committee purchase bonds at a price less than the amount finally realized on the bonds, and keep the profit, they are liable jointly and severally for the profit to the parties who have participated in the reorganization, and the fact that in organizing the new company they stated that profits made by them "from *interim* investments" were excluded is not a sufficient disclosure of their secret profit.[3] Even though a contractor taking stock and bonds in payment for work subcontracts the work for the stock, and then forecloses the mortgage and buys the property in, the subcontractor cannot hold him liable for the stock.[4] A commissioner, appointed by the court to sell the assets of a company, cannot sell to a bank in which he is a stockholder and director, even though the sale and price were fair.[5]

An insurance company's secretary has no right to insure in the company his own property, unless other officers properly approve of it.[6] A judgment that a corporation has a right to have set aside

[1] Cook *v.* Berlin Woolen Mill Co., 43 Wis. 433 (1877). In this case the superintendent's purchase was illegal, inasmuch as one of the directors was a secret partner in the purchase. A corporation may set aside an execution sale fraudulently concealed by its agent, who was interested in the judgment, which fact the purchaser knew. Lang Syne, etc. Co. *v.* Ross, 20 Nev. 127 (1888). The superintendent and surveyor of a rural cemetery association may purchase from it a large number of lots in the cemetery, although he intends to resell them. Palmer *v.* Cypress Hill Cemetery, 122 N. Y. 429 (1890).

[2] Price *v.* Holcomb, 89 Iowa, 123 (1893); Mickles *v.* Rochester City Bank, 11 Paige, 118 (1844). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an underlying mortgage. Farmers', etc. Co. *v.* Penn. etc. Co., 103 Fed. Rep. 132, 157 (1900). Even though the purchasers of an equity in land sell it to a corporation which they form at a price which pays them back their money, and more, and the corporation becomes insolvent and they purchase the land at execution sale, yet a stockholder cannot have the sale set aside unless he repays to them the amounts actually disbursed by them. Fleckenstein *v.* Waters, 160 Mo. 649 (1901). See also § 886, *infra*.

[3] Gluckstein *v.* Barnes, [1900] A. C. 240, aff'g [1898] 2 Ch. 153.

[4] McLane *v.* King, 144 U. S. 260 (1892).

[5] McCullough, etc. Co. *v.* Nat. Bank, etc., 111 Ga. 132 (1900).

[6] Pratt *v.* Dwelling, etc. Ins. Co., 130 N. Y. 206 (1891). Where the secretary,

a sale of certain of its property to its president is personal, and cannot be assigned.[1]

§ 654. *Reorganization of corporations.*— This subject is considered elsewhere.[2]

§ 655. *Issue of "watered" stock and of bonds at discount — Division of assets leaving creditors unpaid.*— The general subject of the legality of issues of stock[3] and bonds[4] at less than their par value is considered elsewhere. The fact that such issues are made to directors instead of to the public is immaterial, unless *actual* fraud is involved. As will be shown hereafter, bonds may legally be issued to directors,[5] and such issues may be at less than par.[6] A corporate creditor cannot complain that a company sold its bonds to some of the directors at a discount of twenty-five per cent.[7] Nevertheless, although none of the stockholders and creditors of a company, which is in difficulties, object to a new issue of bonds and stock for contract work, a part of the bonds and stock being given to the stockholders and bondholders as a bonus, yet where the intention is to have outside people invest in the bonds and stock of the company, the scheme is illegal and the directors are liable.[8] As between the directors and the stockholders the rule invalidating contracts between the corporation and its directors[9] would apply to the sale of bonds at a price which is unfair. The stockholders may sue the directors for gross mismanagement, and for damages, where fraudulent mortgages have been placed by them on the corporate property.[10] A division of the assets of a corporation leaving its creditors unpaid is considered elsewhere.[11] A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a cor-

who is also general manager, buys in the corporate property at an execution and tax sale, he must yield it up to the company upon payment of the amount for which it was sold, and his grantee, who is also in a fiduciary relation, must do the same. San Francisco Water Co. *v.* Pattee, 86 Cal. 623 (1890).

[1] Smith *v.* Pacific Bank, 70 Pac. Rep. 184 (Cal. 1902).

[2] See ch. LII, *infra.*

[3] See ch. III, *supra.*

[4] See ch. XLVI, *infra.*

[5] See §§ 660, 661, 692, *infra.*

[6] Du Pont *v.* Northern Pac. R. R., 18 Fed. Rep. 467 (1883). See also § 766, *infra.*

[7] Bank of Toronto *v.* Cobourg, etc. Ry., 10 Ont. Rep. (Can.) 376 (1885).

[8] London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380 (1893). See also § 766, *infra.* Directors may be personally liable for illegally issuing stock and afterwards paying to the stockholders a portion of the price received by the corporation for bonds and stock, the stock being contributed by the stockholders, but they are not liable jointly for money so paid to each of them separately as stockholders. Great Western, etc. Co. *v.* Harris' Estate, 111 Fed. Rep. 38 (1901).

[9] See §§ 649, 652, *supra.*

[10] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

[11] See ch. XL, *infra.*

porate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached.[1] The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been absorbed by another corporation may hold its directors liable for the loss, and his suit may be at law or in equity.[2] Although one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply.[3] As against corporate creditors the company cannot trade off all its assets for other property, where the latter property is not of a character to be used to pay debts, even though ultimately it will probably be very valuable, such trade being with the general manager of the company.[4]

§ 656. *Stockholders' actions against persons other than directors for frauds, etc., against the corporation.*— Ordinarily, where third persons have defrauded a corporation, and have defrauded it by collusion with the corporate officers, the stockholder's action is against both the officers and the third persons, all being joined as parties defendant. When such is the case the third parties may be held liable, even though the corporation itself is in no position to complain.[5] Where the directors have turned over the property to

[1] Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894).

[2] Mason *v.* Henry, 152 N. Y. 529 (1897).

[3] Sidell *v.* Missouri Pac. Ry., 78 Fed. Rep. 724 (1897).

[4] Levins *v.* Peeples, etc. Co., 38 S. W. Rep. 733 (Tenn. 1896).

[5] See the cases in the notes to §§ 649–655. Thus, where a railroad has been leased to another railroad company under a certain agreement of the latter guaranteeing a fixed sum to the former, and the lessee railroad company refuses to fulfill its contract and has control of the lessor railroad, a stockholder of the latter may bring suit to remedy the wrong. March *v.* Eastern R. R., 40 N. H. 548 (1860). And the case of Lewis *v.* St. Albans, etc. Works, 50 Vt. 477 (1878), very properly says "that whenever the trustee has been guilty of a breach of trust, and has transferred the trust property by sale or otherwise to any third party, the *cestui que trust* has a full right to follow such property into the hands of such third party, unless he stands in the situation of a *bona fide* purchaser for value without notice." See also Imperial, etc. Assoc. *v.* Coleman, L. R. 6 H. L. 189 (1873). A person receiving corporate money in compromise of his suit against guilty directors may be compelled to pay it back to the corporation. Erie Ry. *v.* Vanderbilt, 5 Hun, 123 (1875). The fact that an officer of the company took part in a swindling

an assignee to pay illegal debts, the stockholders may file a bill to set the transaction aside.[1] A director of an assessment life insurance company who receives money for causing a person and his friends to be elected directors, thereby giving them the control of the company, together with its property, may be held liable by the receiver of the company for the money so received.[2] Where the officers and directors, in a conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first-named directors are personally responsible for their action, and a receiver of the corporation may hold them liable.[3] An attorney who receives money from a company for a specific purpose cannot retain it and set it off against his fees.[4] A stockholder in a trust company may file a bill in equity to enjoin the company from paying an illegal income tax to the federal government.[5]

Another class of cases arises when third persons commit frauds against the corporation without the collusion of the corporate officers, but the latter neglect or refuse to institute a suit to rectify the wrong. The right of the stockholder is then not so clear. It is ordinarily within the discretion of the corporate officers to enforce, compromise, or abandon claims which the corporation may have against third persons. Generally this exercise of discretion cannot be questioned or remedied by the stockholders, except by electing at a subsequent election directors more in accord with the stockholders' views. It is possible, however, that cases may occur where the judgment of the directors is so palpably and injuriously wrong that the courts will sustain a stockholder's action herein. This subject is treated elsewhere.[6]

scheme does not deprive the company of its right to recover back moneys of which it was wrongfully deprived by such scheme. Farrow *v.* Holland Trust Co., 74 Hun, 585 (1893). Where trust deeds to a trust company run to the president as trustee, the court will compel him to administer the trusts for the benefit of the company. Tulleys *v.* Keller, 45 Neb. 220 (1895).

[1] People's Sav. Bank *v.* Colorado, etc. Co., 8 Colo. App. 354 (1896). Where an investment company in a receiver's hands has paid all its debts, but by fraud its remaining assets have been transferred to various parties, a suit lies at the instance of a stockholder to set aside the transfer; but the complaint is multifarious where it joins parties not having a common interest and unites distinct and disconnected causes of action. Fry *v.* Rush, 65 Pac. Rep. 701 (Kan. 1901).

[2] McClure *v.* Law, 161 N. Y. 78 (1899).

[3] Bosworth *v.* Allen, 168 N. Y. 157 (1901).

[4] *Re* Mid-Kent Fruit Factory, [1896] 1 Ch. 567. Where bonds are issued by a corporation to a director or officer for a certain purpose, he cannot retain them on the ground that the company owes him money. Greenville Gas Co. *v.* Reis, 54 Ohio St. 549 (1896).

[5] Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429 (1895).

[6] See § 750, *infra*.

§ 657. *Salaries or compensation to corporate officers.*— A frequent fraud upon corporations and stockholders is perpetrated by the corporate funds being used to pay illegal salaries and compensation to corporate officers and assistants. It is a general rule that a director is not entitled to any pay for his services to the corporation as a director where there has been no agreement in advance that he shall have a salary.[1] Hence a salary or back pay voted to a

[1] American Cent. Ry. *v.* Miles, 52 Ill. 174 (1869); Illinois Linen Co. *v.* Hough, 91 Ill. 63 (1878); Citizens' Nat. Bank *v.* Elliott, 55 Iowa, 104 (1880); Smith *v.* Putnam, 61 N. H. 632 (1882). The president cannot claim a salary for services after dissolution. Mason *v.* Pewabic Min. Co., 66 Fed. Rep. 391 (1894). A president who is a large stockholder, and who of his own accord renders services to advance its interests, cannot afterwards recover a salary or even his personal expenses, the claim of the president in this case being $1,000,000. McMullen *v.* Ritchie, 64 Fed. Rep. 253 (1894). The vice-president of a bank is not entitled to a salary where none had been agreed upon. Blue *v.* Capital Nat. Bank, 145 Ind. 518 (1896). In a suit by a director for reasonable compensation the company may show its practice in regard to salaries; also the holdings of the director as a stockholder, and also any agreement between the original incorporators that no salaries be paid. McCarthy *v.* Mt. Tecarte, etc. Co., 111 Cal. 328 (1896). Where one company sells out to another, and the president of the former goes into the employ of the latter, the presumption is that his salary as president ceases. Simonson *v.* New York City Ins. Co., 141 N. Y. 12 (1894). Where, by agreement between the corporation and its creditors, the corporate affairs are managed by a committee of the creditors, the committee may collect for their services. The committee may sue jointly. Dallas *v.* Columbia, etc. Co., 158 Pa. St. 444 (1893). In Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa. 1898), where the court compelled the president of the company to refund a back salary which had been voted and paid to him, the court nevertheless said: "Kase for years, from the inception of the enterprise to its close, performed most arduous duties and rendered the most drudging service to the company. He was, in one sense, the company, and without him there would have been no railroad. Some of his acts were reckless, and perhaps improvident. He was strong, energetic, and domineering. The only one who seemed to exercise any restraint upon him was Mr. Wolverton, the treasurer, and he often failed in holding him to anything like business methods. But immense work, whether good or ill, Kase performed; and if this work had been preceded by a contract for reasonable compensation, he would be entitled to a credit for the contract price." A director who receives a salary for certain services cannot recover a further sum for other services, where he was not expressly employed to render the latter services and there was no promise to pay. Acceptance of the service is immaterial. Gill *v.* New York Cab Co., 48 Hun, 524 (1888), holding also that a vice-president cannot recover for extra services where there was no agreement to pay him. An allegation that the plaintiff had demanded that the president repay an illegal salary, and that he refused to do so, and that he controlled the board of directors and that they refused to take action, is sufficient even in Massachusetts. Blair *v.* Telegram News. Co., 172 Mass. 201 (1898). The secretary of a director is not entitled to pay. West, etc. Co. *v.* Rose, 76 Miss. 61 (1898).

director after the services have been rendered cannot be enforced so far as such pay is for his services as director only, and not for special services performed by him. It is invalid and voidable. It is the same as giving away the assets of the corporation.[1]

Where an illegal salary has been paid, with the consent of a ma-

[1] Bennett *v.* St. Louis, etc. Co., 19 Mo. App. 349 (1885); Ogden *v.* Murray, 39 N. Y. 202 (1868); Blatchford *v.* Ross, 5 Abb. Pr. (N. S.) 434 (1869); Jones *v.* Morrison, 31 Minn. 140 (1883); Maux Ferry, etc. Co. *v.* Branegan, 40 Ind. 361 (1872); Loan Assoc. *v.* Stonemetz, 29 Pa. St. 534 (1858); Holder *v.* Lafayette, etc. Ry., 71 Ill. 106 (1873), where the director even acted as treasurer; Gridley *v.* Lafayette, etc. Ry., 71 Ill. 200 (1873), where the director was a member of the executive committee. Directors are not liable to account for extra pay voted to a director for his services as an agent. Godbold *v.* Mobile Branch Bank, 11 Ala. (N. S.) 191 (1847). The majority of the stockholders cannot, on the winding up, vote back pay to directors. Hutton *v.* West Cork Ry., L. R. 23 Ch. D. 654 (1883); Northeastern Ry. *v.* Jackson, 19 W. R. 198 (1870), holding a director liable for back salary paid him by vote of the directors when the statute required such vote to be by the stockholders. In Hall *v.* Vermont, etc. R. R., 28 Vt. 401 (1856), compensation for taking subscriptions had been voted by the stockholders. After the rescinding of that vote no compensation was allowed, and none was allowed for lobbying the charter through the legislature. A vote by the stockholders of free passes over the road to a director in consideration of his efforts as a promoter before incorporation may be repudiated at any time by the corporation. New York, etc. R. R. *v.* Ketchum, 27 Conn. 170 (1858). But see St. Louis, etc. R. R. *v.* Tiernan, 37 Kan. 606 (1887), where back pay to directors for services in promoting and launching the enterprise was voted and upheld. A director cannot collect pay from the company for his services on the executive committee and for his expenses in travel where there has been no resolution passed previous to the services, entitling him to the pay. Lafayette, etc. Ry. *v.* Cheeney, 87 Ill. 446 (1877). Directors cannot vote compensation to themselves after the services have been performed. Pfeiffer *v.* Lansberg Brake Co., 44 Mo. App. 59 (1891), reviewing at length the cases; Burns *v.* Commencement Bay, etc. Co., 4 Wash. St. 558 (1892). A director cannot recover pay for past services, even though he devoted considerab'e time to the affairs of the company and traveled on several occasions in its behalf, his expenses on such occasions having been paid by the company. The court held that the rule that the director was entitled to pay for services rendered clearly outside of his duties as director is subject to the condition "that they were performed under circumstances sufficient to show that it was well understood by the proper corporate officers as well as himself that the services were to be paid for by the corporation." Brown *v.* Republican, etc. Mines, 17 Colo. 421 (1892). Where no salary is attached to the office none can be recovered. Field *v.* Union Box Co., 2 W. N. Cas. 426 (1876). Nor, when the salary is fixed, will extra compensation be allowed for extra services. Carr *v.* Chartiers Coal Co., 25 Pa. St. 337 (1855). And a resolution remunerating officers who have been elected to serve without compensation is merely voluntary and revocable. Loan Assoc. *v.* Stonemetz, 29 Pa. St. 534 (1858). An officer cannot claim a past-due salary when it was never voted to him and he had on several occasions acted as though nothing was due him. Pyper *v.* Salt Lake, etc. Assoc., 20 Utah, 9 (1899).

jority of the stockholders, but a minority stockholder files a bill to compel repayment, the court may order the repayment to dissenting stockholders of such part of the salary as they would get if the whole salary was repaid to the corporation and a dividend made.[1] The president cannot claim a salary for his services as president where none was voted to him before the services were rendered.[2]

[1] Brown *v.* De Young, 167 Ill. 549 (1897). In Eaton *v.* Robinson, 19 R. I. 146 (1895), where illegal salaries had been paid, the court ordered the guilty parties to pay to each stockholder his proportionate part of the money. Where a trustee holding stock votes himself into office and illegally votes to himself a large salary, the *cestuis que trust* may in a suit for his removal ask also that he account to such *cestuis que trust* for such salary. Elias *v.* Schweyer, 27 N. Y. App. Div. 69 (1898). A receiver will not be appointed at the instance of a stockholder to recover back illegal salaries, inasmuch as such a suit may be carried on by the stockholder himself. Marcuse *v.* Gullett, etc. Co., 52 La. Ann. 1383 (1900). *Cf.* 67 N. E. Rep. 17.

[2] The president is not entitled to a salary unless the same is fixed by resolution or by-law of the board of directors. St. Louis, etc. R. R. *v.* O'Hara, 177 Ill. 525 (1898). The president cannot recover for his services as president, even though an officer and stockholder of the corporation promised that he would be paid, it not being shown that the other directors knew of the promise and the by-laws not providing for his salary and no salary having been voted by the directors. Henry, etc. Co. *v.* Schaefer, 173 Mass. 443 (1899). The president and directors who vote back pay to him and cause corporate notes to be issued therefor are liable to the company therefor, but directors not taking part in the issue of the notes are not liable. Metropolitan Elev. Ry. *v.* Kneeland, 120 N. Y. 134 (1890); Merrick *v.* Peru Coal Co., 61 Ill. 472 (1871); Holland *v.* Lewiston Falls Bank, 52 Me. 564 (1864); Barril *v.* Calendar, etc. Co., 50 Hun, 257 (1888); Commonwealth Ins. Co. *v.* Crane, 47 Mass. 64 (1843), where it was even proved that the former president had a salary. Kilpatrick *v.* Penrose, etc. Co., 49 Pa. St. 118 (1865), where both the president and treasurer sued. The salary of the president ceases upon the discontinuance of the corporate business by a sale of all its property. Long Island Ferry Co. *v.* Terbell, 48 N. Y. 427 (1872). The president is not entitled to a preference in payment under a statute giving to "laborers" of an insolvent corporation such a preference. England *v.* Beatty, etc. Co., 41 N. J. Eq. 470 (1886). A note is not collectible by a principal whose agent made the note as president of a corporation, where the consideration therefor was unpaid salary of the president, and the note was ratified by the corporation only by the casting vote of the president. Chamberlain *v.* Pacific, etc. Co., 54 Cal. 103 (1880). Under a peculiar charter provision it was held in Grundy *v.* Pine Hill Coal Co., 9 S. W. Rep. 414 (Ky. 1888), that there was an implied obligation of the corporation to pay its president a salary. A salary as fixed for a preceding year gives no right to a salary for prior years. Smith *v.* Woodville, etc. Co., 66 Cal. 398 (1885). Stock may be issued to the president in payment of past salary and debts. Reed *v.* Hayt, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659, holding also that though the president himself was one of the three directors voting for the same, yet that long acquiescence cures any right to object. A meeting of four legally-elected and three illegally-elected di-

There is authority to the effect that directors cannot vote a salary to themselves even in advance of their services as directors.[1] In an English case Judge Lindley said: "Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves, out of the company's assets, unless authorized so to do by the instrument which regulates the company, or by the shareholders at a properly convened meeting."[2]

rectors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. Waterman *v.* Chicago, etc. R. R., 139 Ill. 658 (1892). In Bowen *v.* Carolina, etc. Ry., 34 S. C. 217 (1891), the president of a railroad company was allowed to recover from the company what the jury believed his services to have been worth. A president is not entitled to pay for his services unless an agreement in advance to that effect is made. Martindale *v.* Wilson-Cass Co., 134 Pa. St. 348 (1890); Barril *v.* Calendar, etc. Co., 50 Hun, 257 (1888). The president may be entitled to compensation for extra services performed with the knowledge of the directors, although a former resolution, of which he had no knowledge, prohibited pay, unless voted in advance. Bartlett *v.* Mystic River Corp., 151 Mass. 433 (1890). A mutual life insurance company having no capital stock cannot make a contract to pay its retiring president a future salary for life. Beers *v.* New York L. Ins. Co., 66 Hun, 75 (1892). The president cannot enforce the payment of a salary out of the assets of the insolvent corporation, even though the by-laws provided therefor and the salary had been voted to him, such vote having been after the services were rendered. Wood *v.* Lost Lake, etc. Co., 23 Oreg. 20 (1890). A salary voted to the president after the services were performed and the company has become insolvent is not collectible. McAvity *v.* Lincoln Pulp, etc. Co., 82 Me. 504 (1890).

[1] A resolution that directors shall receive pay for attendance in the future does not sustain an action therefor. It is a promise to give a gratuity, and is not enforceable compulsorily. Dunston *v.* Imperial Gas Light Co., 3 B. & Ad. 125 (1832). Directors voting stock to themselves in compensation for selling corporate stock are liable for the value of the stock upon corporate insolvency. Freeman *v.* Stine, 15 Phila. 37 (1881). Stock issued to directors, on a vote of themselves, in payment for extra services will be ordered canceled by the court. Jones *v.* Johnson, 86 Ky. 530 (1888); Collins *v.* Godefroy, 1 B. & Ad. 956 (1831), where a director was not allowed to receive a reward offered for the recovery of stolen property; Kelsey *v.* Sargent, 40 Hun, 150 (1886), denying the right of the directors to vote salaries to themselves. See also cases in the following note.

[2] *Re* George Newman Co., [1895] 1 Ch. 674, 686. The court said: "The shareholders, at a meeting duly convened for the purpose, can, if they think proper, remunerate directors for their trouble or make presents to them for their services out of assets properly divisible amongst the shareholders themselves. Further, if the company is a going concern, the majority can bind the minority in such a matter as this. But to make presents out of profits is one thing, and to make them out of capital or out of money borrowed by the company is a very different matter." The court held that even the fact that all the stockholders knew of the transaction and acquiesced therein was not sufficient. *Cf. Re* Woods, etc. Co., 62 L. T. Rep. 760 (1890). Where directors are allowed a salary by the charter, it may be paid out of

And there is strong authority in America to the effect that compensation to directors for serving as directors merely must be voted by the stockholders or provided for in the by-laws.[1] Where the

the capital if no profits are made. *Re* Lundy Granite Co., 26 L. T. Rep. 673 (1872). A resolution relative to directors' pay passed at a special stockholders' meeting may differ from the resolution specified in the notice of the meeting, but if the meeting adjourns and such resolution is confirmed at the adjourned meeting, it must not differ from the resolution as first passed. Torbock *v.* Lord Westbury, 87 L. T. Rep. 165 (1902). A director and stockholder who, by contract with the company, is entitled to a certain salary, may, upon the insolvency of the company, prove his claim the same as other creditors. *Re* Dale, L. R. 43 Ch. D. 255 (1889).

[1] A stockholder may file a bill to compel the president to repay a salary which the president had paid to himself from the corporate funds, without being authorized so to do, even though the board of directors, which was controlled by the president, afterwards ratified such payment. Blair *v.* Telegram News Co., 172 Mass. 201 (1898). Where a person who, with his friends, controlling a majority of the stock, takes control of the board of directors, and causes the board to vote him a salary as president and to vote one of his employees a salary as director, which salary he himself takes, dissenting stockholders, may compel him to repay such salaries. Strouse *v.* Sylvester, 66 Pac. Rep. 660 (Cal. 1901). Where by the by-laws each director is to be paid so much a year, he can collect nothing for services for less than a year. Inman *v.* Ackroyd, etc., [1901] 1 K. B. 613, aff'g 82 L. T. Rep. 621 (1900). A by-law authorizing the directors to fix the salaries of the officers does not authorize them to vote a salary to themselves, and they may be compelled to pay it back. Schoening *v.* Schwenk, 112 Iowa, 733 (1901). Where by the by-laws salaries are to be fixed by the board of directors, and the salary of the president is not fixed until a year has expired, and is then reduced from $25,000 for the prior year to $10,500 on account of personal hostility to him, the execution of the by-law was unreasonable and the court fixed the amount at $17,500. Banigan *v.* United States, etc. Co., 22 R. I. 452 (1901). A resolution that the president shall receive $5,000 a year, which has been acted on for fifteen years, may be relied upon by a new president, even though he does not collect it for two and a half years. Farmers' L. & T. Co. *v.* Housatonic R. R., 152 N. Y. 251 (1897), aff'g Starbuck *v.* Housatonic R. R., 83 Hun, 534 (1895). Where the salary of the president has been fixed for a year by resolution of the board of directors, the board cannot rescind the resolution. It is a contract. Kimball *v.* New England, etc. Co., 46 N. E. Rep. 432 (Mass. 1897). In *Re* New British Iron Co., [1898] 1 Ch. 324, the by-laws provided that £1,000 annually should be paid to the board of directors for fees, to be divided as the board might direct. The contract to pay the president may be oral and informal, and may consist of conversations. Bagley *v.* Carthage, etc. R. R., 25 N. Y. App. Div. 475 (1898). Where the board consists of the president, his son, and his clerk, and they vote five years' back pay to the president, the act is illegal, and notes issued therefor are illegal. Doe *v.* Northwestern, etc. Co., 78 Fed. Rep. 62 (1896), the court saying: "The directors of a corporation have not the power to fix their own salaries, nor to bind the corporation by a resolution to pay for services which have been rendered in their official capacity under by-laws which contain no express provision for such compensation." The principle of law that back pay cannot be voted to officers of a cor-

board of directors pay salaries to the president and vice-president without any work being done by them, they being insolvent and the salaries being applied on debts which they owe to another corporation, the board of directors may be held personally liable for such salaries.[1] It is legal for a corporation to distribute its profits by the payment of salaries, provided all the stockholders assent thereto.[2] Nevertheless, even without any vote, a director is entitled to pay for extra services which he performed as general manager or otherwise with the consent of the board.[3] And where

poration who are also directors does not apply to a case where the stockholders had assented to the officers receiving reasonable compensation for their work and by the by-laws the board of directors were authorized to fix such compensation. A note given to the president under such circumstances for past work is legal. National, etc. Co. *v.* Rockland Co., 94 Fed. Rep. 335 (1899). A salary duly voted to the president is payable although he by reason of disability is absent part of the time. Such salary is not payable to the vice-president, although he acts as president in the meantime. Brown *v.* Galveston, etc. Co., 92 Tex. 520 (1899). A contract to pay a salary to the president will be closely scrutinized, but where every stockholder assents to it directly or by agents the court will not set the contract aside if reasonable. Church *v.* Church, etc. Co., 75 Minn. 85 (1898). Unpaid salaries voted to its officers by an insolvent corporation which has never made any profits cannot be offset as against the stockholders' liability to creditors. Burns *v.* Beck, etc. Co., 83 Ga. 471 (1889). "The rule that trustees can make no profit out of the estate is carried so far in England that they can receive no compensation for their services. In the United States, trustees are entitled to a reasonable compensation." Perry on Trusts (3d ed.), § 432. Even though a trustee of stock who has been an officer and stockholder in the corporation is voted a salary, this is no ground for removing him as trustee, there being no proof that he voted in favor of the salary. Neither is the fact that the company did not pay as large dividends as it formerly did, any ground for the removal of the trustee. Dailey *v.* Wight, 51 Atl. Rep. 38 (Md. 1902). Where directors vote salaries to themselves for services to be performed, the court will pass upon the reasonableness thereof, and in this case reduced salaries of $5,000 each of the president, vice-president, and secretary to $2,000 each. Davis *v.* Thomas A. Davis Co., 52 Atl. Rep. 717 (N. J. 1902). The Virginia statute requiring stockholders to authorize salaries to the directors before such salaries are paid is satisfied if the salaries are ratified by the stockholders. Shickell *v.* Berryville, etc. Co., 99 Va. 88 (1901). Under the West Virginia statutes the directors cannot vote compensation to the president or directors. Such vote must be of the stockholders. Ravenswood, etc. Ry. *v.* Woodyard, 46 W. Va. 558 (1899).

[1] Harrison *v.* Thomas, 112 Fed. Rep. 22 (1901).

[2] Fitchett *v.* Murphy, 46 N. Y. App. Div. 181 (1899). Where all the stockholders are officers, and, instead of dividends, the corporation distributes its profits by large salaries, there is danger that upon the death of one of them others may continue the payment of such salaries to themselves, even though they are executors of the deceased officer's estate. Matter of Schaefer, 65 N. Y. App. Div. 378 (1901).

[3] A director who is also treasurer and manager may recover compensation for his services although none has been

a reasonable salary was drawn by a managing director without the authority of any resolution, and without any specific notice to the stockholders, but the item appeared in the accounts, and every stockholder either knew or had the means of knowing the fact, it was held that the director was not liable to account to the company for the money.[1] It has been held also that a director may recover reasonable compensation for his services as superintendent,[2]

agreed upon. It is for the jury to decide what is reasonable. Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98, 111 (1890), quoting with approval Pew *v.* First Nat. Bank, 130 Mass. 391 (1881); Eales *v.* Cumberland, etc. Co., 6 H. & N. 481 (1861). A director may be given back pay for his services as manager. Even though his presence at the meeting of the directors so voting is necessary to form a quorum, yet, if he did not himself vote, the action of the directors is legal. He may also be present and vote at the stockholders' meeting ratfying such payment, his vote not being necessary to carry the resolution. Bassett *v.* Fairchild, 132 Cal. 637 (1901). A salary voted to a director by the directors for services as manager is not legal where the charter requires a vote of the stockholders on contracts in which a director is interested. *Re* State F. Ins. Co., 36 L. J. (Ch.) 634 (1867). In Benson *v.* Heathorn, 1 Y. & C. (Ch.) 326 (1842), the court compelled a director to pay back a salary which he had received for acting as "ship's husband" for the company, whose business was the working of vessels. The president cannot bind the corporation by an agreement to pay a director extra compensation. Bailey *v.* Buffalo, etc. Ry., 14 Hun, 483 (1878); Hodges *v.* Rutland, etc. R. R., 29 Vt. 220 (1857). A salary voted by a board of three directors to one of their number as general manager is valid, at least so far as concerns a person who purchases the stock after the salary has been paid. Clark *v.* American Coal Co., 86 Iowa, 436 (1892). A director who performs services as general manager may recover therefor. Kryger *v.* Railway, etc. Mfg. Co., 46 Minn. 500 (1891). A director may recover on a *quantum meruit* for services rendered outside of his duties as director. Ruby, etc. Co. *v.* Prentice, 25 Colo. 4 (1898). It is legal for a corporation to issue stock as full paid to a person in consideration of his leaving an employment in which he is engaged, and of assuming the presidency of the corporation. Shannon *v.* Stevenson, 173 Pa. St. 419 (1896). A resolution of the stockholders that a managing director should receive a certain salary up to a certain date does not entitle him to a salary beyond that date, and he may be compelled to repay it. *Re* Bolt and Iron Co., 14 Ont. Rep. (Can.) 211 (1887); aff'd, 16 App. Rep. 397. While an officer cannot recover for services performed as an officer unless there is a resolution or by-law to that effect, yet for services performed outside of his official duties he may recover compensation. Baines *v.* Coos Bay, etc. Co., 68 Pac. Rep. 397 (Oreg. 1902). An officer is not entitled to pay for performing the ordinary duties of his office, but is entitled to pay for duties outside of those imposed upon him by virtue of his office. Boggiano *v.* Chicago, etc. Co., 67 N. E. Rep. 17 (Ill. 1903).

[1] Felix, etc. Ltd. *v.* Hadley, 77 L. T. Rep. 131 (1897).

[2] A director who, at the request of the president, superintends the construction of the road, may recover pay therefor. Henry *v.* Rutland, etc. R. R., 27 Vt. 435 (1855); Chandler *v.* Monmouth Bank, 13 N. J. L. 255 (1832), where there was even a charter prohibition. A director may recover for services ren-

or attorney in a suit;[1] or secretary and agent;[2] or cashier;[3] but not for services as a promoter;[4] nor for acting as president and master-builder;[5] but may recover for acting as agent of the company.[6]

dered as superintendent. Severson *v.* Bimetallic, etc. Co., 18 Mont. 13 (1896). The president of a club may recover for his services in acting as janitor and collecting rents. Flynn *v.* Columbus Club, 21 R. I. 534 (1900).

[1] Where the president of a railroad renders services in litigations and obtaining loans on the agreement of the board of directors to pay him therefor, he may recover payment for the same, even though there was no formal resolution of the directors, and even though the by-laws were silent as to the duties of the president and as to his salary. Bagley *v.* Carthage, etc. R. R., 165 N. Y. 179 (1900). Even though an attorney is one of the directors, yet if he performs services at the request of the directors and managing officers he may recover therefor. Taussig *v.* St. Louis, etc Ry., 166 Mo. 28 (1901). A lawyer may recover for his services to a corporation, even though he is president and a director thereof. Kenner *v.* Whitelock, 152 Ind. 635 (1899). On this point see also § 707, *infra*, and Jackson *v.* New York Cent. R. R., 2 Thomp. & C. (N. Y.) 653 (1874); Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389 (1878); Ten Eyck *v.* Pontiac, etc. R. R., 74 Mich. 226 (1889). An attorney may recover for services, even though he is a director, it being agreed that he should be paid as soon as the company was able, and an agreement prior to incorporation having been ratified. Arapahoe Inv. Co. *v.* Platt, 5 Colo. App. 515 (1895). A director who acts as attorney for the company cannot collect fees therefor unless there was an express contract to that effect. *Re* Mimico, etc. Co., 26 Ont. Rep. 289 (1895). A lawyer having a contract with the corporation that he should receive five per cent. of its net earnings may enforce the agreement by a suit in equity where net earnings exist and the directors ignore the contract. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902).

[2] Rogers *v.* Hastings, etc. Ry., 22 Minn. 25 (1875). As to secretary, Talcott *v.* Olcott Mfg. Co., 11 N. Y. Week. Dig. 141 (1880). *Contra*, Fraylor *v.* Sonora Min. Co., 17 Cal. 594 (1861). Neither the president, treasurer, nor secretary can recover the value of their services, where they are also directors, unless there was an express contract to pay them or the by-laws so provide. The decisions in Pennsylvania to this effect control services there rendered, though suit is brought elsewhere. Crumlish *v.* Central Imp. Co., 38 W. Va. 390 (1893). A secretary may recover for real services, even though he is also a director. Chamberlain *v.* Detroit Stove Works, 103 Mich. 124 (1894).

[3] First Nat. Bank *v.* Drake, 29 Kan. 311 (1883).

[4] Rockford, etc. R. R. *v.* Sage, 65 Ill. 328 (1872). See Eakins *v.* American, etc. Co., 75 Mich. 568 (1889).

[5] Levisee *v.* Shreveport City R. R., 27 La. Ann. 641 (1875).

[6] In the case of Taussig *v.* St. Louis, etc. Ry., 166 Mo. 28 (1901), the court said: "The rule applicable to such a case, to be deduced from the modern and best considered cases, is, we think, that a party, although a director or other officer of a corporation, may recover the reasonable value of necessary services rendered to a corporation entirely outside of the line and scope of his duties as such director or officer, performed at the instance of its officers, whose powers are of a general character, upon an implied promise to pay for such services, when they were rendered under such circumstances as to raise a fair presumption that the parties intended

A salary which takes all the profits and part of the capital stock is unreasonable.[1] The voting of a salary or compensation must be entirely free from fraud, actual or constructive. The vote is illegal if it is carried only by including the vote of the director who receives the salary or pay.[2] A salary paid to a director for nominal

and understood they were to be paid for, or ought to have so intended and understood." Where the vice-president performs services which are not incumbent on him by reason of his office, he may recover pay for the same on a *quantum meruit*, even though there was no contract to pay him. Brown *v.* Creston Ice Co., 113 Iowa, 615 (1901). Services rendered by a director after he had subscribed for stock are a good consideration in payment therefor, in accordance with an agreement to that effect. Doak *v.* Stahlman, 58 S. W. Rep. 741 (Tenn. 1899). Even though the president of a corporation brings about a sale of all its stock, under a contract by which the corporation is to pay him a certain sum, nevertheless he cannot collect that sum from the corporation itself. Wood *v.* Manchester, etc. Co., 54 N. Y. App. Div. 522 (1900). Where a company is in financial trouble and a committee of the directors is authorized to sell the property, their expenses to be paid by the company, and the committee abandon the effort, and certain directors then take up the work and complete the sale, and a majority of the stockholders vote that their expenses shall be paid, a dissenting stockholder cannot prevent such payment. Huffaker *v.* Krieger's Assignee, 107 Ky. 200 (1899). A director may collect a reasonable compensation for services and materials given to his company. Greensboro, etc. Co. *v.* Stratton, 120 Ind. 294 (1889). A *bona fide* holder of a street railway company's note is protected, even though it was given to a director in payment for services in procuring the franchise. Kneeland *v.* Braintree Street Ry., 167 Mass. 161 (1896). A director who performs extra services is entitled to pay therefor. Zellerbach *v.* Allenberg, 99 Cal. 57 (1893). The president may collect a salary legally voted to him, even though he failed to fulfill his promise to make the business a success. Paducah, etc. Co. *v.* Hays, 24 S. W. Rep. 237 (Ky. 1893). The president may collect pay for his services if they were outside of his official duties, and he was actually employed by the corporation, and the services were rendered with the knowledge and consent of the corporation. Outterson *v.* Fonda Lake Paper Co., 20 N. Y. Supp. 980 (1892). A director may recover for services rendered. McDowall *v.* Sheehan, 13 N. Y. Supp. 386 (1891) (rev'd on another point, 129 N. Y. 200). A salary payable when bonds are sold is collectible in cash if they are not sold within a reasonable time. Indianapolis, etc. R. R. *v.* Hyde, 122 Ind. 188 (1890). In general, see also Cheeney *v.* Lafayette, etc. Ry., 68 Ill. 570 (1873); Shackelford *v.* New Orleans, etc. R. R., 37 Miss. 202 (1859); Santa Clara Min. Assoc. *v.* Meredith, 49 Md. 389 (1878), where a director obtained patents and negotiated their sale.

A director may be paid eight per cent. interest for his services and advances in purchasing claims against the corporation, such rate not being usurious. Kroegher *v.* Calivada, etc. Co., 119 Fed. Rep. 641 (1902).

[1] Decatur, etc. Co. *v.* Palm, 113 Ala. 531 (1896).

[2] Butts *v.* Wood, 37 N. Y. 317 (1867), where the vote was set aside, although the salary was for services by the director as secretary and treasurer; Ward *v.* Davidson, 89 Mo. 445 (1886), where increased pay was voted to the president of the corporation; Gardner *v.* Butler, 30 N. J. Eq. 702 (1879); Jones *v.* Morrison, 31 Minn. 140 (1883); Kelsey

services when the corporation was insolvent may be recovered back.[1]

v. Sargent, 40 Hun, 150 (1886). The president, secretary, and treasurer cannot vote salaries to themselves, the company being in bad financial condition. Hardee *v.* Sunset Oil Co., 56 Fed. Rep. 51 (1893). Where the directors vote a salary to themselves, partly for services, but largely in fraud, the court will compel them to refund the whole salary. Eaton *v.* Robinson, 19 R. I. 146 (1895). In McNulta *v.* Corn Belt Bank, 164 Ill. 427 (1897), the president sued to recover a two and a half per cent. commission which had been voted by the directors to him on unissued stock for services. The suit failed on several grounds of illegality, particularly that his vote was necessary to carry the same. A ratification by the same directors as stockholders does not cure the defect. A salary voted to the president by a quorum of three directors, the two other directors being absent, and the president being one of the three, is not enforceable. Copeland *v.* Johnson Mfg. Co., 47 Hun, 235 (1888). MacNaughton *v.* Osgood, 41 Hun, 109 (1886), holds that a stockholder cannot cause the vote of salary to be set aside and repayment made merely by proving that the officers voted it to themselves. He must prove actual fraud. This decision, however, may well be doubted. It was reversed on another point in 114 N. Y. 574. Where the president presides over a meeting which votes a future salary to himself for life, the salary is illegal, although he did not vote. Beers *v.* New York L. Ins. Co., 66 Hun, 75 (1892). Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for five years is fatal. U. S. Ice, etc. Co. *v.* Reed, 2 How. Pr. (N. S.) 253 (1885). A stockholder may compel the president to refund a salary voted to himself at an illegal meeting of a part of the directors. Back pay is illegal. Where the president takes part in the proceeding, or his vote is essential, the vote of salary to him is illegal. Wickersham *v.* Crittenden, 93 Cal. 17 (1892). A salary to the president, his own vote being necessary, is illegal. Wickersham *v.* Crittenden, 106 Cal. 327 (1895). A salary voted by the aid of the vote of an officer receiving the same may be validated by subsequent vote of the board. Wickersham *v.* Crittenden, 110 Cal. 332 (1895). A salary voted to the president at a meeting at which he presides, the minutes showing no dissenting vote, is illegal where he had performed no substantial service, even though he swears that he did not vote. Ashley *v.* Kinnan, 2 N. Y. Supp. 574 (1888). A director cannot collect a salary voted to him as general manager, even in advance of the services, where there were only three directors, and the other two were voted salaries, one as vice-president and the other as assistant treasurer. Delay in objecting thereto for some months is no bar to this defense. Mallory *v.* Mallory-Wheeler Co., 61 Conn. 131 (1891). Where a company is prosperous, the directors may vote increased salaries to themselves, each one refraining from voting when the resolution affecting himself is voted upon. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891); aff'd, 133 N. Y. 687. In Bagaley *v.* Pittsburgh, etc. Iron Co., 146 Pa. St. 478 (1892), a salary to the president, fixed by the president and another director, was upheld where the company was a close corporation. Where two directors, forming a majority of the board, vote themselves very large salaries, and refuse information to another director who is the only other stockholder, and refuse to declare divi-

[1] Putnam *v.* Gunning, 162 Mass. 552 (1895).

Where the board of directors vote large pay to themselves, evidently in bad faith, and with a view to depriving the corporation of more than a reasonable proportion of its net earnings, a dissenting stockholder may file a bill in equity to have the amount recovered back.[1] And where the chief stockholder, who is president, induces the directors, his "dummies," to vote a large salary to him, the corporation may defeat the officer's action at law to recover it.[2]

dends, and proceed to convey the property of the company to another company controlled by themselves, a court of equity will set aside the illegal conveyance and the resolutions authorizing the salaries, and will order the books to be opened to the other director, and will order dividends to be declared. The court, however, will not appoint a receiver and enjoin the continuance of the business, and will not order a distribution of the assets of the company. Laurel Springs Land Co. *v.* Fougeray, 50 N. J. Eq. 756 (1893), rev'g Fougeray *v.* Cord, 50 N. J. Eq. 185. Where three out of five directors are present at a board meeting and vote one of themselves a salary as secretary, it is illegal. The action of the full board subsequently in increasing the salary does not validate the first vote. Martin *v.* Santa Cruz, etc. Co., 36 Pac. Rep. 36 (Ariz. 1894). Where three persons, being the owners of a majority of the stock, agree that they will vote their stock to elect as directors three persons to be named by one of them and two persons to be named by the others, and that one of them who had received a salary of $2,500 should receive a salary of $5,000, and that two of such directors should receive a salary of $500 each, the agreement is illegal. Snow *v.* Church, 13 N. Y. App. Div. 108 (1897). A trustee holding stock and electing himself the president of a company and receiving a salary must not allow his personal interest in the salary to conflict with his duty as a stockholder to favor the sale of the corporate property at a high price. Elias *v.* Schweyer, 13 N. Y. App. Div. 336 (1897); s. c., 27 N. Y. App. Div. 69. Where the president is the chief stockholder, and causes the directors to vote him a large salary, it is illegal, especially where he votes for it and his vote is necessary. Adams *v.* Burke, 102 Ill. App. 148 (1902).

[1] Quoted and approved in Bixler *v.* Summerfield, 62 N. E. Rep. 849 (Ill. 1902). In this case a minority stockholder maintained a bill in equity for an accounting against the president, who owned a majority of the stock and who had voted himself and wife exorbitant salaries. Where during eight years all the profits of a turnpike company, amounting to $20,000, are used to pay exorbitant salaries to the treasurer and secretary, the court will order a repayment of the same with interest. Wayne Pike Co. *v.* Hammons, 129 Ind. 368 (1891); Blatchford *v.* Ross, 54 Barb. 42 (1869); Ziegler *v.* Hoagland, 52 Hun, 385 (1889), where $86,000 in salaries was voted to three persons. In Hedges *v.* Paquett, 3 Oreg. 77 (1869), the court refused to interfere, though fraud was charged, in that the directors credited large bills to themselves, and paid themselves large sums for services, had destroyed the business and had wasted the funds and property. This case, however, has met with universal disapproval, and must be considered as contrary to law.

[2] Davis *v.* Memphis City Ry., 22 Fed. Rep. 883 (1885). In Hubbard *v.* New York, etc. Co., 14 Fed. Rep. 675 (1882), wherein a person contracted in advance to become a director and superintendent at a remuneration of one-third of the profits of the business, the court refused to uphold the agreement, and said the contract is to be "construed in the same manner as if he was actually a director at the time of its inception, and

It has been held also, where the majority of the stock of a corporation was held by one family, who voted away the corporate profits for salaries, that the minority might call upon a court of equity to remedy the fraud.[1] Where an insurance company has re-insured all its risks and is doing no business, but the officers are drawing large salaries, a stockholder may have a receiver appointed.[2]

In another case, where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company and caused the board to vote a large salary to himself as president and manager, and leased to the company his property at a large rental, the salary and rental were held to be illegal and voidable.[3]

Again, where persons buying a majority of the stock thereupon take control and vote to the retiring president a large salary for past services, he being one of the persons selling the stock to them, and such salary so paid is credited to the vendees on the purchase price of the stock, the vendees are liable to restore the money so paid.[4]

A person who is appointed and acts as secretary, and is neither a director nor a stockholder, is entitled to pay although the corporation never agreed to pay him.[5]

as if it was made with him while he was a director." The court will scrutinize carefully a salary voted by the board of directors to one of their number as superintendent, where such vote is by those representing him in the board, but if the salary is reasonable the court will sustain it. Harris *v.* Lemming, etc. Works, 43 S. W. Rep. 869 (Tenn. 1896).

[1] Sellers *v.* Phœnix Iron Co., 13 Fed. Rep. 20 (1881). See 66 N. E. Rep. 235.

[2] Treat *v.* Pennsylvania, etc. Co., 52 Atl. Rep. 60 (Pa. 1902).

[3] Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892).

[4] Ellis *v.* Ward, 137 Ill. 509 (1890); s. c., 20 N. E. Rep. 671, holding the president not liable where he knew nothing of it.

[5] Smith *v.* Long Island R. R., 102 N. Y. 190 (1886); Edwards *v.* Fargo, etc. Ry., 4 Dak. 549 (1887); Greenleaf *v.* Norfolk Southern R. R., 91 N. C. 33 (1884); Missouri River R. R. *v.* Richards, 8 Kan. 101 (1871). The secretary and president cannot, by their own votes, cause the board to vote them a salary for past services. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). An understanding between the president and secretary, who is also a director, by which the latter was to have a commission on the sale of land, the business of the corporation being that of buying land and selling it in lots, is not binding on the corporation, but the secretary is entitled to reasonable pay for what work he did. Louisville, etc. Assoc. *v.* Hegan, 49 S. W. Rep. 796 (Ky. 1899). A secretary, after he ceases to be such, cannot claim pay where he has been receiving pay during all the time as general manager. Fowler *v.* Great, etc. Co., 104 La. 751 (1901). Where by oral agreement between the president and secretary the secretary was to receive a certain monthly salary, and at the end of the

Even though a large stockholder of a corporation renders valuable services to it for several years, yet he is not entitled to pay therefor from the corporation unless there is a contract to that effect, especially where the circumstances showed that he expected his pay from the increased value of his investment.[1]

Although a treasurer is presumed to be entitled to compensation, yet if he is a stockholder and his firm have the banking business of the company, and nothing has ever been said about compensation, he cannot afterwards claim or obtain it.[2]

A contract of a director, officer, or president that he will not ask any compensation for his services cannot be insisted upon by the company if it was not a party to the contract.[3]

year the directors approved the accounts, including the payment of such salary, and the secretary holds over, he may recover the same salary for the entire time. Mobile, etc. R. R. *v.* Owen, 121 Ala. 505 (1899). A secretary is not entitled to pay for his services as secretary unless there is an express contract to that effect; but where he gives up his whole time to the company's business, one-half as secretary and one-half in doing engineering work, he is entitled to pay. Talcott *v.* Olcott, etc. Co., 11 N. Y. Week. Dig. 141 (1880). In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence a contract, before incorporation, as to the secretary's salary, is unenforceable. He can recover only on a *quantum meruit*. *Re* Dale, 61 L. T. Rep. 206 (1889). The salary of a secretary, where it consists of a fixed sum and also dividends on certain stock not owned by him, continues as to both until stopped on notice. Crane, etc. Co. *v.* Adams, 142 Ill. 125 (1892). A sale of all the corporate property stops the salary of the secretary where he was subject to removal at any time by the directors. Union Compress Co. *v.* Douglass, 60 Ark. 591 (1895).

[1] Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897). The cashier of a bank cannot collect money for his services while collecting the dividends and coupons of a depositor and stockholder in a bank, where there was no agreement to pay. Wright *v.* Sheldon, 53 Atl. Rep. 59 (R. I. 1902).

[2] Mather *v.* Eureka, etc. Co., 118 N. Y. 629 (1890), 44 Hun, 333 (1887). The question may be one for the jury. Pendleton *v.* Empire, etc. Co., 19 N. Y. 13 (1859). A treasurer may recover for services actually rendered by him, even though he was a director and there was no agreement as to his pay for services as treasurer. Reeve *v.* Harris, 50 S. W. Rep. 658 (Tenn. 1897). The secretary and treasurer and curator of a scientific institute is not entitled to back salary where the facts show that no such salary was contemplated. Whittemore *v.* Kent Scientific Institute, 87 N. W. Rep. 623 (Mich. 1901). "No duties, no pay." A treasurer's salary ceases upon the sale of all of its assets even though there is no dissolution; but if substantial duties continue, the salary continues. Rodney *v.* Southern R. R. Assoc., 3 N. Y. St. Rep. 564 (1886), distinguishing Long Island Ferry Co. *v.* Terbell, 48 N. Y. 427 (1872). A salary to a treasurer does not continue while he is sick, it appearing that during that time he sold his stock and never performed any further services. Raley *v.* Victor Co., 90 N. W. Rep. 973 (Minn. 1902).

[3] An agreement among the officers to reduce their salaries cannot be insisted

Various decisions in regard to other officers of the company are given in the notes below.[1]

§ 658. *Contracts between corporations having one or more directors in common.*— It has been difficult to determine whether a stockholder in one corporation could cause to be set aside a contract or agreement between two corporations having one or more directors in common. As a rule, even though the boards of directors of two corporations are the same, and one buys out the property of the other, yet the transaction is not void, and will not be set aside at the instance of a stockholder unless he shows damage.[2] A contract between two corporations will not be declared invalid because the corporations have common directors, where its fairness is manifest.[3] But a contract between corporations having directors in common must be "open and free from any suspicion of secret dealing in favor

upon by the corporation. It was not a party to the agreement. Thompson Co. *v.* Brook, 14 N. Y. Supp. 370 (1891). An agreement of the president with certain creditors that he would not take a salary until other claims were paid cannot be enforced by the receiver. The president may come in as a creditor. Snow *v.* Russel Coe etc. Co., 58 Hun, 134 (1890). Lambert *v.* Northern Ry., 18 W. R. 180 (1869), holds that a promise by directors to perform their duties gratuitously is *nudum pactum*, and does not prevent them from recovering upon a previous binding agreement for salaries. Where the vendor of property agrees by contract with the vendee and accepted by the company that he, the vendor, will for five years give his personal supervision to the business of the company, he, the vendor, cannot recover compensation from the company for such services. Wetmore *v.* Wetmore Co., 113 Cal. 321 (1896). The conduct of an officer may be such as to preclude the idea that he was to have a salary. Simonson *v.* New York City Ins. Co., 25 N. Y. Week. Dig. 90 (1886).

1 The president may employ the vice-president, his brother, to do work for which the company will pay him. McDowell *v.* New York, etc. R. R., 12 N. Y. St. Rep. 877 (1887). When it is understood by the directors that the officers are to be paid for their services, and at the end of the year a note is given for services to the superintendent, who is also a director, he may collect it. Stewart *v.* St. Louis. etc. R. R., 41 Fed. Rep. 736 (1887). Where the vice-president sues for services as general manager, he must prove services clearly outside of his duties as an officer, and that there was no contrary agreement (citing many cases). Toponce *v.* Corinne, etc. Co., 6 Utah, 439 (1890). A contract with directors for their services ceases upon the winding up of the company. Frames *v.* Bulfontein Min. Co., [1891] 1 Ch. 140. *Cf.* Rodney *v.* Southern R. R. Assoc., 3 N. Y. St. Rep. 564 (1886). For the services of ordinary clerks, etc., the corporation is of course liable. Legrand *v.* Manhattan, etc. Assoc., 80 N. Y. 638 (1880); Pollok *v.* Shultze, 1 Hun, 320 (1874); Bard *v.* Bauigan, 39 Fed. Rep. 13 (1889); Gowen Marble Co. *v.* Tarrant, 73 Ill. 608 (1874). Where an excessive salary is paid to an employee in order to induce him to subscribe for stock, he may be liable for the excess upon the corporation becoming insolvent. Deppen *v.* German-American, etc. Co., 70 S. W. Rep. 868 (Ky. 1902).

2 Smith *v.* Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897).

3 Evansville, etc. Co. *v.* Bank of Commerce, 144 Ind. 34 (1896).

of one principal while acting as the representative of the other."[1] A mortgage by an insolvent corporation to a creditor corporation, the two corporations having a majority of their directors in common, has been declared to be illegal.[2] A guaranty where there are directors in common is voidable.[3] Such contracts as these, however, are not void, and they may be validated by a unanimous vote of the stockholders.[4] Moreover, if the minority stockholders object to the contract, the court will consider it, and will sustain it if fair, and set it aside if unfair.[5]

[1] Mercantile, etc. Co. *v.* Pittsburgh, etc. Assoc., 173 Pa. St. 30 (1896).

[2] Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. Rep. 496 (1894).

[3] Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891); Metropolitan Elev. Ry. *v.* Manhattan Ry., 15 Am. & Eng. R. R. Cas. 1 (1884). A contrary conclusion was reached by the federal court on the same facts. Flagg *v.* Manhattan Ry., 10 Fed. Rep. 413 (1881). For other cases connected with this litigation, see Metropolitan Elev. Ry. *v.* Manhattan Ry., 14 Abb. N. Cas. 152, n. (1884); Manhattan Ry. *v.* New York Elev. Ry., 29 Hun, 309 (1883), rev'g N. Y. D. Reg., Dec. 2, 1882; People *v.* Metropolitan Elev. Ry., 26 Hun, 82 (1881); Harkness *v.* Manhattan Ry., 54 N. Y. Super. Ct. 174 (1886). See also St. James' Church *v.* Church of Redeemer, 45 Barb. 356 (1865), where one religious corporation gratuitously conveyed property to another, the directors being common. A consolidation of two religious corporations having a director in common is illegal and may be set aside. Stokes *v.* Phelps Mission, 47 Hun, 570 (1888). "It is undoubtedly a well settled rule of law that executory contracts entered into by corporations having common directors are voidable at the instance of either corporation, and the court will not inquire into the question whether or not it is beneficial to the corporation seeking to avoid it." But this right is vested in the corporation and not in any stockholder, and a stockholder cannot obtain an injunction against such contract being carried out, unless actual fraud is shown. Burden *v.* Burden, 159 N. Y. 287, 307 (1899); 72 S. W. Rep. 822.

[4] If the stockholders unanimously ratify a contract between two corporations having directors in common, the contract is legal. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). A sale of property by one corporation to another, all of the directors except one being in common, is legal where such sale is subsequently ratified by a meeting of the stockholders. Grant *v.* United, etc. Ry., L. R. 40 Ch. D. 135 (1888). A sale of property by one corporation to another is not fraudulent merely because there was one director common to both, where the directors and stockholders assented thereto. Leathers *v.* Janney, 41 La. Ann. 1120 (1889). A lease of one railroad to another, ratified by the stockholders as required by the statute, is legal, even though the same persons were directors in both companies. Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); S. C., 67 N. H. 234. Where a land company agreed to pay a railroad company a certain sum in instalments, if the railroad company would extend its road to the land company's land, it is immaterial that four of the five directors of the land company were also directors of the railroad company, it being shown that all acts of the directors were expressly ratified at a stockholders' meeting, and it being also shown that the railroad had been constructed and a part of the instalments paid. San Diego, etc. R. R. *v.* Pacific Beach Co., 112 Cal. 53 (1896).

[5] A stockholder cannot cause to be

§ 659. *Foreclosure of mortgage on corporate property, and collusion with directors, whereby no defense is made to the foreclosure.*— This subject is considered elsewhere.[1] Where the directors of a

set aside a contract between two corporations having a majority of directors in common, unless he shows damage. Lyman *v.* Kansas City, etc. R. R., 101 Fed. Rep. 636 (1900). A debt from one corporation to another is not invalid, although they have directors in common. Salina, etc. Bank *v.* Prescott, 60 Kan. 490 (1899). The fact that two of the directors in a vendor corporation are also directors in a vendee does not render the sale fraudulent *per se.* Hagerstown, etc. Co. *v.* Keedy, 91 Md. 430 (1900). A pledge of bonds by one corporation to another is not invalid, even though there is one director in common. Rawlings *v.* New Memphis, etc. Co., 60 S. W. Rep. 206 (Tenn. 1900). Even though all the directors of a corporation organize another company to buy out the first named company, and they are directors in the second company also, yet, if all the facts are fully stated, the sale is legal and the new company cannot repudiate the sale on that ground. The fact that the directors are not independent, but represent the vendor, is immaterial if that fact is made known to the parties. Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate, Ltd., [1899] 2 Ch. 392. In the case of Robotham *v.* Prudential Ins. Co., 53 Atl. Rep. 842 (N. J. 1903), the court said: "I incline strongly to believe that the safe rule in most cases, in the end, will be found to be that the presence of a director or directors on both sides of the transaction under investigation does not give the dissenting stockholder an arbitrary right to an injunction, but may give him a most ample right to subject the transaction to the scrutiny of the court, and may cast upon the corporations or directors concerned the burden of disclosing and justifying the transaction. To give the dissenting stockholder the arbitrary right to an injunction in this class of cases often will put a deadly weapon in the hands of the blackmailer and the corporation 'striker.' Such a rule tends to drive the actual wrong-doers to cover,—to induce them to seek concealment while the corporate action is accomplished through apparently impartial directors,—who are in fact only agents or 'dummies.'" The court in this case held that where all the directors are personally interested in the matter, aside from their interest as stockholders, the court at the instance of a minority stockholder may compel the directors to prove that the proposed action is advantageous to the corporation, inasmuch as it has not received the approval of an impartial board of directors. Where a rolling-stock company by its board of five directors makes a contract with a railroad company having thirteen directors, five of whom are the same as the directors of the rolling-stock company, and the railroad company makes the contract at a meeting of eight directors, two of whom are of the five, and for two years the railroad company lives up to the contract, it cannot then repudiate. The majority of its directors were not in common, and it should have objected before. U. S. Rolling-Stock Co. *v.* Atlantic, etc. R. R., 34 Ohio St. 450 (1878). *Cf.* Bill *v.* Western Union Tel. Co., 16 Fed. Rep. 14 (1883), where the illegality was clear, since the directors common to both corporations constituted a majority of the directors of one of them. In Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894), where the same persons formed a majority of the boards of directors of a construction company and also of a railroad company, to which latter company the construction company had agreed to

[1] See § 848, ch. XLIX, *infra.*

corporation have misappropriated the funds of the company, created fraudulent debts, levied assessments upon the stock, caused the stock to be forfeited for non-payment, and judgment to be entered

turn over the stock of another railroad company; and where, by the contract between the two companies having a majority of the board of directors in common, the railroad company was to transport freight at a certain price, and to deliver to the construction company its bonds to a certain amount; and where subsequently this contract was changed so as to reduce the amount going to the construction company by upwards of $700,000,—it was held that the minority stockholders and directors of the construction company might file a bill on behalf of the construction company and compel the railroad company to pay to the construction company the amount mentioned above. It was also held that where these directors controlled both boards, and sold a part of the bonds going to the construction company to themselves at ninety cents on the dollar, when the bonds were worth par, the construction company could hold the railroad company liable for the loss. The decision was modified in 44 Neb. 463 (1895), reducing the decree to $300,906.33. An appeal to the supreme court of the United States was dismissed in Missouri Pac. Ry. *v.* Fitzgerald, 160 U. S. 556 (1896). The fact that a minority of the directors are directors in another contracting company does not render a contract voidable at the instance of one of the companies or of a dissenting stockholder. Ziegler *v.* Lake Street El. R. R., 69 Fed. Rep. 176, 182 (1895). A receiver of an insolvent bank may file a bill in equity to compel its president and another bank to pay back the price of stock in the insolvent bank which the latter, through the instrumentality of its president, who was also cashier of the other bank, had purchased of the other bank on the eve of the insolvency of the former. Bridgens *v.* Dollar Sav. Bank, 66 Fed. Rep. 9 (1895). The fact that a railroad company and a construction company have mainly, though not entirely, the same officers and stockholders, does not render them legally identical, but merely requires a more careful scrutiny of their dealings with each other where the interests of outside parties are affected. Hence a contract by which the construction company takes stock and bonds and agrees to do certain work will be upheld if it is a reasonable and fair contract, and the construction company may enforce claims against the railroad company. Davidson *v.* Mexican Nat. R. R., 58 Fed. Rep. 653 (1893). A mortgage by one corporation to another is not void because they have the same president. Roy *v.* Scott, etc. Co., 11 Wash. 399 (1895). An insurance policy issued by an agent to a corporation in which he is an officer is not enforceable. Greenwood, etc. Co. *v.* Georgia, etc. Ins. Co., 72 Miss. 46 (1895). A sale of iron by one corporation to another which is fair is not illegal simply because the company has directors in common. Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896); aff'd, 159 N. Y. 287 (1899). In Hart *v.* Ogdensburg, etc. R. R., 89 Hun, 316 (1895), where two railroads having directors in common were consolidated, the court held that the minority stockholders could not object, inasmuch as the act was not so clearly against the interest of the minority as to be a wanton and fraudulent destruction of their rights, nor a clear, substantial, flagrant violation thereof. Moreover the court held that six years' delay in suing was fatal. A city is liable on a gas contract although the same man is mayor and is also president of the gas company. Capital, etc. Co. *v.* Young, 109 Cal. 140 (1895). In Santa Fe Electric Co. *v.* Hitchcock, 9 N. Mex. 156 (1897), the court held a lease to be

on said debts and the property to be sold out, a stockholder may file a bill to set aside all the transactions and to compel the directors to account and to wind up the company.[1]

void between two companies having the same directors, there being actual fraud. A note by one corporation to another is valid although the same person is president of both. St. Joe, etc. Co. *v.* First Nat. Bank, 10 Colo. App. 339 (1897). Where a town board of three are authorized to make a grant to a railroad, and two of them, one being a director of the railroad, made the grant, the court will set it aside. San Diego *v.* San Diego, etc. R. R., 44 Cal. 106 (1872). The fact that two directors out of eight of one packet company are also directors out of six directors of a competing packet company does not render them liable for fraud, although the former company loans the latter company much money and takes a chattel mortgage and closes out its property. Booth *v.* Robinson, 55 Md. 419 (1880). In England contracts between companies having directors in common are void by statute, unless they are ratified by vote of the stockholders, and may be so ratified, although the by-laws prohibit the directors from making contracts in which they are interested. Grant *v.* United, etc. Ry., L. R. 40 Ch. D. 135 (1888); Ernest *v.* Nicholls, 6 H. L. Cas. 401 (1857). *Cf.* Griffin *v.* Inman, 57 Ga. 370 (1876), where the town officers merely executed bonds to a railroad company of which they were directors. The bonds were held to be valid. In Wallace *v.* Long Island R. R., 12 Hun, 460 (1877), *held,* that a dissenting stockholder could not sue to set aside a lease made between two railroads having directors in common, but that a majority of the stockholders might have objected. A conveyance of all the property of an insolvent corporation to one of its creditors, a corporation having two directors in common with the insolvent corporation, such conveyance being to secure the latter corporation's debt, is *prima facie* fraudulent and voidable. If free from actual fraud, and if reasonable, it is sustained. Sweeny *v.* Sugar Ref. Co., 30 W. Va. 443 (1887). The fact of having stockholders in common is immaterial. Warfield *v.* Marshall, etc. Co., 72 Iowa, 666 (1887). The fact that a construction contract is assigned by the contractor to a corporation having directors in common with the railroad does not render the contract fraudulent *per se.* Union Pac. R. R. *v.* Credit Mobilier, 135 Mass. 367 (1883). A contract between two corporations having directors in common is voidable, but equity will cause such payments to be made for work done as are just, irrespective of the written contract. Thomas *v.* Peoria, etc. Ry., 36 Fed. Rep. 808 (1888). Where one director is a director also in another company with which a contract is being made, he cannot be counted in making up a quorum. Metropolitan, etc. Co. *v.* Domestic, etc. Co., 44 N. J. Eq. 568 (1888). A contract between corporations having common directors is voidable, not void. If it is fair it will not be disturbed. Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38 (1889); Alexander *v.* Williams, 14 Mo. App. 13 (1888). A lease of one railroad to another by directors who are directors in both companies is invalid. Thouron *v.* East, etc. Ry., 5 Ry. & Corp. L. J. 77 (Tenn. 1888). In Pearson *v.* Concord R. R., 62 N. H. 537 (1883), the court, in setting aside a contract made by corporations having common directors, said: "Stockholders and creditors are entitled not only to the vote of a director in the board, but to his influence and argument in discussion."

[1] Jellenik *v.* Huron, etc. Co., 177 U. S. 1 (1899).

§ 660. *Directors' purchases of property needed by the corporation, and purchases of outstanding debts or claims against the corporation.*— It is an abuse of trust for a corporate director to purchase property which he knows the corporation will need, and then to sell the same to the corporation at an advanced price. This generally occurs where the director purchases in his own name land which the corporation must purchase for its enterprise, or over which it will need a right of way.[1] Where, however, the director offers the land to the corporation at the price which he paid for it,

[1] Blake . Buffalo Creek R. R., 56 N. Y. 485 (1874). See Buffalo, etc. R. R. *v.* Lampson, 47 Barb. 533 (1867); Blair, etc. Co. *v.* Walker, 50 Iowa, 376 (1879); Taylor *v.* Salmon, 4 Myl. & C. 134 (1838), where the corporate agent took in his own name a lease which the company desired and had instructed him to obtain for itself. See also Mitchell *v.* Reed, 61 N. Y. 123 (1874). The corporate treasurer cannot purchase stock at a discount and sell to the corporation at par, where such stock is needed by the corporation to fulfill its contracts. East New York, etc. R. R. *v.* Elmore, 5 Hun, 214 (1875). Where the business of a corporation requires the construction of a railroad and steamship line, and the company has no power to construct them, and consequently the officers with others take out a separate charter and own the stock of the new company and construct the line, and then propose to consolidate the companies on a plan which will give to the new stock an interest in the consolidated company which will represent a large profit, a stockholder of the old company may enjoin the consolidation upon proving that the new franchises were necessary to the old company and were intended for the benefit of the old company, the same officers being in control of the two companies. Miller *v* Consolidated, etc. Co., 110 Fed. Rep. 480 (1901). Where a corporation has a lease of and option to purchase land, and the officers purchase the land for themselves in violation thereof, the corporation is entitled to the property at the price paid by the officers, but as to land which the company merely wished to purchase, but had made no contract in respect thereto, the company is not entitled to the benefit of purchase of such land by an officer. Lagarde *v.* Anniston, etc. Co., 126 Ala. 496 (1900). Where the president is directed to buy the boats of a rival company, and does so by buying them for another corporation which he controls, and credits himself with an advance, he may be made to refund. Ward *v.* Davidson, 89 Mo. 445 (1886). A director cannot take a contract in his own name for himself where such contract really should belong to the corporation. The president of a packet company may take a contract for carrying mails, and may have the service performed by the packet company, he paying it therefor. He is not liable to it for his profits, he having endeavored first to get the contract for the company. Keokuk, etc. Co. *v.* Davidson, 95 Mo. 467 (1888). A treasurer is not liable for profits in coal sold by himself to the corporation, where he purchased the coal with no intent of selling to the company. Parker *v.* Nickerson, 137 Mass. 487 (1884). A director who takes to himself an assignment of a patent that ought to have been assigned to his corporation must account for all profits that he has received. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889). A corporate creditor cannot complain that a director has purchased property needed by the corporation. Cornell *v.* Clark, 104 N. Y. 451 (1887). See also § 652, *supra*, on sales by directors to the corporation.

and the corporation refuses it, he cannot long subsequently be compelled to accept that price.[1] A director may construct works to compete with the works of the corporation in which he is a director. He is not disqualified from so doing.[2] Directors, who are also officers, of a manufacturing corporation, if acting in positive good faith towards the corporation and their co-stockholders, are not precluded from engaging in the building and operation of other distinct works in the same general business; and they do not stand, in respect to said works, in any trust relation to the corporation.[3] But where the president takes a renewal of a corporate lease in his own name, and admits that he takes it for his company, he cannot claim any of the profits arising from it, even though, in order to get the lease from him, a contract is made that he have a part of the profits.[4] A director cannot take a contract in his own name for himself, where such contract really should belong to the corporation.[5]

It is a fraud on the corporation and on corporate creditors for the directors to buy up at a discount the outstanding general debts of the corporation, and compel it to pay them the full face value thereof. In such a case the directors may be compelled to turn over to the corporation the evidences of indebtedness upon being paid the money which they gave for the same.[6]

[1] Sandy River R. R. *v.* Stubbs, 77 Me. 594 (1885). A president and treasurer who purchase land as agents for a railroad company, and allow it to pay part of the purchase price, and obey its direction to sell part, whereby the purchase price is repaid, are liable to convey to the company the remainder, the title to which is in their names. Church *v.* Sterling, 16 Conn. 388 (1844).

[2] Barr *v.* Pittsburgh, etc. Co., 51 Fed. Rep. 33 (1892). See also Ward *v.* Davidson, 89 Mo. 445 (1886). *Cf.* Keokuk, etc. Co. *v.* Davidson, 95 Mo. 467 (1888). The president of a water irrigation company cannot acquire an interest in the property hostile to the interest of the stockholders. Center, etc. Co. *v.* Lindsay, 21 Utah, 192 (1900).

[3] Barr *v.* Pittsburgh, etc. Co., 57 Fed. Rep. 86 (1893), aff'g 51 Fed. Rep. 33.

[4] Robinson *v.* Jewett, 116 N. Y. 40 (1889). Even though a corporation has applied for the renewal of a lease, and afterwards a director applies and the lease is given to the director, the corporation cannot compel the director to turn over the lease where the lease contains a provision against sub-letting. Crittenden, etc. Co. *v.* Cowles, 66 N. Y. App. Div. 95 (1901); 54 Atl. Rep. 254.

[5] Richardson *v.* Green, 133 U. S. 30 (1890). Where a corporation has forfeited its right to buy a mining claim, a director may subsequently buy it in good faith from a person who has relocated it. McDermott, etc. Co. *v.* McDermott, 69 Pac. Rep. 715 (Mont. 1902).

[6] Quoted and approved in Bonney *v.* Tilley, 109 Cal. 346 (1895). A stockholder who is also a director cannot buy up claims against the insolvent company and offset them at their face value. Bulkley *v.* Whitcomb, 121 N. Y. 107 (1890); Duncomb *v.* New York, etc. R. R., 84 N. Y. 190, 202 (1881); *Re* Imperial Land Co., L. R. 4 Ch. D. 566 (1877). See also Davis *v.* Rock Creek, etc. Co., 55 Cal. 359 (1880), where a mortgage given to a director to secure

But directors may buy corporate bonds from third parties at a discount and enforce them at par, where there are no special equities against such a purchase, and no present duty in regard to them

debts purchased by him at a discount was defeated in foreclosure. If the corporate managers buy up corporate debts with corporate funds, a corporate creditor may compel them to give up the claims so purchased. Thomas *v.* Sweet, 37 Kan. 183 (1887). Directors who authorize acts by the corporation infringing on a patent cannot afterwards buy the patent and enforce the right to damages. New York, etc. Co., *v.* Buffalo, etc. Co., 24 Fed. Rep. 604 (1885). A corporate creditor cannot complain that a director has purchased property needed by the corporation. Cornell *v.* Clark, 104 N. Y. 451 (1887). Where an insurance company absorbs another company *ultra vires* and gives notes therefor, and the president acquires and collects the notes, he may be compelled to refund. McClure *v.* Levy, 147 N. Y. 215 (1895). Where a company has assigned, and its directors have bought claims at a discount, a suit to compel them to turn in the claims at cost should be instituted by the assignee. Moulton *v.* Connell, etc. Co., 93 Tenn. 377 (1894). Payment of corporate notes by a director may entitle him to preference in the distribution of the assets. Atkinson's Appeal, 11 Atl. Rep. 239 (Pa. 1887). English debentures may be issued to directors at a discount. Campbell's Case, L. R. 4 Ch. D. 470 (1876). Where a corporation is without funds, its president may purchase for himself its overdue bond, and may agree with the corporation that the rate of interest of the bond shall be increased. There was no proof that he purchased at a discount. Bradly *v.* Marine, etc. Co., 3 Hughes, 26 (1879); s. c., 3 Fed. Cas. 1172. As to the rule that where a director or officer of an insolvent corporation obtains a preference in the payment of his debt it is illegal, see § 692, *infra.* Officers occupy a quasi-fiduciary relation to the corporation, and cannot profit by purchasing claims against it. Hill *v.* Frazier, 22 Pa. St. 320 (1853). Also Lingle *v.* National Ins. Co., 45 Mo. 109 (1869); Holland *v.* Heyman, 60 Ga. 174 (1878), holding that the purchased claims are good only for the amount paid.

Where a corporation is a going concern, although embarrassed for ready money, it is legal for the president to purchase its outstanding notes at a discount, and the corporation cannot maintain a bill in equity to pay such notes at such discount. Glenwood, etc. Co. *v.* Syme, 109 Wis. 355 (1901).

Perry on Trusts (3d ed.), § 428, lays down the rule as follows: "A trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself; but such purchase inures for the benefit of the trust estate, and the creditors, legatees, and *cestuis que trust* shall have all the advantage of such purchase. But if a trustee buys up an outstanding debt for the benefit of the *cestuis que trust*, and they refuse to take it or to pay the purchase-money, they cannot afterwards, when the purchase turns out to be beneficial, claim the benefit for themselves. Nor can the trustee make any contract with the *cestui que trust* for any benefit, or for the trust property, nor can he accept a gift from the *cestui que trust.* The better opinion, however, is, that a trustee may purchase of the *cestui que trust*, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity.

from him as a director. Morever, the corporation must claim the benefit at once, if at all.[1]

An attachment and execution sale of railroad bonds on a judgment obtained by a director was disregarded and declared void, where the director himself purchased at the sale, and the whole transaction was tainted with a fraudulent control exercised by the director over the company.[2]

So, if a trustee buys the trust property at private sale or public auction, he takes it subject to the right of the *cestui que trust* to have the sale set aside, or to claim all the benefits and profits for the sale himself."

Where a director is one of a committee appointed by the board of directors to settle claims against the corporation, and he buys some of the claims, he must turn them in at the price he paid, and even though the stockholders and directors intended to allow him the profit, yet this does not estop the corporation from objecting. Kroegher *v.* Calivada, etc. Co., 119 Fed. Rep. 641 (1902).

[1] Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333 (1895); s. c., 157 N. Y. 697. See also § 655, *supra*. In Higgins *v.* Lansingh, 154 Ill. 301 (1895), the court said that if a director acts fairly and for the interest of the corporation, he may buy up at a discount a debt of the corporation and enforce such debt at its full face value, provided the corporation was given an opportunity itself to become the purchaser and could not or would not purchase. The court held, however, in the case before it that the purchase on the part of the director was fraudulent, and that the director could collect only the amount he paid. The fact that a director buys up the securities of an insolvent corporation for the purpose of using them in reorganization is not fraudulent or a breach of his duty, he having paid all that the securities were worth. Powell *v.* Willamette Valley R. R., 15 Oreg. 393 (1887). In Inglehart *v.* Thousand Island Hotel Co., 109 N. Y. 454 (1888), 32 Hun, 377, the assignee of a judgment from a director who purchased it at a discount was allowed to enforce it for the full amount. After the corporation has assigned for the benefit of creditors, and all its property has been sold, a director may buy up claims against it, and participate in the distribution of assets. Hammond's Appeal, 123 Pa. St. 503 (1889); Craig's Appeal, 92 Pa. St. 396 (1880). The case of St. Louis, etc. R. R. *v.* Chenault, 36 Kan. 51 (1886), holds that a corporate treasurer may buy up outstanding notes against the corporation, and may then pay such notes out of the corporate funds in his possession. Where the directors issued bonds as collateral to the company's note, and, upon the sale of the bonds by the pledgee for non-payment of the note, purchased the bonds at five cents on the dollar, a foreclosure based chiefly on such bonds will be set aside. James *v.* Railroad Co., 6 Wall. 752 (1867). The complicated principles of law growing out of directors owning corporate debts are considered in §§ 692, 693, *infra*. As to the issue by the corporation of its bonds to directors at less than par, see § 766, *infra*.

[2] Richardson *v.* Green, 133 U. S. 30 (1890). Where the president of a coal company contracts in his own name to supply coal to parties, and the board of directors, a majority of whom are his relatives, contract to furnish the company's coal to him on a royalty, a stockholder may compel him to turn into the corporation the profits of his contract. An assignee of his interest who took with notice is not protected. Davis *v.* Gemmell, 70 Md. 356 (1889).

§ 661. *Loans by directors to the corporation; mortgages by the corporation to the directors, and the right of an insolvent corporation to give a mortgage or assignment of its property to a director in order to prefer the payment of his debt.*— These questions are considered elsewhere.[1]

§ 662. *Frauds by a majority of the stockholders on the minority — Directors owning stock in another corporation with which a contract is made — Stockholders' ratification of the voidable acts of directors — One corporation voting stock in another competing corporation.*— It often happens that a consolidation, lease, sale, or contract between two corporations is made where, first, the directors of one of the corporations are largely interested in the stock of the other, or, second, one corporation owns a majority of the stock of the other, or, third, the same person or persons own a majority of the stock of both corporations. There then is likely to arise a conflict between interest and duty. Such contracts as these are investigated very closely by the courts. They are not necessarily void, and are not constructively fraudulent. But if there is actual fraud, or if there has been an undue advantage taken or an unconscionable bargain made, the court will set it aside. If the transaction is fair the court will sustain it; if it is unfair the court will undo it.[2]

First, where the directors of one corporation are stockholders in another corporation, and a lease, sale, consolidation, or contract is made between the two. Such transactions are of constant occurrence. They are not fraudulent in law unless they are unfair. The court has power to set them aside, however, at the instance of a dissenting stockholder, if in the conflict between interest and duty interest has prevailed.[3]

[1] See §§ 692, 693, *infra.*

[2] Quoted and approved in Hill *v.* Gould, 129 Mo. 106 (1895), where a sale of coal was upheld, although at about cost, and a majority of the directors were elected by and represented the railroad company that bought the coal.

[3] Where a majority of the directors of an irrigation company are members of an association which desires to obtain water from such corporation, a contract to that effect which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. Goodell *v.* Verdugo, etc. Co., 71 Pac. Rep. 354 (Cal. 1903), the court saying: "The publicity alone of an illegal and unauthorized act of the directors of the corporation does not make it legal or valid."

Where the officers and owners of a majority of the stock of a company vote as stockholders and officers to lease its property to another corporation, all of whose stock they own, the minority stockholders in the first corporation may cause it to be set aside. Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883). See also Brewer *v.* Boston Theater, 104 Mass. 378 (1870); Fitz-

Nevertheless a court of equity will not, at the instance of minority stockholders in a corporation, enjoin that corporation from taking a lease of another railroad, even though the same persons are

gerald v. Fitzgerald, etc. Co., 41 Neb. 374 (1894).

A lease made by a majority of the board of directors, of which majority one is interested in another corporation taking the lease, and his vote being necessary to authorize the lease, is voidable at the instance of a stockholder of the lessor. Parsons v. Tacoma, etc. Co., 25 Wash. 492 (1901). A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of the stock. Geer v. Amalgamated, etc. Co., 61 N. J. Eq. 364 (1901). Where the business of a corporation requires the construction of a railroad and steamship line and the company has no power to construct them, and consequently the officers with others take out a separate charter and own the stock of the new company and construct the line, and then propose to consolidate the companies on a plan which will give to the new stock an interest in the consolidated company which will represent a large profit, a stockholder of the old company may enjoin the consolidation upon proving that the new franchises were necessary to the old company and were intended for the benefit of the old company, the same officers being in control of the two companies. Miller v. Consolidated, etc. Co., 110 Fed. Rep. 480 (1901). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not for the benefit of an underlying mortgage. Farmers', etc. Co. v. Penn, etc. Co., 103 Fed. Rep. 132, 157 (1900). A lease will not be set aside even though a majority of the directors of the lessor are interested in the lessee, and even though after the lease was made they became stockholders and directors of the lessee, it being shown that the lessor had a floating and bonded debt and no funds, and had never paid a dividend, and that as a result of the lease the stock advanced fifty per cent. in value, and the complaint is not made until eighteen months after the lease was made. Dickinson v. Consolidated, etc. Co., 114 Fed. Rep. 232 (1902); aff'd, 119 id. 871. The fact that directors loaned money to the corporation on its purchase of property from another corporation in which they are interested does not postpone their claims to the claims of other creditors. *In re* Estate, etc., 202 Pa. St. 589 (1902). Even though the general manager is a stockholder in another company which is selling articles to his company, yet where the board of directors of his company knew the facts and monthly statements were made, and no actual fraud is shown, the sales cannot be set aside after they have been completed. Aldine Mfg. Co. v. Phillips, 88 N. W. Rep. 632 (Mich. 1902). Where the by-laws expressly provide that a director shall not be liable for the profits received by him as a stockholder in another corporation by reason of a contract between the

the officers and majority stockholders in both companies, unless actual unfairness and injustice are proven. Moreover, the court cannot prescribe the terms of a lease. It can merely enjoin a fraudulent

two corporations, he cannot be held liable. Costa Rica Ry. *v.* Forwood, [1900] 1 Ch. 756; aff'd, [1901] 1 Ch. 746.

Where the directors let a contract, and then the contractor assigns his rights to a corporation the majority of whose stock is owned by the directors, the court will not aid the contractor as a stockholder in the second corporation. Wardell *v.* Union Pac. R. R., 103 U. S. 651 (1880). See § 649, *supra.* Where the directors of a railway company enter into a contract with third persons, whereby a new company is organized, franchises secured, and a road built and leased to the old company, and the profits realized from the transaction are equally divided between the directors and the third persons, the latter are not liable for their profits, even though exorbitant, on a suit by the stockholders of the old company, unless the contract of lease is rescinded and the road restored to the new company. Hitchcock *v.* Barrett, 50 Fed. Rep. 653 (1892). Although a lessee railroad company has directors, a minority of whom are largely interested in the stock and bonds of the lessor railroad, and such bonds and stock are largely "water," yet this does not necessarily vitiate the lease. The court will not set the lease aside if no undue advantage was taken and no actual fraud involved. Jesup *v.* Illinois Cent. R. R., 43 Fed. Rep. 483 (1890). Where a gas company is under contract to furnish gas to several concerns, and its business is so managed as to favor a concern in which the officers are interested, there being an insufficient supply of gas, a minority stockholder may complain. Clark *v.* Pittsburgh, etc. Co., 184 Pa. St. 188 (1898). Although certain persons, being directors and owners and in control of a railroad company, cause it to make a construction contract with a company which they also control, yet, if all stockholders assent, subsequent consolidated bondholders cannot object that a part of the old issue of bonds was issued below par and was fraudulently and illegally issued. Coe *v.* East, etc. R. R., 52 Fed. Rep. 531 (1892). An agreement of persons holding a majority of the stock, they being directors also, that a person purchasing stock from them shall be general manager, and may at the end of two years sell the stock back to them at a stated price, is contrary to public policy and void. The vendors need not repurchase. The arrangement is unfair to the corporation. Wilbur *v.* Stoepel, 82 Mich. 344 (1890). It is illegal for directors to be stockholders in a construction company to which a construction contract is let. Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875).

In England it seems that under the statutory power of one company to sell out to another, the sale may be for cash, and the minority are bound, even though the majority own the purchasing company. But all the cash must be paid, and not merely the part that goes to the minority. Holst *v.* Sydney, etc. Ry., 69 L. T. Rep. 132 (1893). A contract of a corporation that a patentee shall have forty-eight per cent. of an increase of stock does not apply to the capital stock of a consolidated company, although the former corporation is one of those entering into the consolidation. Einstein *v.* Rochester, etc. Co., 146 N. Y. 46 (1895).

Sometimes an underwriting syndicate is brought into the deal. The following decision may then be applicable: Where unissued shares of the par value of £1 each are worth about £4 each and a portion thereof are offered to the stockholders at £2 10*s.* each, and an option on the balance is given to under-

or *ultra vires* one.[1] Again, where one corporation buys out another, a stockholder of the former cannot complain, even though a large amount of watered stock was issued in payment, and even though the directors of the purchasing company were personally interested in the selling company and had made large profits in the construction of the work, it appearing that the purchasing company had no property at all at the time of the purchase. In such a case no damage is done to the stockholder, and hence suit by him does not lie.[2] But where a lease is made, and the directors of the lessee railroad company are also directors of the lessor company, and own a majority of the stock of both companies, a stockholder of the lessee company alleging that the lease is at an exorbitant rent and unlawfully depletes the funds and earnings of the lessee company, and injures him as a stockholder, and alleging also that the directors have unlawfully paid large sums to themselves on account of alleged loans, may by a bill in equity compel them to account.[3]

Where the officers of a lessee corporation, which has leased the property of the lessor corporation, control a majority of the stock of the latter, and conspire to compel the minority to sell their stock by refusing to pay the rent due on the lease, a court of equity, on the application of the minority, will compel a payment of the rent.[4] The question as to the liability of a director who is interested as a stockholder in a contracting construction company is considered elsewhere.[5]

A lease to a director is not necessarily illegal, even though a stockholder objects thereto, where a majority of the stockholders have ratified the lease.[6]

Where a director has sold his property to the corporation, or has committed some other act which is voidable and not void, and

writers at the same price in consideration of the underwriters agreeing to take such of the stock as is offered to the stockholders and is not taken by the latter, a minority stockholder may enjoin the carrying out of such option to the underwriters, it being in violation of the English statute prohibiting the payment of a commission for underwriting subscriptions. Burrows *v.* Matabele, etc. Co., [1901] 2 Ch. 23. The fact that one of the trustees of a voting trust is an officer in a certain railroad does not render illegal the voting of the stock in favor of consolidating with that railroad, there being no proof of wrong-doing or unfair terms. Dady *v.* Georgia, etc. Ry., 112 Fed. Rep. 838 (1900).

[1] Shaw *v.* Davis, 78 Md. 308 (1894). The court held that no actual fraud was proven in this case.

[2] Smith *v.* Ferries, etc. Ry., 51 Pac. Rep. 710 (Cal. 1897).

[3] Sage *v.* Culver, 147 N. Y. 241 (1895).

[4] Barr *v.* New York, etc. R. R., 96 N. Y. 444 (1884).

[5] See § 649, *supra*.

[6] The court refused, at the instance of a dissenting stockholder, to set aside such a lease, in the case of Nye *v.* Storer, 168 Mass. 53 (1897). See also § 649, *supra*.

where a majority of the stock can ratify and validate that act, it being not actually fraudulent, but merely voidable at the option of the stockholders, the important question arises whether, in taking the vote of the stockholders on such a question, the stock held by the director himself is to be counted. The well-settled rule is that his stock is to be counted, even though the vote would have failed if his stock had not been voted.[1]

[1] A director may sell property to the corporation where the purchase is adopted at a meeting of the stockholders. Such director may vote in favor of such purchase all the stock that he owns; but if the result is "so detrimental to the interests of the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that their action is a wanton or fraudulent destruction of the rights of such minority," then a court of equity will set the act aside. Gamble *v.* Queen's, etc. Co., 123 N. Y. 91 (1890). The court said: "In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders." Even though the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. Hodge *v.* United States Steel Corp., 54 Atl. Rep. 1 (N. J. 1903). The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied the right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." The court further said: "In Leavenworth *v.* Chicago Railway Co., 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the case of Nye *v.* Storer, 168 Mass. 53, and Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders." A purchase of a steamboat from one who is a director and owns a majority of the stock is valid where ratified by a majority vote at a stockholders' meeting. The director may vote his stock. Northwest Transp. Co. *v.* Beatty, L. R. 12 App. Cas. 589 (1887). It was said, in effect, that in such case the ratification must not be brought about by unfair or improper means, nor be illegal or fraudulent or oppressive toward those shareholders who oppose it. A rule excluding stockholders from the right to vote, merely because they might be personally interested to vote in a particular way, contrary to the interests of the other stockholders, would be likely to lead to great confusion. Beatty *v.* Northwest Transp. Co., 5 Can. L. T. 277 (1885) (rev'g s. c., 4 Can. L. T. 85), holding that a purchase by the directors of a vessel from one of the directors could not be set aside by a dissenting stockholder where a majority of the stock had ratified the purchase, even though the director himself held and voted that majority.

A stockholder may vote to ratify a purchase of property from a corpora-

Second, a similar situation arises where one corporation owns a majority of the stock of another, and hence controls it, and brings about a lease, consolidation, sale, or contract between the two.[1] This is very much the same as where a corporation sells property to one of its directors,[2] or buys property from him.[3] The courts

tion by the directors, although such stockholder is a director himself. The court said: "The fact that he may have a personal interest separate from the others or from that of the corporation in the matter to be voted upon does not affect his right to vote. It is not to be understood that the majority stockholders may use their power of voting for the purpose of defrauding the minority." Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483 (1892); Foss *v.* Harbottle, 2 Hare, 461 (1843), where the directors sold their property to the corporation. Inasmuch as the majority of stockholders could ratify the purchase, the court refused to entertain a stockholders' suit until they had voted. Where a person fraudulently misrepresented a mine in its sale to the company for shares of stock, a suit by the company against him does not lie where a majority of the stock votes against the suit, although the shares obtained by the vendee were voted by him and were necessary to make the majority, and although he was a director of the company at the time. East, etc. Co. *v.* Merryweather, 2 Hem. & M. 254 (1854). This case goes much farther than the modern rule would uphold. See Mason *v.* Harris, L. R. 11 Ch. D. 97 (1879), holding explicitly that where a director is guilty of fraud as a promoter, a dissenting stockholder may bring him to an accounting, although the director controls the directorate and a majority of the shares of stock. Also Atwool *v.* Merryweather, L. R. 5 Eq. 464, note (1867), where a dissenting stockholder sued to set aside a sale of property to the company by the defendant, who divided the profits with one of the directors. Although a majority of the stockholders had voted not to bring the action, yet this majority was made up by counting the stock of the guilty parties, and hence was not binding. In a stockholders' vote ratifying the acts of directors, a stockholder has no right to vote stock which he has transferred to others, even though it still stands in his name on the books. Graves *v.* Mono Lake, etc. Co., 81 Cal. 303 (1889). A creditor who is also a stockholder may vote his stock in favor of a mortgage to himself. Rittenhouse *v.* Winch, 11 N. Y. Supp. 122 (1890). Works built by a director in opposition to the corporation may be purchased by the latter and new stock issued therefor. Such a transaction is certainly legal where a majority of the minority stockholders, not including the parties interested, vote in favor of it. Barr *v.* Pittsburgh, etc. Co., 51 Fed. Rep. 33 (1892). In Cumberland Coal Co. *v.* Sherman, 30 Barb. 553 (1859), the court held that a unanimous vote of the stockholders was necessary to confirm. A ratification by the stockholders of directors' acts cannot be made by a general resolution ratifying "all of the acts of the officers." Farmers' L. & T. Co. *v.* San Diego, etc. Co., 45 Fed. Rep. 518 (1891), holding also that the directors holding a majority of the stock cannot by its vote ratify a preference to them by the corporation, which is insolvent. A stockholder may vote on the propriety of a sale to the corporation in which he is interested as vendor. Worth, etc. Co. *v.* Bingham, 116 Fed. Rep. 785 (1902).

[1] This is practically a private sale of the corporate property to one of the stockholders and may be objected to. See Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1890). See also § 671, *infra.*

[2] See § 653, *supra.*

[3] See § 652, *supra.*

will scrutinize the transaction very closely and will set it aside, at the instance of a stockholder, if it is unreasonable, unfair, and practically fraudulent.[1] The New York court of appeals has well said

[1] Where one railroad owns a majority of the stock and controls the board of directors of another railroad, and causes the latter to lease its road to the former, a stockholder of the former may file a bill in equity to set aside such lease on the ground that its terms were so inequitable as to constitute fraud. In such case no demand need be made to the board of directors to bring the suit, if the facts alleged in the bill show that the board of directors is controlled by the guilty party. Rogers *v.* Nashville, etc. Ry., 91 Fed. Rep. 299 (1898). Where one mining company owns the majority of the stock of another mining company and elects the directors of the latter, and causes its property to be sold out to the former on its own terms, the minority stockholders of the latter may cause the sale to be set aside, even though no actual fraud is shown. Glengary, etc. Co. *v.* Boehmer, 62 Pac. Rep. 839 (Col. 1900). This would seem to be the logical rule under the decision of the supreme court of the United States in Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1889), which held that a majority of the stockholders could not sell out all the property of the company to themselves at a fixed price at a private sale, even though the minority stockholders were given an opportunity to participate in such sale the same as the majority stockholders. See on this subject § 671, *infra.*

Where one corporation has taken a lease of the property of another and guarantees dividends on the stock of the latter, and then acquires a majority of the stock of the latter and proposes to rescind such an agreement, a minority stockholder may enjoin such action. McLeary *v.* Erie, etc. Co., 38 N. Y. Misc. Rep. 3 (1902). Even though one railroad company owns the majority of the stock of another railroad company and purchases the property of the latter at a foreclosure sale thereof, yet, if there was no actual fraud, the minority stockholders of the insolvent company cannot complain, especially where they waited seventeen months and allowed large expenditures to be made in reliance on the sale. Rothchild *v.* Memphis, etc. R. R., 113 Fed. Rep. 476 (1902). Where an insolvent savings bank is really controlled by a national bank, although they have not the same directors, yet the former cannot prefer the latter. It is an illegal preference in behalf of the directors. Slack *v.* Northwestern, etc. Bank, 103 Wis. 57 (1899). In a stockholders' suit to set aside a consolidation on the ground that it was *ultra vires* and also fraudulent in that one company controlled the other, a *preliminary* injunction will not be granted if the consolidation has already been completed. Stevens *v.* Missouri, etc. Ry., 106 Fed. Rep. 771 (1901). As to one corporation voting stock in another corporation, see § 615, *supra.*

Where one street railway owns all the stock of another street railway (excepting five shares, the owner of which does not object), and the former makes a contract authorizing a third street railway to run its cars over the tracks of the company whose stock is so owned, such contract is legal and will be enforced. South, etc. Ry. *v.* Second Ave. etc. Ry., 191 Pa. St. 492 (1899). The provision in a lease that any differences arising shall be decided by arbitration cannot be avoided by a minority stockholder, even though the lessee owns a majority of the stock of the lessor and controls its board. Wolf *v.* Pennsylvania R. R., 195 Pa. St. 91 (1900).

Where a majority of the stock of a railroad company is held by another company, and the latter company uses its control to acquire all the property

that where "a majority of the stock is owned by a corporation or a combination of individuals, and it assumes the control of another company's business and affairs through its control of the officers and directors of the corporation, it would seem that for all practical purposes it becomes the corporation of which it holds a majority of stock, and assumes the same trust relation towards the minority stockholders that a corporation itself usually bears to its stockholders."[1]

Third, the same principles of law apply, where an individual or several individuals, instead of a corporation, own the majority of the stock of another corporation and bring about a sale, lease, consolidation, contract, or foreclosure, to their own personal gain, at the expense of minority stockholders. The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders. Hence, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority upon an application by the latter.[2] The principle of law has been laid down that "when a

of the former company fraudulently, a minority stockholder may bring the latter company to account therefor. Pondir *v.* New York, etc. R. R., 72 Hun, 384 (1893). *Cf.* 72 S. W. Rep. 822.

[1] Farmers' L. & T. Co. *v.* New York, etc. Ry., 150 N. Y. 410, 430 (1896), the court saying also (p. 434): "There are circumstances under which the majority stockholders occupy substantially the same relation of trust towards the minority as the board of directors would occupy towards the stockholders it represents." This decision was followed in a stockholders' suit in the federal court to remedy the same wrong in De Neufville *v.* New York, etc. Ry., 81 Fed. Rep. 10 (1897). A stockholder in one railroad corporation cannot maintain a suit at law against another railroad corporation for damages to his shares of stock on account of the latter railroad corporation owning a majority of the stock of the former, and so managing the former as to cause a mortgage to be foreclosed resulting in a purchase of the property by the latter railroad corporation. Niles *v.* N. Y. etc. R. R., 35 N. Y. Misc. Rep. 69 (1901), involving the same transaction as the preceding two cases. *Cf.* 54 Atl. Rep. 121.

[2] Quoted and approved in the case of Farmers' L. & T. Co. *v.* New York, etc. Ry., 150 N. Y. 410, 430 (1896).

In the case of Flynn *v.* Brooklyn, etc. R. R., 158 N. Y. 493 (1899), the court said that a lease of one railroad to another is illegal, even though made by vote of the stockholders in accordance with the statutes, where it is shown that the same parties controlled both corporations, and the lease itself was unfair in that the lessee was a dummy corporation without responsibility, and the rental consisted of a guarantee of dividends to a certain amount and the right to purchase a certain amount of stock of the lessee for $15 per share; but

number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for

the court further held that a proper request to the board of directors to bring suit had not been made.

Where a corporation sells or leases all its property to another corporation, which the majority of the stockholders of the former corporation own or control, the contract is not illegal in itself, but it will be scrutinized carefully by the court, and if unfair will be set aside. Mumford *v.* Ecuador, etc. Co., 111 Fed. Rep. 639 (1901). See also § 671, *infra*, as to the majority buying the property at private sale on dissolution. A lease of all the corporate property made by a majority vote of the stockholders and directors may be set aside at the instance of a dissenting stockholder, where the lessee owned a majority of the stock and controlled the board of directors of the lessor. Parsons *v.* Tacoma, etc. Co., 25 Wash. 492 (1901). A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. Treadwell *v.* United, etc. Co., 47 N. Y. App. Div. 613 (1900). See also § 629, *supra*. The voluntary dissolution, under the New York statute, of a prosperous corporation will be enjoined at the instance of minority stockholders where it is alleged that it is a mere scheme to freeze out the latter and to buy in the property for a partnership. Elbogen *v.* Gerbereaux, etc. Co., 30 N. Y. Misc. Rep. 264 (1900). Where the same person controls two corporations in the same line of business, and is conducting one at the expense of the other, a minority stockholder of the latter may have relief. Jacobus *v.* American, etc. Co., 38 N. Y. Misc. Rep. 371 (1902). In the case of Drake *v.* New York, etc. Co., 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails and he may be compelled to take his actual interest.

The holder of seventy-five shares cannot enjoin the holders of three thousand six hundred and seventy-five shares from making a private sale of the corporate assets at a fair price, where the corporate business is unprofitable and each stockholder has an opportunity of participating in the purchase. Phillips *v.* Providence, etc. Co., 21 R. I. 302 (1899). It has been held that where a majority stockholder buys the property at foreclosure sale and sells it to a new company for stock and bonds, a minority stockholder has a right to his proportion of the new stock subject to a lien of the majority stockholder for claims owned by him against the old company which have not been paid by bonds of the new company, no actual fraud being involved. Cutting *v.* Baltimore, etc. R. R., 35 N. Y. Misc. Rep. 616 (1901). This decision, however, may well be questioned. See 54 Atl. Rep. 578.

Where a person controls a majority of the stock of a ferry and also a railroad company, and puts his "dummies"

all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders."[1]

in as directors, and leases all the property of the former to the latter at an unfair price, the court will set the lease aside at the instance of a minority stockholder. Meyer *v.* Staten Island Ry., 7 N. Y. St. Rep. 245 (1887). Where a lessor and a lessee company are controlled by the same person, and the lessor company is insolvent, and the lessee company is advancing large sums of money to pay interest on the bonds of the lessor company, with no hope of repayment, the minority stockholders of the lessee company may enjoin such payments. Jeans *v.* Pittsburgh, etc. Ry. (Com. Pl. Ohio, 1885), stated in Moran *v.* Pittsburgh, etc. Ry., 32 Fed. Rep. 882 (1885). See Menier *v.* Hooper's Tel. Works, L. R. 9 Ch. 350 (1874); also Peabody *v.* Flint, 88 Mass. 52 (1863), where, however, laches barred the remedy; Gorham *v.* Gilson, 28 Cal. 479 (1865), where, however, the action failed because the stockholders sued to compel a conveyance to each of his proportionate part. Where the majority of the stockholders vote to make a lease of the whole corporate property to themselves, a dissenting stockholder may have the lease set aside. Meeker *v.* Winthrop Iron Co., 17 Fed. Rep. 48 (1883); Rice's Appeal, 79 Pa. St. 168, 204 (1875). Where, however, corporate property has been sold and the proceeds retained by one stockholder, another stockholder cannot sue him for money had and received. The action must be in equity and for the benefit of the corporation. Hodsdon *v.* Copeland, 16 Me. 314 (1839). Equity will set aside a lease which the directors make of a mine to the minority stockholders in order to take it from the control of incoming directors who were elected by the majority. Mahoney Min. Co. *v.* Bennett, 5 Sawyer, 141 (1878); s. c., 16 Fed. Cas. 497. The mere fact that a person owns a majority of the stock does not raise a legal inference that he dominates the board of directors. Porter *v.* Pittsburg, etc. Co., 120 U. S. 649, 670 (1887). The sale of all corporate assets to the majority, where others offer a higher price, is fraudulent. Wilson *v.* Central Bridge, 9 R. I. 590 (1870); Gregory *v.* Patchett, 33 Beav. 595 (1864), where a sale of all the corporate assets to two of the stockholders on the purchase of their stock by the company was set aside as a fraud on the remaining stockholders. Where the stockholders enter into a contract by which they give a certain amount of their stock to a person who agrees to do certain work for the corporation

[1] Ervin *v.* Oregon R. & Nav. Co., 27 Fed. Rep. 625 (1886); s. c., 20 Fed. Rep. 577. In Lowe *v.* Pioneer Threshing Co., 70 Fed. Rep. 646 (1895), the court enjoined the company from transferring nearly all of its property to a few stockholders in purchase of their stock, but the court refused to appoint a receiver. Where a person in control of a company obtains control of a rival company and allows judgments against the latter, and the sale of its bonds on execution at nine cents on the dollar, and executes a mortgage and controls the business, all for the benefit of the former corporation, he and the dummy directors and third persons may be joined in a bill filed by a minority stockholder to enjoin their acts and obtain a personal judgment. Gray *v.* Fuller, 17 N. Y. App. Div. 29 (1897). An able New Jersey court, in the case of Robotham *v.* Prudential Ins. Co, 53 Atl. Rep. 842 (N. J. 1903), called attention to the fact that the persons holding a majority of the stock occupied no fiduciary relations towards the minority, but if the majority caused the directors to commit a breach of duty then the minority may complain of the acts of the majority.

Thus, the majority of stockholders cannot cause the corporate property to be sold to themselves at private sale at a price agreed upon by them and the directors whom they placed in office. The minority are entitled to a public sale.[1]

Where two stockholders own two-thirds of the capital stock, and cause the directors to sell all the corporate property to a person who buys for them, the owner of the other one-third may cause the sale to be set aside, even though a stockholders' meeting has authorized it.[2]

Where a stockholder is under contract to carry along the corporate debt, and instead of doing so obtains control of the board of directors, and causes a mortgage to be given to a confederate, and thereby causes the corporate property to be foreclosed and sold,

in consideration of the stock, the remedy for a breach of contract on his part is an action for damages, unless by the contract the stock was to be returned in case of non-payment. Gillett *v.* Bowen, 23 Fed. Rep. 625 (1885). If the action is to recover back the stock, the corporation is a proper party in order to obtain a transfer. Johnson *v.* Kirby, 65 Cal. 482 (1884). See also Cates *v.* Sparkman, 73 Tex. 619 (1889); §§ 334, 350, *supra.* Where a branch corporation faithfully performs its duty as agent, the contract of agency cannot be set aside on the ground that individuals supposed to be hostile to the principal own a majority interest in a corporation which in turn owns a majority interest in the agent corporation. Brush Electric Co. *v.* Brush-Swan, etc. Co., 49 Fed. Rep. 8 (1892). Minority stockholders cannot have an accounting on the ground that the company is managed in the interest of one stockholder, who owns a majority of the stock; also that the corporation is insolvent, and that under different management it would be profitable, no fraud being alleged. Wheeler *v.* Pullman Iron, etc. Co., 143 Ill. 197 (1892). A majority of the members of a corporation organized not for profit cannot vote a part of the assets to themselves. Another member may prevent it. Ashton *v.* Dashaway Assoc., 84 Cal. 61 (1890). Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891). Where the stockholders in a power company sell their stock and then obtain control of water rights on which the company had an option, which option has expired, the party purchasing the stock may by a suit in equity compel them to turn over such water rights. Valentine *v.* Berrien, etc. Co., 87 N. W. Rep. 370 (Mich. 1901). The largest stockholder in a corporation may, as the holder of its purchase-money bonds and mortgage, foreclose the same, and may join as party defendant the person to whom the corporation, subsequently to the execution of the mortgage, contracted to sell the property. Blair *v.* Silver Peak Mines, 93 Fed. Rep. 332 (1899).

[1] Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1890). See also § 671, *infra.* A corporation owning a majority of the stock of another company may legally take the latter's bonds at a fair price, ninety cents on the dollar in this case. Gloninger *v.* Pittsburgh, etc. R. R., 139 Pa. St. 13 (1891).

[2] Chicago Hansom Cab Co. *v.* Yerkes, 141 Ill. 320 (1892).

and wrecks the corporation, he is liable in damages to other stockholders.[1]

Where the majority stockholders through directors who are their tools, having sold property to the corporation and agreed to pay a mortgage on such property, afterwards cause the corporation to assume and pay the mortgage, the minority stockholders may have the transaction set aside.[2]

A contract by which a purchaser of a majority of the stock of three corporations agrees that the corporations should employ the seller of the stock at a fixed salary for a certain time, and after a certain time should give him a salary and allow him to name one-half of the directors, is illegal, and cannot be enforced by the vendor as against the vendee, even though the stock has been delivered and paid for under such agreement.[3]

Nevertheless, although a person holds a majority of the stock and causes his friends to be made directors, he may sell property to the corporation and take stock in payment, if the transaction is a fair one.[4] And the fact that the holders of a majority of the stock are stockholders in another contracting corporation does not

[1] Hanley *v.* Balch, 94 Mich. 315 (1892). In Ritchie *v.* McMullen, 79 Fed. Rep. 522 (1897), the court held that if a pledgee, being in control of the corporation, refuses to develop the property and to accept subsidies which are offered, and to accept profits under a contract which are possible, and to sell the property at a large price, all for the purpose of depreciating the pledged stock and thus obtain the stock himself, the pledgor may call the pledgee to account for the loss suffered from this conspiracy and wrong. The court held also that, although the damage was directly to the corporation, yet that, indirectly, it was a damage to the pledgor, and that hence the pledgor could sue in his own behalf alone, and that the measure of damage is the difference between the market value at the time of suit and what it would have been if the conspiracy had not been set on foot. The court held, however, in the case before it, that the proofs did not sustain the allegations.

[2] Woodroof *v.* Howes, 88 Cal. 184 (1891), holding also that where the majority stockholders cause the directors to purchase stock from themselves for the corporation at a price higher than the market price, the minority may cause the transaction to be set aside.

[3] Fennessy *v.* Ross, 5 N. Y. App. Div. 342 (1896). On this subject, see § 622, *supra*.

[4] Russell *v.* Rock, etc. Co., 184 Pa. St. 102 (1898). Where a mining corporation makes a contract with a person holding a majority of its stock, and who has furnished the qualification shares for the directors, by which contract the stock is issued to him for work to be done on the mine, minority stockholders may cause the contract to be set aside, and the decree may provide that the stock shall be delivered back upon the repayment of the money. Jones *v.* Green, 88 N. W. Rep. 1047 (Mich. 1901). A mining company may make a contract with some of its stockholders for the transportation and milling of the ore, even though such stockholders own a large amount of the stock of the company. Fox *v.* Mackay, 125 Cal. 57 (1899).

render the contract voidable.[1] "There is no law which makes it impossible for a majority stockholder to enter into a contract with his company."[2] Where a lease of its property is made by a corporation, it is legal for the lessee to pay secretly to one of the stockholders of the lessor a sum of money to induce such stockholder to favor the lease.[3] A stockholder may vote for the dissolution of the corporation as allowed by the statute, even though his object is to terminate a contract which he has with the corporation.[4] A stockholder has a right to sell his stock at any time unless he has specifically agreed otherwise.[5] But where the various stockholders of a corporation join in a contract for the sale of their stock, but secretly one of them receives a bonus from the purchaser, the others may compel him to account therefor proportionately.[6] The employment by the corporation of a person as general manager is not proved by proving that the person who owned all the stock of the corporation so employed him.[7]

Where two companies in litigation pass under the same control,

[1] Ziegler v. Lake Street El. R. R., 69 Fed. Rep. 176, 182 (1895).

[2] Central Trust Co. v. Bridges, 57 Fed. Rep. 753, 767 (1893); 54 Atl. Rep. 254.

[3] But where subsequently the stockholder becomes a director and takes part in reducing the rent paid to the corporation, it was his duty to disclose the extra price which he was continually receiving, and for failure so to do he must account to the corporation and pay over an equal percentage of his secret profit subsequently received, it being presumed that a reduction on his secret profit would have been made for the benefit of the corporation. Bird, etc. Co. v. Humes, 157 Pa. St. 278 (1893). It is legal for a person who is endeavoring to purchase all the property of a corporation to pay a stockholder for consenting thereto. Lamkin v. Palmer, 24 N. Y. App. Div. 255 (1897).

[4] Windmuller v. Standard, etc. Co., 115 Fed. Rep. 748 (1902). A corporation that owns stock in another corporation may vote such stock in favor of dissolution of the latter, even though it was influenced so to vote by the fact that it has guaranteed dividends on the stock of the latter so long as the latter exists. Windmuller v. Standard, etc. Co., 114 Fed. Rep. 491 (1902). Compare the comments on this case in Robotham v. Prudential Ins. Co., 53 Atl. Rep. 842 (N. J. 1903).

[5] "We do not understand that one stockholder is, by virtue of his ownership of stock, bound to continue in the holding of it in order to allow another stockholder to make a profit out of the negotiations then pending. . . . We do not understand that a stockholder is under obligations, legal or moral, to sacrifice his personal interests in order to secure the welfare of the corporation of which he is a stockholder, or to enable another stockholder to make gains and profits." Farmers', etc. Co. v. Chicago, etc. Ry., 163 U. S. 31 (1896). See § 622, *supra*. A stockholder cannot maintain a suit against the corporation to enjoin other stockholders from selling their stock to a second corporation, such second corporation and the other stockholders not being parties to the suit. Ingraham v. National Salt Co., 36 N. Y. Misc. Rep. 646 (1902); aff'd, 72 N. Y. App. Div. 582.

[6] Synnott v. Cummings, 116 Fed. Rep. 40 (1902); 120 id. 84, and §§ 320, 321, 650.

[7] Hammond v. Hammond, etc. Co., 72 Conn. 130 (1899). See also § 709, *infra*.

the court will no longer retain the case, inasmuch as the same parties control both sides, but, in order to protect the minority stockholders, the case will be left open.[1]

Where on a winding up the court decrees a sale of the corporate mining property at public sale, any one or more of the stockholders may bid, and the court will not readily set the sale aside on the ground that after the property was struck off some one offered a higher price.[2]

Sales of property by a corporation may be valid, although made at the instigation of stockholders whose stock really belongs to others.[3] Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown.[4]

A corporate creditor cannot complain of the acts specified above to the same extent that a stockholder may complain.[5]

§§ 663, 664. *"Dummy" corporations — The courts will ignore the corporate existence where it is fraudulently used to do what the stockholders cannot legally do — An individual or corporation owning all the stock of another corporation is not ordinarily liable for the debts of the latter.*— A corporation is in law a person or entity entirely distinct from its stockholders and officers. It may become insolvent and yet not make them insolvent. It may commit fraudulent or *ultra vires* acts and yet they be not liable therefor. It may do acts which its stockholders as individuals may be under contract not to do, and the stockholders may do acts which the corporation cannot do. The disabilities of the corporation are not disabilities

[1] South Spring, etc. Co. *v.* Amador, etc. Co., 145 U. S. 300 (1892). Where an insolvent corporation passes into a receiver's hands and the receiver acquires all the interests of the parties to the suit, an outside creditor may file a new bill to reach certain equitable assets of the corporation. Harp *v.* Abbeville, etc. Co., 108 Ga. 168 (1899).

[2] Pewabic Min. Co. *v.* Mason, 145 U. S. 349 (1892). A stockholder may bid for the property at a public sale, even though he owns a majority of the stock. Wilson *v.* Central Bridge, 9 R. I. 590 (1870). The person owning a majority of the stock of a failing corporation may at the *public* sale of its property buy such property. "He has his own interests to protect, and is not charged with the care of the interests of the other stockholders. They act for themselves." Price *v.* Holcomb, 89 Iowa, 123 (1893).

[3] Gottfried *v.* Miller, 104 U. S. 521 (1881).

[4] Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). See also § 681, *infra.*

[5] See § 735, *infra.* A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation. Although other stockholders, bondholders, or the corporation itself might question such a contract, yet subcontractors cannot. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893).

of the stockholders, nor are the disabilities of the stockholders the disabilities of the corporation. Hence it is that a corporation is often organized to act as a "cloak" for frauds. Such cases as these are becoming common, and the courts are becoming more and more inclined to ignore the corporate existence, when necessary, in order to circumvent the fraud.[1] Thus, it has been held that, where a person has contracted that he will not do a certain act, he cannot form and control a corporation and have the corporation do that act.[2] The mere fact, however, that a person has contracted to sell a patent-right does not affect the title of a corporation to whom he transfers such patent.[3] But where a patentee is under obligation to assign his patent, a corporation wholly owned by him is not protected as a *bona fide* purchaser of the patent from him.[4] Although

[1] See § 6, *supra*.

[2] Beal *v.* Chase, 31 Mich. 490 (1875). When a person sells a trade-mark and then sells an infringement upon it to a corporation organized and controlled by himself, the latter may be enjoined from using it. Le Page Co. *v.* Russia Cement Co., 51 Fed. Rep. 941 (1892). Unless there is a positive allegation and proof that the corporation was fraudulently formed to violate the individual contract, the suit will fail. Moore, etc. Co. *v.* Towers Hardware Co., 87 Ala. 206 (1888). A contract by a person to sell all lumber manufactured by him through certain agents cannot be evaded by his forming a corporation and manufacturing and selling through it. Hagy *v.* McGuire, 147 Pa. St. 187 (1892).

[3] Davis, etc. Co. *v.* Davis, etc. Co., 20 Fed. Rep. 699 (1884); Averill *v.* Barber, 6 N. Y. Supp. 255 (1889). See also § 727, *infra*, on Notice. The vendor of a goodwill who agrees not to engage in the same business again in a certain territory cannot evade his agreement by becoming a stockholder in, or organizing, or managing a competing corporation; but, there being other stockholders in the corporation, an injunction will not be granted against the corporation or such other stockholders. Kramer *v.* Old, 119 N. C. 1 (1896). A foreign corporation cannot prevent a domestic corporation from using the same name, especially where the latter was incorporated first, even though the public may be misled. In this case a party sold out to individuals, but did not sell any trade-marks. He then incorporated a company under the name of the trade-mark. Hazelton Boiler Co. *v.* Hazelton, etc. Co., 142 Ill. 494 (1892). In Gormully, etc. Co. *v.* Bretz, 64 Fed. Rep. 612 (1894), where a firm, being under contract to manufacture and sell only certain bicycle patents and machines, formed a corporation to manufacture and sell other machines, the court held that if the holdings of stock showed that the two concerns were practically one, then that the corporation would be enjoined. See also Pratt *v.* Wilcox Mfg. Co., 64 Fed. Rep. 589 (1894). Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company. Dennison *v.* Chapman, 105 Cal. 447 (1895). See also Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894), to the effect that the corporation is liable for the fraud of its board of directors against another corporation which the same board controlled.

[4] National, etc. Co. *v.* Connecticut, etc. Co., 73 Fed. Rep. 491 (1896). See also § 727, *infra*. Where an attorney in fact for the sale of a patent causes his friends to organize a corporation, and

a lessee corporation has a right to payment for improvements, if the lessor does not renew, such payment need not be made, if the new lease is to a new corporation organized by the same stockholders as are in the old.[1] Where it would be illegal for two or more corporations to unite in regulating the production and price of an article, it is illegal to accomplish that result by placing all the shares of stock of those corporations in the hands of trustees and thereby securing co-operating boards of directors.[2]

There are many other instances in which the corporate existence will not suffice to evade liabilities, disabilities, and frauds. An individual or partnership cannot transfer all of his or its property to a corporation for shares of stock and thereby defraud the creditors of the partnership.[3] The officers and agents of a corporation who cause the corporation to defraud its creditors or subscribers to its stock by means of fraudulent misrepresentations are liable to the persons so defrauded.[4] The stockholders and officers of a corporation which was not properly organized may be liable as partners for all of its debts,[5] but this liability is not based on fraud.

A few cases hold that a corporation incorporated in one state for the purpose of doing all its business in another state is a fraud on the law, and is only a partnership; but the weight of authority holds otherwise.[6] If the promoters or officers or a majority of stockholders defraud the corporation itself or the minority stockholders, a court of equity will give full and ready relief.[7] Where persons in control of a corporation use that control to defraud persons with whom they have contracted in reference to stock, a court of equity will aid the persons so defrauded.[8] The stockholders of a corporation are distinct from the corporation itself,[9] and may of course transact business irrespective of its contracts or obligations;

then sells the patent to the corporation on terms entirely beyond his authority, his principal may repudiate the sale, and the company is not a *bona fide* purchaser, inasmuch as its projector and organizer was the attorney. Another company to which the principal again assigns his patent may sue the former company for infringement. Young, etc. Co. *v.* Young, etc. Co., 72 Fed. Rep. 62 (1896).

1 New York, etc. Ferry Co. *v.* New York, 146 N. Y. 145 (1895).

2 See ch. XXIX, *supra.*

3 See § 672, *infra.*

4 See § 48; also chs. IX and XX, and § 243, *supra.*

5 See ch. XIII, *supra.*

6 See §§ 237–240, *supra.*

7 See the previous sections of this chapter for many instances of such frauds.

8 See § 350, *supra*, and the notes thereto. A stockholder who desires to have the corporation purchase certain property may purchase a mortgage against that property and compel the owner to sell to the corporation under threat of foreclosure. Martin *v.* New Rochelle Water Co., 11 N. Y. App. Div. 177 (1896); aff'd, 162 N. Y. 599.

9 See § 709, *infra.*

but an injunction against their doing a specified act is violated if they cause or aid the corporation to do that act.[1]

Where a corporation secures a rebate from a railroad company, not only on shipments made by the former, but on shipments made by other parties, the active agents of such corporations receiving such moneys may be held personally liable for them. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense."[2]

The subject of the personal liability of officers and directors of corporations is more fully considered elsewhere.[3]

The New York court of appeals has laid down a general rule as follows: "In no legal sense can the business of a corporation be said to be that of its individual stockholders. It is true that they have an interest in the business carried on, and an influence in controlling its conduct; but they have created a legal entity to prosecute such business, make its contracts, and be responsible for its obligations, and that entity is alone responsible to persons dealing with it for the conduct of such business."[4] This rule is

[1] See King *v.* Barnes, 113 N. Y. 476 (1889). An injunction against certain directors of the corporation from using patented articles is violated by their forming a new corporation to do the same acts, they being directors also of the latter. Iowa, etc. Wire Co. *v.* Southern, etc. Wire Co., 30 Fed. Rep. 123 (1887).

[2] Brundred *v.* Rice, 49 Ohio St. 640 (1892).

[3] See § 682, *infra.*

[4] People *v.* American Bell Tel. Co., 117 N. Y. 241, 255 (1889). The fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other through ownership of its stock or through the identity of the stockholders, such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one so as to make a contract of one corporation binding upon the other. Richmond, etc. Co. *v.* Richmond, etc. R. R., 68 Fed. Rep. 105 (1895). In the case of St. Louis Breweries, Ltd. *v.* Apthorpe, 79 L. T. Rep. 551 (1898), where an English corporation held all the stock of an American corporation, and dividends paid by the American corporation were paid directly to the stockholders in the English corporation, the court held that the income tax on the English corporation applied also to dividends paid by the American corporation to American stockholders in the English corporation. The court declined, however, to hold that it would ignore the existence of the American corporation, "because experience has certainly satisfied me that if you give a decision embodying large principles and large considerations without having felt exactly where the shoe pinches, it is very likely that the next case that may turn up will show that some consideration has been omitted which might have been very vital, or might have affected one's judgment." Nevertheless the court said, "I cannot say that the commissioners were not justi-

fundamental. It is the explanation and cause of the marvelous increase of corporations in modern times. The stockholders are not liable on the contracts of the corporation. The separate existence and entity of the corporation is recognized and preserved. The courts will refuse to ignore the corporate existence, even though all the stock is owned by one person or by another corporation.[1]

fied in coming to the conclusion that 'the head and seat and directing power of the appellant company were at the appellant company's registered offices in the city of London, and that if the business at St. Louis and the profits made thereby were technically the business and profits of the American company, the American company was for such purpose the agent of the appellant company.'"

[1] A railroad company owning all the stock and bonds of another company does not own the property of the latter and cannot sue on a cause of action belonging to the latter. Fitzgerald *v.* Missouri Pac. Ry., 45 Fed. Rep. 812 (1891). Although one corporation owns all the stock of another corporation, the property of the latter is not subject to a mortgage given by the former, but an independent first mortgage may be given by the latter company. Williamson *v.* New Jersey Southern R. R., 28 N. J. Eq. 277 (1877); aff'd, 29 N. J. Eq. 311 (1878); Central Trust Co. *v.* Kneeland, 138 U. S. 414, 423 (1891); Toledo, etc. R. R. *v.* Hamilton, 134 U. S. 296, 304 (1890), and §§ 852, 857, *infra.* Although one water-works company owns all the stock of another water-works company, a mortgage given by the former company on all its property does not cover the property of the latter company as against *bona fide* purchasers of bonds of the latter company. National Water-Works Co. *v.* Kansas City, 78 Fed. Rep. 428 (1896).

A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation and the bridge itself leased to the latter. St. Louis, etc. Ry. *v.* Williams, 53 Ark. 58 (1890). Even though one man owns a majority of the stock of two corporations, and they have dealings with each other, yet upon the insolvency of the one a claim of the other is to be allowed the same as the debt of any other creditor. Lange *v.* Burke, 69 Ark. 85 (1901). A mortgage covering after-acquired property of an irrigation company does not cover property of another company subsequently organized by parties interested in the first company, even though the second company used the property of the first company. Farm, etc. Co. *v.* Alta, etc. Co., 65 Pac. Rep. 22 (Colo. 1901).

Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, debts, etc., of the latter. Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). A corporation owning all the stock of another corporation is not liable for the rent due from the latter to a third corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. East St. Louis, etc. Ry. *v.* Jarvis, 92 Fed. Rep. 735 (1899). The fact that the same persons own all the stock in two corporations does not make one corporation responsible for the contracts of the other. Waycross, etc. R. R. *v.* Offerman, etc. R. R., 109 Ga. 827 (1900). Even though a person buys all the stock, bonds, and property of a corporation, and a suit is pending against the corporation for negligence, yet he is not liable for a judgment thereon. Tilley *v.* Coykendall, 69 N. Y. App. Div. 92 (1902). Where an individual con-

The lower English courts recently held that where a merchant transfers all his business to a corporation formed for that purpose, and continues to carry on the business in the name of the corpora-

structs an electric light system in a village and then transfers it to a corporation in which he holds most of the stock, he may be personally liable for the death of a person by reason of the crossing of the electric wire with a telephone wire, causing the electric wire to melt and fall and convey the current through such person, the negligent construction of the electric system having been made by him before the property was transferred to the corporation. Gordon *v.* Ashley, 34 N. Y. Misc. Rep. 743 (1901). The fact that one corporation owns a large amount of stock in another corporation does not affect the identity of the two. *Ex parte* Fisher, 20 S. C. 179 (1883). Although a stockholder purchases corporate property at a tax sale this does not constitute payment of the taxes in favor of the mortgagee of the property. Jenks *v.* Brewster, 96 Fed. Rep. 625 (1899). Upon the expiration of a charter and the winding up of its affairs, stock which it holds in another corporation may be sold, but not the property of the latter corporation, even though the former corporation owned all of the stock of the latter. Stewart *v.* Pierce, 89 N. W. Rep. 234 (Iowa, 1902). Even though a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, yet it cannot ignore the corporate existence and convey, incumber, or deal with the property as its own. Watson *v.* Bonfils, 116 Fed. Rep. 157 (1902). Even though an English corporation owns ninety-five per cent. of the stock of an American corporation, yet the separate identity of the two corporations continues, and the income of the American corporation cannot be taxed in England as the income of the English corporation. Kodak Limited *v.* Clark, 87 L. T. Rep. 99 (1902). The fact that two irrigation companies have the same officers and the same stockholders and the same purposes, except that one operates in one state and the other in another state, does not make one of them liable for the debts of the other. White *v.* Pecos, etc. Co., 18 Tex. Civ. App. 634 (1898). A statutory lien which is good against a lessee mining company is not good against a lessor mining company, even though the stockholders are substantially the same. United Mines Co. *v.* Hatcher, 79 Fed. Rep. 517 (1897), rev'g Hatcher *v.* United Leasing Co., 75 Fed. Rep. 368. A deed of corporate property by a person who owns all the stock does not convey good title, especially where he has pledged some of the stock. Parker *v.* Bethel, etc. Co., 96 Tenn. 252 (1896). Even though one corporation is a stockholder in another, yet a debt due from the latter to the former may be enforced, although one company is practically a branch of the other. Alabama, etc. Co. *v.* Chattanooga, etc. Co., 37 S. W. Rep. 1004 (Tenn. 1896). Although a construction company owns all the stock of a railroad company, and a bank has loaned large sums of money to the construction company, yet mortgage bonds issued by the railroad company have priority over the claims of the bank. Exchange Bank *v.* Macon Const. Co., 97 Ga. 1 (1895). Where a failing bank organizes a trust company and owns all its stock, the stock standing in the names of "dummies," and uses the funds of the trust company, it is a debtor of the trust company. Fisher *v.* Adams, 63 Fed. Rep. 674 (1894). See also the cases in the notes below. A company is not liable for the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and domi-

tion, he being practically the only stockholder, he is liable for the corporate debts on the theory of principal and agent; but the House of Lords reversed all this and held that he is not liable.[1]

This principle of law is particularly applicable to the plan of a parent company owning all or a majority of the shares of stock of numerous subsidiary companies, such subsidiary companies being local in their operations for the purpose of dividing the responsibilities, liabilities, duties, and details of the business,[2] or for the purpose of regulating taxes,[3] or for the purpose of exercising the

nates and controls the action of the corporation. Although other stockholders, bondholders, or the corporation itself might question such a contract, yet subcontractors cannot. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). Where the president owns nearly all of the stock, and keeps no proper accounts, and mingles the business with his own business, and the corporation is insolvent, a creditor of the corporation may attach its property on the ground that it is being fraudulently disposed of. Senour Mfg. Co. *v.* Clarke, 96 Wis. 469 (1897).

[1] Salomon *v.* Salomon & Co., [1897] A. C. 22. The supreme court of Louisiana, however, has held that in such a case the corporate existence will be ignored. Samuel, etc. Co. *v.* Illinois, etc. Co., 51 La. Ann. 64 (1898).

[2] Such is the case of the Bell Telephone Company.

[3] Such was the original purpose of the Standard Oil Companies. Mr. John D. Rockefeller on January 10, 1900, before the Industrial Commission of Congress, said in reply to a question as to what are the chief advantages of industrial combinations: "All the advantages which can be derived from co-operation of persons and aggregation of capital. Much that one man cannot do alone two can do together, and once we admit the fact that co-operation, or, what is the same thing, combination, is necessary on a small scale, the limit depends solely upon the necessities of business. Two persons in partnership may be a sufficiently large combination for a small business, but if the business grows or can be made to grow, more persons and more capital must be taken in. The business may grow so large that a partnership ceases to be a proper instrumentality for its purposes, and then a corporation becomes a necessity. In most countries, as in England, this form of industrial combination is sufficient for a business co-extensive with the parent country, but it is not so in this country. Our federal form of government, making every corporation created by a state foreign to every other state, renders it necessary for persons doing business through corporate agency to organize corporations in some or many of the different states in which their business is located. Instead of doing business through the agency of one corporation, they must do business through the agencies of several corporations." For a careful and clear statement of the plan of having a parent company own stock in subsidiary companies, see People *v.* American Bell Telephone Co., 117 N. Y. 241, 244, 255 (1889). A receiver of the parent company will not necessarily be appointed receiver of the branch companies. Evans *v.* Union Pac. Ry., 58 Fed. Rep. 497 (1893). As to the power of one company to acquire the stock of another company, see ch. XIX, *supra.* Where a parent company, owning the stock of branch companies, passes into a receiver's hands, and the latter expends money in operating one of the branch companies, he cannot recover it as against a mortgagee of the branch company. The rule is otherwise as to necessary improvements. Coupons paid

power of eminent domain. The fact that a New York telegraph corporation, a parent company, owns practically all the stock of an Idaho corporation, does not prevent the latter exercising its power of eminent domain in Idaho.[1] A contract by a subsidiary company is not illegal on the ground that the parent company is avoiding the statutory obligations relative to foreign corporations doing business within the state.[2] Even though a Nebraska railroad

by the receiver on bonds issued by the branch road rank next after the bonds and other coupons are paid. Phinizy *v.* Augusta, etc. R. R., 62 Fed. Rep. 771 (1894). Where one street railway owns all the stock of another street railway (excepting five shares, the owner of which does not object), and the former makes a contract authorizing a third street railway to run its cars over the tracks of the company whose stock is so owned, such contract is legal and will be enforced. South, etc. Ry. *v.* Second Ave. etc. Ry., 191 Pa. St. 492 (1899).

[1] Oregon, etc. R. R. *v.* Postal, etc. Co. of Idaho, 111 Fed. Rep. 842 (1901). In a condemnation proceeding instituted by a local telegraph corporation it is no defense that such corporation is a mere "dummy" for a non-resident corporation. Postal, etc. Co. *v.* Oregon, etc. R. R., 114 Fed. Rep. 787 (1902). The fact that a New York telegraph company owns all the stock of a Utah telegraph company does not prevent the latter exercising the power of eminent domain under the Utah statutes. Moreover, the *de jure* existence of a corporation which is a *de facto* corporation will not be inquired into in condemnation proceedings, unless fraud in its organization is involved. Postal Tel. etc. Co. *v.* Oregon, etc. R. R., 23 Utah, 474 (1901). The fact that a Colorado telegraph company is but a subsidiary company of a New York corporation, does not prevent the former condemning a right of way on a railroad as allowed by the statutes of Colorado. Union Pacific R. R. *v.* Colorado, etc. Co., 69 Pac. Rep. 564 (Colo. 1902). A railroad company regularly organized is entitled to condemn a right of way, even though it was organized in the interest of a coal company which furnished the capital for such railroad. The claim that the railroad company is merely a dummy for the coal company is no defense to the condemnation proceedings. Kansas, etc. Ry. *v.* Northwestern, etc. Co., 161 Mo. 288 (1901). In Central R. R. *v.* Pennsylvania R. R., 31 N. J. Eq. 475, 494 (1879), the defendant was enjoined from building another railroad by means of an independent corporation operated by "dummies." The court said: "A corporation cannot in its own name subscribe for stock or be a corporator under the general railroad law, nor can it do so with a simulated compliance with the provisions of the law through its agents as pretended corporators and subscribers of stock." Although a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation. Southern Kansas, etc. R. R. *v.* Towner, 41 Kan. 72 (1889); Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). In Nebraska a "dummy" domestic corporation cannot condemn land for a foreign corporation. Koenig *v.* Chicago, etc. R. R., 27 Neb. 699 (1889).

[2] Cunningham *v.* City of Cleveland, 98 Fed. Rep. 657 (1899), the court saying: "It is a common plan to have a parent company engaged in a national business of installing local companies and taking stock in the local companies, but they are distinct legal entities, and the interest of the larger

corporation sells all its property to an Illinois railroad corporation in exchange for stock of the latter, which is issued to the stockholders of the former, the latter does not thereby become a Nebraska corporation, preventing the removal of cases to the federal court.[1] The agreement of a telephone company to pay to another company twenty per cent. of all rentals or royalties received by the former does not entitle the latter to any interest in stock of subsidiary companies which the telephone company has formed and to which it has given licenses, where the rental above mentioned is paid on the telephones used by such subsidiary companies.[2] Sometimes a "dummy" corporation is used to hold land, the stockholders being aliens or foreign corporations.[3]

This general rule, however, like all general rules, has exceptions, and the New York court of appeals stated the exception forcibly as follows: "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth."[4] And again: "The abstraction of the corporate entity should never be allowed to bar out and pervert the real and obvious truth."[5]

The chief application of this statement of law is in cases of fraud,[6] but there is a line of cases which apply this rule where there is no fraud, and where the owner of the stock is held liable merely because he owns all the stock of the corporation. Thus, it has been held that where a railroad company causes a telegraph company to be incorporated, and subscribes to all its stock, and appoints all its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to someone else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract, on the principle of a principal being liable on the contracts of its agent.[7] It has also been held that where the corporation does business by organizing branch corporations, and the

company in the smaller is no reason for holding otherwise." Where a railroad company of one state organizes a railroad company in another state to construct and operate a connecting railroad in the latter state, and owns a majority of the stock and bonds of the latter corporation and controls its policy and divides rates on a mileage basis, it will be considered as doing business in the latter state sufficiently to enable a non-resident to bring suit against it in the latter state for an injury occurring outside of the state. Buie *v.* Chicago, etc. Ry., 65 S. W. Rep. 27 (Tex. 1901).

[1] Walters *v.* Chicago, etc. R. R., 104 Fed. Rep. 377 (1900).

[2] Western U. T. Co. *v.* American Bell Tel. Co., 105 Fed. Rep. 684 (1900).

[3] See § 694, *infra.*

[4] Anthony *v.* American Glucose Co., 146 N. Y. 407 (1895).

[5] Seymour *v.* Spring, etc. Assoc., 144 N. Y. 333, 340 (1895).

[6] See § 663, *supra.*

[7] Interstate Tel. Co. *v.* Baltimore, etc. Tel. Co., 51 Fed. Rep. 49 (1892).

stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company.[1] And there are other decisions to practically the effect that the courts will ignore the corporate existence under certain circumstances.[2]

[1] Day *v.* Postal Tel. Co., 66 Md. 354 (1887).

[2] For an interesting discussion of the question as to why the artificial existence of the corporation, as distinguished from that of stockholders, should be ignored, see Cincinnati, etc. Co. *v.* Hoffmeister, 56 N. E. Rep. 1033 (Ohio, 1900); and Andres *v.* Morgan, 56 N. E. Rep. 875 (Ohio, 1900). Where all the stockholders of a company transfer their stock to a trustee and receive in exchange therefor bonds of the company guaranteed by another company and secured by such stock, the latter company, being the owner of the equity of redemption, may be considered as practically owning the property of the former company. Chicago, etc. Co. *v.* City of Chicago, 65 N. E. Rep. 470 (Ill. 1902). Where, in order to develop the property of a land company, its stockholders organize a railroad company and also a light, heat, and power company, the respective interests of the various companies being practically the same, it is legal for the land company to indorse and guarantee the notes of the other companies, the court saying, "for purposes of equity, courts will look behind that artificial personality, and, if need be, ignore it altogether, and deal with the individuals who constitute the corporation; and that is what, in justice and fairness, must be done here, where practically the same persons were associated together for one common purpose, under three or four different names, corresponding to the several branches of the single common enterprise, and acted together only formally as distinct organizations, each devoted to the corporate pursuit of its appropriate branch." Kendall *v.* Klapperthal Co., 202 Pa. St. 596 (1902). Where a person, who is carrying on a dairy business, buys all the stock of a dairy company and becomes its general manager and conducts both businesses the same as one, the bank in which the accounts are kept is not responsible for the funds of the dairy company being transferred to him. Bank of New South Wales *v.* Goulburn, etc. Co., 87 L. T. Rep. 88 (1902). Where a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, the object of the whole transaction being to conceal the amount of money the bank has invested in real estate, the transaction is fraudulent as to creditors of the bank and the real estate may be attached as the property of the bank. Watson *v.* Bonfils, 116 Fed. Rep. 157 (1902). A railroad corporation that has been operating a railroad cannot avoid liability for accidents on the ground that it leased the same to another company, such other company being a mere nominal corporation and the interest being the same. Chesapeake & Ohio R. R. *v.* Howard, 14 App. Cas. Dist. of Col. 262 (1899). A judgment against a West Virginia corporation cannot be enforced against the president, even though it is alleged that the corporation was a myth and did not exist, and that its organization had not been kept up and that the president was the real owner and carried on the business. The remedy is an original suit against him. Tilley *v.* Coykendall, 172 N. Y. 587 (1902). An officer is not personally liable for an infringement by the corporation, unless it is insolvent or it is a mere dummy to protect others. Southern,

Where one corporation is merely a "dummy" of another corporation, a mortgage on the property of the latter may attach to property of the former, even in priority to a new mortgage on the

etc. Assoc. *v.* Cary, 117 Fed. Rep. 325 (1902).

Where a railroad pays for the construction of another railroad company's line on an understanding that they should be consolidated, and assumes all the obligations of the latter and practically owns all its stock and takes possession and operates it, the two roads may be considered as having been consolidated, sufficiently at least to come within the meaning of a statute authorizing the consolidation of certain consolidated companies. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). A railroad contractor in suing the construction company may join also the railroad company on an allegation that the construction company is a mere dummy of the railroad company. O'Brien *v.* Champlain, etc. Co., 107 Fed. Rep. 338 (1901). Where a corporation owns and operates a hotel and then leases it to another corporation without notice to the employees, and the latter fails, the former may be held liable to them. Oriental, etc. Co. *v.* Barclay, 64 S. W. Rep. 80 (Tex. 1901). Where the only stockholders in a corporation are two men and their wives, and the corporation is merely an instrument for their business, and they are adjudged bankrupts, the assets of the corporation belong to them and may be administered in the bankruptcy court. *In re* Horgan, 97 Fed. Rep. 319 (1899). Where the president owns all or nearly all of the stock and mingles his business with that of the company, and causes a debtor of the company to make a payment on his individual debt to a bank, the payment is legal. Brunswick, etc. Co. *v.* Nat. Bank, etc., 99 Fed. Rep. 635 (1900). Where one person is president and general manager and owns all the stock, a note executed by him in the name of the corporation is valid, the proceeds being used in the corporate business. Africa *v.* Duluth, etc. Co., 84 N. W. Rep. 1019 (Minn. 1901). A promoter's agreement involving the getting in to a new organization of many properties is satisfied as to one property if ninety-five per cent. of the stock of the latter is obtained. Jewell *v.* McIntyre, 33 N. Y. Misc. Rep. 26 (1900). Where a person has turned in securities under a plan of consolidation which states the aggregate capacity of properties which it is proposed to acquire, or so many of them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith who had no notice of personal representations. Jewell *v.* McIntyre, 62 N. Y. App. Div. 396 (1901). Where a person owns the entire capital stock of a corporation and contributes money to it, by reason of its capital stock being impaired, and then sells all the stock, he cannot claim that the corporation owes him the money so contributed, such money having been charged by him on the books to profit and loss. Times, etc. Co. *v.* Given, 106 Fed. Rep. 253 (1900). Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has

property of the former.[1] And where a corporation or person owns all the stock and bonds of another corporation and causes the lat

passed into other hands. Saranac, etc. R. R. *v.* Arnold, 167 N. Y. 368 (1901). Where a partnership owns all the stock of a corporation which was organized for the purpose of holding timber lands, the court in appointing a receiver of the partnership may ignore the incorporation and may authorize the receiver to take possession of the property of the corporation, it being merely an organization for convenience. Cole *v.* Price, 22 Wash. 18 (1900). Where an Arkansas mercantile company and an Ohio real estate company are practically one company, having the same stockholders and officers, two contracts between a third person and each of them may be considered as one contract, where practically two parts of the same transaction are involved. Bloch, etc. Co. *v.* Metzger, 65 S. W. Rep. 929 (Ark. 1901). A railroad company owning practically all the stock of another company may lease the line of the latter company to another company. Chicago, etc. Ry. *v.* Union Pac. Ry., 47 Fed. Rep. 15 (1891). Where a bank buys wall paper at a sheriff's sale and organizes a corporation to sell the paper, all the stock of the corporation being owned by the bank, and guarantees debts thereafter incurred by such corporation, the bank is liable on such debts. American Nat. Bank *v.* National Wall-Paper Co., 77 Fed. Rep. 85 (1896). Where the contractor to construct the road is merely a "dummy" for the officers and stockholders, and there is evidence that the company's name and credit were used to construct the road, it is for the jury to say whether the company is liable for the debts incurred by the contractor in construction. Hirschmann *v.* Iron Range, etc. R. R., 97 Mich. 384 (1893). Where a railroad company is interested in the construction of a connecting line, it is liable for the services of an attorney employed by it in connection therewith. St. Louis, etc. R. R. *v.* Kirkpatrick, 52 Kan. 104 (1893). A firm, one of the members of which owns all the stock of a corporation which owes money to such firm, cannot participate with other creditors of the corporation in the distribution of the latter's assets, where the firm have treated the debt as the individual debt of that member of the firm. Pott *v.* Schmucker, 84 Md. 535 (1897). A contract between three local companies, by which one runs over the tracks of another for a consideration paid to the third, is legal as to the second corporation, where such second corporation is a mere dummy of the third corporation and the earnings of both corporations went together. Union, etc. Ry. *v.* Chicago, etc. Ry., 163 U. S. 564, 592 (1896). Under the usual contract, by which a construction company takes all the stock and bonds and does all the work, and the railroad company is dormant until the road is finished, a creditor of the construction company may file a lien, under the statute, the same as though he furnished the labor and materials to the railroad company itself. McDonald *v.* Charleston, etc. R. R., 93 Tenn. 281 (1893). If one person buys all the stock of another company, it thereby becomes dormant, and he is liable for the debts incurred thereafter, except as to those debts which were incurred on the credit of the company only. Louisville Banking Co. *v.* Eisenman, 94 Ky. 83 (1893). Under a constitutional provision that conveyances to a corporation, a majority of the stock of which is held by aliens, shall be void, the attorney-general may commence suit to have certain conveyances declared void, even though a majority of the stock was owned by citizens at the time of the conveyance, such ma-

[1] Central T. Co. *v.* Kneeland, 138 U. S. 414 (1891).

ter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person.[1]

It is to be borne in mind, however, that these decisions arose out of unusual circumstances and, hence, are applicable only to cases of unusual equitable considerations.

The liability of a corporation on the obligations of another corporation whose entire assets it purchases at private sale,[2] or at judicial sale,[3] is considered elsewhere, such a purchase being different from a purchase of the stock of such other corporation.

§ 665. ***Participation, ratification, and laches as a bar to stockholders' complaints.***— This subject is considered elsewhere.[4]

§ 666. ***Parties, pleadings, etc.***— This subject also is considered elsewhere.[5]

jority having since that time passed into alien hands. State *v.* Hudson Land Co., 19 Wash. 85 (1898). A domestic corporation cannot obtain a patent to a mining claim under the federal statutes unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. Thomas *v.* Chisholm, 13 Colo. 105 (1889). As to the power of one corporation to buy the stock of other corporations, see §§ 315-317, *supra*. On this general subject see also § 709, *infra*.

[1] Union Pac. Ry. *v.* Chicago, etc. Ry., 51 Fed. Rep. 309 (1892).

[2] See § 672, *infra*.

[3] See § 890, *infra*.

[4] See ch. LXIV, *infra*.

[5] See ch. XLV, *infra*.

CHAPTER XL.

ULTRA VIRES ACTS AND CONTRACTS — IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE IN EXCESS OF THE CHARTER POWERS OF THE CORPORATION, DIRECTORS, OR STOCKHOLDERS.

§ 667. *Meaning of the term ultra vires.*— The term *ultra vires*, as used in this treatise, means any act of a corporation which the corporation is not authorized to do, either by its express or implied powers. This term has been objected to as having no fixed and clear meaning, and to some extent the objection is reasonable. There is no other term, however, that has acquired the significance, general use, and peculiar meaning that are attached to the words *ultra vires;* and consequently the term probably has acquired a permanent place in the vocabulary of corporation law.[1]

[1] "The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is their rule of corporate action." Leslie *v.* Lorillard, 110 N. Y. 519 (1888). For various definitions of the words *ultra vires*, see Pierce, Railroads (2d ed.), p. 516; Taylor *v.* Chichester, etc. Ry., L. R. 2 Exch. 356, 378 (1867); Bissell *v.* Michigan, etc. R. R. Cos., 22 N. Y. 258, 293 (1860); National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875); Shrewsbury *v.* North Staffordshire Ry., 35 L. J. (Ch.) 166 (1865); Nassau Bank *v.*

§ 668. *Method of treatment of the subject.*— There has been extreme difficulty and confusion in defining the validity, effect, rights, and remedies of an *ultra vires* act. The attempt to formulate general rules on this subject has only added to the confusion.[1] Accordingly, the plan of explanation pursued in this work is to state those acts which have been adjudged *ultra vires*,[2] and also those

Jones, 95 N. Y. 115 (1884); Green's Brice, Ultra Vires (2d ed.), 35; Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 579 (1869); McPherson *v.* Foster, 43 Iowa, 48, 64, 65 (1876); Ashbury, etc. Co. *v.* Riche, L. R. 7 H. L. 653, 672 (1875); 2 Kent's Com. *300 (12th ed.), note. Two difficulties have arisen in agreeing upon a definition of this term. First, the term *ultra vires* was often used to designate not only acts beyond the express and implied powers of the corporation, but also acts which are contrary to public policy, and are void whether done by corporations or individuals. Such acts when done by corporations are now termed "illegal" acts, and the term *ultra vires* is not used so as to include them. Second, the term *ultra vires* has been applied to acts which are beyond the powers of the directors, but within the powers of the majority of the stockholders. This use of the term, however, is now discarded, and it is used to designate acts which are beyond the powers of a majority of the stockholders as against a minority; or are beyond the powers of the stockholders acting unanimously as against the state. In Taylor *v.* Chichester, etc. Ry., L. R. 2 Exch. 356, 378 (1867), Blackburn, J., said: "I think it very unfortunate that the same phrase *ultra vires* has been used to express both an excess of authority as against the shareholders, and the doing of an act illegal as being *malum prohibitum;* for the two things are substantially different; and I think the use of the same phrase for both has produced confusion." Even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue. Anderson *v.* Midland Ry., 85 L. T. Rep. 408 (1901).

[1] For instance, the general rule that "any ambiguity in the terms of the grant must operate against the corporation and in favor of the public, and the corporation can claim nothing that is not clearly given by the law," etc. (Perrine *v.* Chesapeake, etc. Co., 9 How. 172 — 1850), is sound law, and has been laid down in many cases; but as a matter of fact, this principle gives little light or satisfaction to the bench, bar, or layman. Each case turns largely on its own facts. Moreover, the decision turns largely on who sues, who is sued, what relief is sought, and whether the act has been performed by one side or not. General rules cannot clearly make the distinctions. The old ideas have been changed. Indeed it is refreshing to hear from that great judge, Mr. Justice Miller, such sound sense as this: "The truth is, that, with the great increase in corporations in very recent times and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers." Salt Lake City *v.* Hollister, 118 U. S. 256 (1886). See also Pennsylvania R. R. *v.* Keokuk, etc. Co., 131 U. S. 371, 384, 389 (1889); Stourbridge Canal *v.* Wheeley, 2 Barn. & Ad. 792 (1831).

[2] This is the subject of this chapter.

acts which have been adjudged to be *intra vires*.[1] It must be borne in mind that nearly every corporate act is *ultra vires* or *intra vires* in a broad sense. It was from this standpoint that Professor Brice's work on Ultra Vires was written. The plan of this book, however, has been to divide the subject into other and more practical headings, such as "preferred stock" and the various other chapter headings herein contained, rather than to group everything under the heading of *ultra vires* or *intra vires*. Most corporate acts, whether *ultra vires* or *intra vires*, have been or will be considered in other parts of this book. Hence only such subjects are treated here as are not extensive enough or important enough for separate chapters.

In general, it remains to add that at common law an *ultra vires* act may be objected to by the state, a stockholder, the corporation, or the person contracting with the corporation; and since often one of these parties may sustain the objection, where the others are not allowed to do so, it is necessary to consider always the four questions: Who brings the suit; who is sued; what act is complained of; and what performance has already been had. It rarely happens that the state objects to an *ultra vires* act. That it has a right to object by *quo warranto* is undoubted.[2] The question of when and whether the stockholder must first apply to the directors or stockholders to remedy the wrong before he brings suit,[3] and also the question of when a ratification of the act by the other stockholders is a bar,[4] is considered elsewhere.

The tendency is to limit the application of the doctrine of *ultra vires*, especially in regard to partially executed contracts. In this respect the New York court of appeals is in conflict with the supreme court of the United States.[5]

§ 669. *A stockholder may object to an ultra vires act.*—That a charter constitutes a contract between the corporation and its stockholders is a principle of law that has become firmly imbedded in the jurisprudence of modern times.[6] Upon this principle of law rest the stability, permanence, and honesty of management of many corporations, particularly those of railroads, and from it arises much of the confidence, safety, and protection of the stockholder himself. It was first promulgated in America, in 1820, in Livingston *v.* Lynch,[7] and was applied to corporations in Hartford & New Haven Railroad Company *v.* Croswell,[8] and in England, in 1824, in Na-

[1] This is the subject of the following chapter, XLI.

[2] See § 635, *supra*.

[3] See § 740, *infra*.

[4] See §§ 649, 652, 662, and ch. XLIV.

[5] See § 681, *infra*.

[6] Quoted and approved in Harding *v.* American, etc. Co., 182 Ill. 551 (1899). See §§ 492–496, *supra*.

[7] 4 Johns. Ch. 573.

[8] 5 Hill, 383 (1843).

tusch *v.* Irving.[1] These cases have been followed by a long list of supporting decisions. They were the first to establish clearly the doctrine that any act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the express or implied powers of the charter of incorporation or of association — in other words, any *ultra vires* act — is a breach of the contract between the corporation and each one of its stockholders, and that consequently any one or more of the stockholders may object thereto and compel the corporation to observe the terms of the contract as set forth in the charter.[2]

§ 670. ***Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition.***— Ever since the case of Abbot *v.* American Hard Rubber Company[3] the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate property by the directors or by a majority of the stockholders, where the corporation is a solvent, going concern.[4] And even

[1] 2 Cooper's Ch. 358, by Lord Eldon; also reported in Gow on Partnership, 398. Thus, Lord Chancellor Campbell, in Simpson *v.* Westminster, etc. Co., 8 H. L. Cas. 712 (1860), said: "I bow to the authority of Natusch *v.* Irving. . . . The funds of a joint-stock company established for one undertaking cannot be applied to another. If an attempt to do so is made, this act is *ultra vires;* and, although sanctioned by all the directors and by a large majority of the shareholders, any single shareholder has a right to resist it, and a court of equity will interpose on his behalf by injunction." In Pickering *v.* Stephenson, L. R. 14 Eq. 322 (1872), the court said: "It is difficult to conceive any system of jurisprudence in which Natusch *v.* Irving would have been differently decided."

[2] Quoted and approved in Harding *v.* American, etc. Co., 182 Ill. 551 (1899). A stockholder may file a bill to enjoin or set aside an *ultra vires* act, even though every other stockholder is opposed to him. Hoole *v.* Great Western Ry., L. R. 3 Ch. App. 262 (1867); Beeman *v.* Rufford, 1 Sim. (N. S.) 550 (1851), where a majority of the stockholders had even voted to ratify the illegal act; Bagshaw *v.* Eastern Union Ry., 19 L. J. (Ch.) 410 (1850); Hare *v.* London, etc. Ry., 30 L. J. (Ch.) 817, 829 (1861); Winch *v.* Birkenhead, etc. Ry., 16 Jur. 1035 (1852). A stockholder in a trust company may file a bill in equity to enjoin the company from paying an illegal income tax to the federal government. Pollock *v.* Farmers' L. & T. Co., 157 U. S. 429 (1895). *Cf.* 187 U. S. 271.

[3] 33 Barb. 578 (1861). See also Abbot *v.* American Hard Rubber Co., 4 Blatchf. 489 (1861); s. c., 1 Fed. Cas. 13.

[4] People *v.* Ballard, 134 N. Y. 269 (1892), reviewing the cases (rehearing denied, 136 N. Y. 639); *Re* Sovereign L. Ass. Co., L. R. 42 Ch. D. 540 (1889). See also Smith *v.* New York, etc. Co., 18 Abb. Pr. 419, 435 (1865); Rollins *v.* Clay, 33 Me. 132 (1851); Sheldon, etc. Co. *v.* Eickmeyer, etc. Co., 56 How. Pr. 70 (1878); Barclay *v.* Quicksilver Min. Co., 9 Abb. Pr. (N. S.) 283 (1870); Copeland *v.* Citizens' Gas Light Co., 61 Barb. 60 (1871); Conro *v.* Port Henry Iron Co., 12 Barb. 27 (1851); Astor *v.* Westchester Gas Light Co., 33 Hun, 333 (1884); Bird *v.* Bird's, etc. Co., L. R. 9 Ch. App. 358 (1874); Adriance *v.* Roome, 52 Barb.

where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, such a sale cannot be made.[1] Indeed it is very

399 (1868); Brady *v.* New York, 16 How. Pr. 432 (1857); Middlesex R. R. *v.* Boston, etc. R. R., 115 Mass. 347 (1874). *Cf.* Dana *v.* Bank of U. S., 5 Watts & S. (Pa.) 223, 247 (1843); Union Bank *v.* Ellicott, 6 Gill & J. (Md.) 363 (1834). See also Sheldon, etc. Co. *v.* Eickemeyer, etc. Co., 90 N. Y. 607 (1882); Balliet *v.* Brown, 103 Pa. St. 546 (1883); Gray *v.* New York, etc. Steamship Co., 5 Thomp. & C. 224 (1875). But see Hutchinson *v.* Green, 91 Mo. 367 (1886), and Mills *v.* Hurd, 29 Fed. Rep. 410 (1887), relative to unincorporated associations. A stockholder of a manufacturing company may enjoin a lease of all its property and business to another corporation for twenty-five years at a rental equal to one-half of the profits of the business. Small *v.* Minneapolis, etc. Co., 45 Minn. 264 (1891). The board of directors have no power to sell all the property of the company without action by the stockholders. Consolidated, etc. Co. *v.* Nash, 85 N. W. Rep. 485 (Wis. 1901). A lease of all the corporate property made by a majority vote of the stockholders and directors may be set aside at the instance of a dissenting stockholder where the lessee owned a majority of the stock and controlled the board of directors of the lessor. Parsons *v.* Tacoma, etc. Co., 25 Wash. 492 (1901). A transfer of a lease of property by the general manager, who has exercised all the powers of the company, is valid, even though there is no vote of the stockholders, where such lease does not constitute all the assets of the corporation and the transaction was fair in itself. Pennsylvania, etc. Co. *v.* Pure-Oil Co., 195 Pa. St. 388 (1900). A member of a mutual insurance company may enjoin the company from transforming itself into a joint-stock company. Schwarzwaelder *v.* German Ins. Co., 59 N. J. Eq. 589 (1899). In the case of Arents *v.* Blackwell's, etc. Co., 101 Fed. Rep. 338 (1900), where the holders of 159,769 shares out of 160,000 shares of the stock of a tobacco company wished to accept the offer of another company to buy it out for $2,800,000, and a person had purchased one share for the purpose of stopping the sale and having the charter repealed, the court appointed a receiver to sell the property as preliminary to a dissolution and distribution of the assets. Where the president of an unincorporated association issues treasury stock and thereby obtains control of the association, and sells it out to a corporation organized by himself, the minority stockholders of the association may compel him to account for the property. As regards the person to whom the stock was issued, how-

[1] Quoted and approved in Harding *v.* American, etc. Co., 182 Ill. 551 (1899); People *v.* Ballard, 134 N. Y. 269; 136 N. Y. 639 (1892). A minority stockholder may enjoin a public sale of the property of a prosperous corporation, even though the company has been dissolved, under the New York statute, where he shows that the public sale is not being fairly advertised and conducted, and shows also that the dissolution is for the purpose of reorganizing under the laws of another state and freezing out the minority, and that information could not be obtained as to the actual condition of the company. Treadwell *v.* United, etc. Co., 47 N. Y. App. Div. 613 (1900). The voluntary dissolution, under the New York statute, of a prosperous corporation will be enjoined at the instance of minority stockholders where it is alleged that it is a mere scheme to freeze out the latter and to buy in the property for a partnership. Elbogen *v.* Gerbereaux, etc. Co., 30 N. Y. Misc. Rep. 264 (1900). See also § 629, *supra.*

doubtful whether a dissolution can ever be had at common law by a majority of the stockholders where the corporation is a going,

ever, a general allegation that he acted in connection with the president is not sufficient to render him liable on the ground of fraud. Booth *v.* Dodge, 60 N. Y. App. Div. 23 (1901). In the case of De La Vergne, etc. Co. *v.* German, etc. Inst., 175 U. S. 40 (1899), a contract was made by which the president of an Illinois manufacturing corporation sold all its assets to a rival New York corporation, and all the shares of stock in the Illinois corporation were also delivered to the New York corporation. The court held the transaction to be illegal on the ground that the president was not authorized to sell the assets, and that on the other hand the New York corporation was prohibited by its charter from purchasing stock in other corporations. A mining corporation may at common law lease its property for five years for a rental, payable in a certain portion of the product of the mine. A stockholder cannot complain, even though the contract be an error of judgment. Hennessy *v.* Muhleman, 40 N. Y. App. Div. 175 (1899). A receiver was appointed at the instance of minority stockholders, under the Louisiana statutes, in the case of Davies *v.* Monroe, etc. Co., 107 La. 145 (1901), where the majority were about to sell out an electric-light and water-works plant to a foreign corporation controlled by the president at a price less than the debts, and the president, in addition to his salary, had been charging for traveling expenses. A sale of all the corporate property to an individual who purchases in good faith cannot be set aside by the corporation as *ultra vires*. Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869). An injunction against transferring all the property to another corporation will not be granted where only a leasing of part of the property is contemplated. Small *v.* Minneapolis, etc. Co., 10 N. Y. Supp. 456 (1890). A vendee of all the property of a corporation cannot avoid the purchase on the ground that the stockholders had not assented thereto. Stokes *v.* Detrick, 75 Md. 256 (1892). A charter cannot be assigned. Only the property or shares of stock can be assigned. Welch *v.* Old Dominion, etc. Co., 10 N. Y. Supp. 174 (1890). Directors who are merely vested with the ordinary powers of executive management cannot radically affect the chartered rights of stockholders (Baker's Appeal, 109 Pa. St. 461 (1885), 42 Leg. Int. 226); and hence have no authority to dispose of the corporate plant by lease, sale, or otherwise. Martin *v.* Continental, etc. Ry., 14 Phila. 10 (1880). A secession of the majority, carrying corporate funds to a new corporation, is a fraud on the old corporation. Tomlinson *v.* Bricklayers' Union, 87 Ind. 308 (1882). Where all the property of the corporation is sold, together with the stock of the company, the directors cannot subsequently act as a board, they no longer being stockholders, as required by the statute. Orr, etc. Co. *v.* Reno Water Co., 17 Nev. 166 (1882). In Citizens' Street R. R. *v.* Robbins, 144 Ind. 671 (1896), the administratrix had illegally sold stock to a party, who then caused the corporation to sell all its property to another corporation. A subsequent administrator sued to set aside the sale of the corporate property or for damages. The court held that, as the purchasing corporation had expressly assumed the liabilities of the vendor corporation, it must pay for the value of the stock, inasmuch as the vendor corporation was liable for allowing the transfer. It is legal for a person who is endeavoring to purchase all the property of a corporation to pay a stockholder for consenting thereto. Lamkin *v.* Palmer, 24 N. Y. App. Div. 255 (1897); aff'd, 164 N. Y. 201. The case of Hirsch

prosperous concern.[1] And certainly if the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even

v. Burns, 74 L. T. Rep. 769 (1897), was affirmed in 77 L. T. Rep. 377, to the effect that a person having an option to purchase the unissued stock of a company has a claim for damage in case the company sells the business to another company without protecting such option.

Where, by a majority vote of the stockholders, all the assets of a Maine corporation are transferred to a New Jersey corporation, the latter agreeing to pay all the debts and to issue one share of its stock for every two shares of the stock in the former corporation, and for two years the New Jersey corporation fails to pay such debts and the stock of the Maine corporation has not been fully delivered, a dissenting stockholder in the Maine corporation may enjoin the New Jersey corporation from disposing of such assets. Eldred *v.* American Palace-Car Co. etc., 96 Fed. Rep. 59 (1899). In a stockholder's suit to set aside an illegal transfer of the assets of his corporation to another corporation and to compel a re-transfer, the persons through whom the property was transferred need not be made parties if the persons in possession of the assets are made parties. Eldred *v.* American, etc. Co., 99 Fed. Rep. 168 (1900). But the federal court in New Jersey has no jurisdiction of a suit brought by stockholders in a Maine corporation against that corporation and a New Jersey corporation to set aside an illegal transfer of property from the Maine corporation to the New Jersey corporation, the property itself not being in New Jersey. Eldred *v.* American, etc. Co., 105 Fed. Rep. 455 (1900). Moreover, if the Maine corporation is not served and does not voluntarily appear, final relief cannot be granted and a preliminary injunction will be dissolved. Eldred *v.* American, etc. Co., 105 Fed. Rep. 457 (1900). In a stockholder's suit to set aside a sale by a Maine corporation of all its assets to a New Jersey corporation, the suit being in New Jersey, the Maine corporation is a necessary party defendant, and a court in Maine will not appoint a receiver of the same for the sole purpose of appearing in the suit in New Jersey. Hutchinson *v.* American, etc. Co., 104 Fed. Rep. 182 (1900). A New York court will not, at the instance of a New York stockholder in an Arizona mining company, enjoin the company from transferring its property in Arizona, and appoint a receiver thereof, inasmuch as such an injunction will not be effective except with the aid of the Arizona courts, and the question involved is one relating to the internal affairs of the company which should be controlled by the statutes and public policy of Arizona. The court, however, in the final decree, may set aside illegal sales, even though the property is beyond the jurisdiction. Hallenborg *v.* Greene, 66 N. Y. App. Div. 590 (1901). Where the secretary and treasurer has managed the business as though the property was his own, a sale of all the property with the consent of ninety-five per cent. of the stockholders to an innocent purchaser for value is legal, even though no meeting of the directors or stockholders authorized the sale. Magowan *v.* Groneweg, 86 N. W. Rep. 626 (S. D. 1901). Where, in a stockholder's suit in the federal court to set aside a sale of all the assets of the company to another company, an injunction has been denied on the giving of a

[1] See § 629, *supra*.

though it is made with a view to dissolution of the corporation. This is the law as laid down in the well considered case of Kean *v.* Johnson.[1] Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly that which cannot legally be done directly.[2]

If, however, the corporation is an unprofitable and failing enterprise, then a sale of all the corporate property with a view to dissolution may be made.[3]

bond, an injunction will not be granted in a similar suit by the same parties in the state court, especially where the purchaser is outside of the jurisdiction of the court, and the advantage to the complainant will be small as compared with the injury to the defendant. Mumford *v.* Ecuador, etc. Co., 50 Atl. Rep. 476 (N. J. 1901). Where a minority stockholder starts a suit in the federal court to set aside a sale of the property of the company to another corporation, but does not bring in as a party defendant a railway company which is about to issue securities, in accordance with contracts with the two companies, and afterwards starts a suit in the state court for the same relief, and brings in the railway company as party defendant, laches in bringing in the railway company is a bar to relief against that company. A protest not followed by prompt application to a court does not excuse laches. Mumford *v.* Ecuador, etc. Co., 50 Atl. Rep. 476 (N. J. 1901). In the case of Drake *v.* New York, etc. Co., 36 N. Y. App. Div. 275 (1899), where the owner of ten out of two thousand shares of stock attacked a foreclosure decree on the ground of fraud, the court refused to grant relief, the purchaser at the foreclosure sale being willing to pay to such stockholder his proportion of the actual value of the property, irrespective of the price realized at the foreclosure sale. The court said that the expense of further litigation would be many times the actual value of the plaintiff's interest, and that, while the plaintiff in a court of law would be entitled to the full measure of his legal rights, yet in a court of equity a different rule prevails, and he may be compelled to take his actual interest.

[1] 9 N. J. Eq. 401 (1853); Ervin *v.* Oregon, etc. Nav. Co., 27 Fed. Rep. 625 (1886). Where before the dissolution of an insurance company all of its assets were transferred to another responsible company which contracted to meet all obligations, the court will not necessarily set the transfer aside and appoint a receiver, but will allow the transfer to stand, if fair and best. The minority are not absolutely entitled to a receivership and sale. Baltimore, etc. R. R. *v.* Cannon, 72 Md. 493 (1890).

[2] Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881). See §§ 629, 630. *supra.*

[3] Quoted and approved in Price *v.* Holcomb, 89 Iowa, 123 (1893), and Harding *v.* American, etc. Co., 182 Ill. 551 (1899); Doyle *v.* Leitelt, 97 Mich. 298 (1893); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858). An embarrassed corporation may lease its property for a year in order to keep afloat, such lease being reasonable in its terms. Plant *v.* Macon, etc. Co., 103 Ga. 666 (1898). Where the stockholders of an insolvent corporation have authorized the directors to sell the property and public sale is thereupon made, the court will not set the sale aside, although directors who were creditors of the corporation purchased at such sale at a low figure. Patterson *v.* Portland, etc. Works, 35 Or. 96 (1899). The holder of seventy-five shares cannot enjoin the holders of three thousand six hundred and sev-

Where an insurance company, having authority to sell its property, proceeds to sell to another company which has no authority to buy, the transaction is illegal, and a stockholder in the former who agrees to take stock in the latter in exchange for his old stock is not bound to carry out the transaction.[1] But even though a note given by one insurance company to purchase the business of another insurance company is not legal, yet if the assets of the corporation that issued the note are used to take it up, the money cannot be

enty-five shares from making a private sale of the corporate assets at a fair price, where the corporate business is unprofitable and each stockholder has an opportunity of participating in the purchase. Phillips *v.* Providence, etc. Co., 21 R. I. 302 (1899). Where the business was a losing one, a lease of all the property by the stockholders, having wide powers by the charter, was upheld. Featherstonhaugh *v.* Lee, etc. Co., L. R. 1 Eq. 318 (1865). A dissenting stockholder cannot enjoin the corporation from selling all its property where its debts are large and a mortgage is about to be foreclosed, and a sale is the only means of protecting the company, and there is no fraud involved, and a large majority of the stockholders are in favor of the sale, and the company will have the proceeds of the sale in its treasury to continue business. Sewell *v.* East, etc. Co., 50 N. J. Eq. 717 (1893). A manufacturing corporation may, for the purpose of protecting its stockholders from further loss, discontinue its operations when unprofitable, and may sell or lease the property. Skinner *v.* Smith, 134 N. Y. 240 (1892). To discontinue a failing business and proceed to sell the property and pay the debts is not a breach of trust. Rothwell *v.* Robinson, 44 Minn. 538 (1890). A sale, however, of all the corporate assets for stock in another company is not legal, even though the vendor corporation is insolvent, where the intent is, not to wind up the insolvent company, but to hold the stock indefinitely in the names of trustees. Byrne *v.* Schuyler, etc. Co., 65 Conn. 336 (1895). By a vote of the board of directors and a majority of the stockholders, in a meeting assembled, a rubber manufacturing company may lease its entire business to another rubber manufacturing company, the financial condition of the leasing company being depressed and its business not profitable for want of capital, and the lease being the best, if not the only, means of preventing insolvency, and there being no fraud in the case. Bartholomew *v.* Derby R. Co., 69 Conn. 521 (1897). In New Jersey a failing corporation cannot sell out all its assets to another corporation, inasmuch as the statutes authorize a dissolution by a failing corporation, and the sale can be made in connection with such dissolution. Hunt *v.* American, etc. Co., 81 Fed. Rep. 532 (1897). If the corporation is financially embarrassed, a majority of the stockholders may authorize the directors to sell all its property at public auction, and a reorganization committee representing a part of the stockholders may buy it in, the price paid being a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). Where one building association absorbs another and takes all its assets and tries to force the minority stockholders to transfer or surrender their stock, and causes the absorbed association to become insolvent, a receiver will be appointed at the instance of minority stockholders, even though the absorbed association is a failing one. Continental, etc. Assoc. *v.* Miller, 33 S. Rep. 404 (Fla. 1902).

[1] Dougan's Case, 28 L. T. Rep. 60 (1873); aff'd, L. R. 8 Ch. App. 540 (1873).

recovered back.[1] Where a sale of all the corporate assets is set aside, and a receiver is authorized to borrow money to repay the money received on the sale, the loan made by him is legal.[2]

By the unanimous consent of the stockholders it is always legal to sell all the property of a private corporation,[3] proper provision

[1] McClure *v.* Trask, 161 N. Y. 82 (1899).

[2] St. Paul Trust Co. *v.* St. Paul Globe Pub. Co., 60 Minn. 105 (1895).

[3] See § 671, *infra*. A corporation may convey its property with the consent of stockholders. State *v.* Western, etc. Co., 40 Kan. 96 (1888). Where an iron manufacturing concern owns an iron manufacturing plant and stocks in an ore company and a railway company and a steamboat company and other corporations, and also a farm, and by consent of all the partners the firm is transformed into a corporation which takes all the property, including the stocks and the farm, one of the participants cannot afterwards complain that it was illegal for the corporation to acquire such stocks and the farm. Burden *v.* Burden, 159 N. Y. 287 (1899). The agreement of a creditor of a corporation with a stockholder who is also a creditor of the same, that if the latter will consent to a sale of the property the former will pay the latter's debt, is enforcible, even though oral. Lamkin *v.* Palmer, 164 N. Y. 201 (1900). So long as a corporation is solvent it may, with the consent of its stockholders, dispose of property at such price as it sees fit, and may even make a gift of property, and, present creditors being protected, future creditors cannot complain. Hamilton *v.* Menominee, etc. Co., 106 Wis. 352 (1900). Stockholders in selling their stock in connection with the transfer of all the property to a new corporation may reserve what may be thereafter realized from a suit. Independent, etc. Co. *v.* Anderson, 106 La. 55 (1901). Where the purchaser of a plant and stock is sued for the price and judgment is recovered, he may afterwards bring suit for the stock and for dividends paid after the time when he would have been entitled to the stock, if he had fully complied with his contract. Beaty *v.* Johnston, 66 Ark. 529 (1899). The board of directors with the consent of the stockholders may sell all the property. Robinson, etc. Co. *v.* De Bautte, 50 La. Ann. 1281 (1898). A stockholder who knows that her stock has been voted by her husband in favor of selling all the corporate property for stock in another corporation cannot object thereto where she afterwards disposes of part of the new stock so issued. Hoene *v.* Pollak, 118 Ala. 617 (1898). Where but one meeting of the board of directors was ever held and then the charter was forfeited, and the president, with the consent of the directors individually, and of all the stockholders, conveyed away the property, and creditors were not injured, the transaction is legal. Aransas, etc. Co. *v.* Manning, 63 S. W. Rep. 627 (Tex. 1901). By unanimous consent of the stockholders a mercantile company may sell all its property and take land in part payment therefor for the purpose of winding up the business. Morisette *v.* Howard, 63 Pac. Rep. 756 (Kan. 1901). Where a private corporation sells all its property to another corporation on the agreement of the latter to pay the debts of the former, and the latter has paid a part of such debts, the selling corporation cannot claim that the deed is *ultra vires* and retake possession. Savings & T. Co. *v.* Bear Valley, etc. Co., 112 Fed. Rep. 693 (1902). Even though the purchaser of the property of a corporation takes, in addition to the deed, all of the shares of stock, the consideration going directly to the stockholder, the transaction is a sale of the property and not of the stock, and hence the proceeds

being made for the protection of corporate creditors.[1] Moreover, where by the written consent of all the stockholders of a New Jersey corporation, and the action of its board of directors, a corporation sells all its property for stock and bonds of a new company to be distributed among the old stockholders, a pledgee of one of the old stockholders cannot object, especially where the statute authorizes the pledgor of stock to represent the stock and no notice had been given of the pledge.[2] These rules do not apply,

of the sale belong to the corporation. Pendery *v.* Carleton, 87 Fed. Rep. 41 (1898). Where a corporation sells its property through misrepresentations, and in deeding the property causes all its outstanding capital stock to be delivered to the vendee, the vendor in suing to recover back the money need not allege that the stock was valueless, there being an allegation that the property was valueless. Keener *v.* Baker, 93 Fed. Rep. 377 (1899). A corporation in acquiring the assets of a partnership may acquire a cause of action which the latter has against another corporation for negligence and may enforce such cause of action, even though it would have had no power to buy it separately from the other property. Central, etc. Co. *v.* Capital, etc. Co., 60 Ohio St. 96 (1899). Where a corporation has sold all its property with the consent of all its stockholders, the transaction cannot subsequently be attacked by a subsequent purchaser of stock. City of Spokane *v.* Amsterdamsch, etc., 22 Wash. 172 (1900). The sale of a business of a corporation which does not specifically transfer the trade name and good will does not enable a purchaser of the business from the corporation to claim such trade name. Cutter *v.* Gudebrod, etc. Co., 44 N. Y. App. Div. 605 (1899). Where in a dissolution proceeding an injunction has been issued against a corporation doing any further business or disposing of its property, a sale or mortgage of its property to one of its stockholders is illegal and will be set aside by the court, especially where it is made to a director for an inadequate consideration. Grant *v.* Lowe, 89 Fed. Rep. 881 (1898). Where the various stockholders of a corporation join in a contract for the sale of their stock, but secretly one of them receives a bonus from the purchaser, the others may compel him to account therefor proportionately. Synnot *v.* Cummings, 116 Fed. Rep. 40 (1902). Where the directors own all the stock of a corporation, they may authorize its president to sell its assets; and the fact that the authority was not given at a regular directors' meeting is immaterial. Jordan *v.* Collins, 107 Ala. 572 (1895). A sale by a corporation of all its property does not entitle the vendee to stock in the corporation which the corporation itself has purchased on a sale for a delinquent assessment and not re-issued. Tulare, etc. Dist. *v.* Kaweah, etc. Co., 44 Pac. Rep. 662 (Cal. 1896). The new company may enforce the right of the old one to indemnity. Miller *v.* Lancaster, 5 Coldw. (Tenn.) 514 (1868). Or may settle a suit against the old one. Paine *v.* Lake Erie, etc. R. R., 31 Ind. 283 (1869). In general see Slattery *v.* St. Louis, etc. Co., 91 Mo. 217 (1886). The incorporation of a reorganized company, giving it all the rights, etc., of the old company, does not give it title to a judgment obtained by the old company. Wilmington, etc. R. R. *v.* Downward, 14 Atl. Rep. 720 (Del. 1888). Sometimes the stock as well as the property is delivered. Pendery *v.* Carleton, 87 Fed. Rep. 41 (1898).

[1] See § 672, *infra*.

[2] Elyea *v.* Lehigh, etc. Co., 169 N. Y. 29 (1901).

however, to railroad and certain other quasi-public corporations. The state has an interest in their continuance, and they cannot sell their property except upon the express consent of the state.[1]

Where the by-laws of a private corporation authorize a sale of all its property, such sale may be made even against the wishes of a minority of the stockholders.[2] So also, where the charter expressly authorizes such a sale, it is legal.[3] But statutory power to

[1] See ch. LIII, *infra*.

[2] It is legal for the by-laws to provide that the company may sell out all its property at any time. Cotton *v.* Imperial, etc. Corp., [1892] 3 Ch. 454. The by-laws may provide that the company may sell out its entire business. Republican, etc. Mines *v.* Brown, 58 Fed. Rep. 644 (1893), reversing Brown *v.* Republican, etc. Mines, 55 Fed. Rep. 7.

[3] See § 892, notes, *infra*. The sale may have to be a public sale. See § 671, *infra*. The principle that the board of directors has no power to sell out the entire property does not apply where the statute under which it was incorporated authorized such a sale. St. Louis *v.* St. Louis Gaslight Co., 70 Mo. 69, 98 (1879). Under the English statutes authorizing the holders of the securities to reorganize or modify the original plan, provided the court approves the same, the plan may be amended so that dissenting security-holders be paid in cash their proportion of the assets as they then exist. Foreign, etc. Trust Co. *v.* Sloper, [1894] 3 Ch. 716, rev'g [1893] 2 Ch. 96. Where a water-works company has power to sell its entire property, and the sale has been authorized by a vote of 1,100 shares out of 1,350 shares, the court will not enjoin the sale at the instance of the minority stockholders, on the ground that the price is inadequate. Peabody *v.* Westerly Waterworks, 20 R. I. 176 (1897). In *Re* Buenos Ayres, etc. Co., 66 L. T. Rep. 408 (1892), a sale of the company's enterprise to the government upon terms which paid something to the preferred stockholders, but left nothing for the common stockholders. was sustained. Power to sell to a company does not authorize a sale to an individual. Bird *v.* Bird's, etc. Co., L. R. 9 Ch. App. 358 (1874). In Clinch *v.* Financial Corp., L. R. 5 Eq. 450 (1868), the company had power to consolidate with another company if the liabilities of the stockholders were not increased. A stockholder enjoined a consolidation in which such liabilities would be increased. Where a corporation is given power to lease its property without the mode of making the lease being prescribed, it may be by a vote of the majority of the stockholders. Dickinson *v.* Consolidated, etc. Co., 114 Fed. Rep. 232 (1902). A statute authorizing a sale of corporate property in whole or in part upon a vote of the stockholders does not require such vote upon an ordinary sale of real estate. Marvin *v.* Anderson, 111 Wis. 387 (1901). Where a corporation sells or leases all its property to another corporation which the majority of the stockholders of the former corporation own or control, the contract may not be illegal in itself, but it will be scrutinized carefully by the court, and, if unfair, will be set aside. Mumford *v.* Ecuador, etc. Co., 111 Fed. Rep. 639 (1901). Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute, the lessee runs the risk of the lease being

transfer the business and property of a corporation does not authorize a transfer of its unpaid subscriptions.[1] A hotel company may sell its hotel and with the proceeds purchase another hotel.[2] And in any case the right of a dissenting stockholder to object may be lost by laches or ratification.[3]

The subject of the reorganization of corporations upon foreclosure is considered elsewhere.[4]

§ 671. *Sale of corporate property to another corporation in exchange for stock and bonds of the latter — Distribution of such stock and bonds.*— In addition to the objections to a sale of all the corporate property to another corporation, referred to in the preceding section, there often is involved the question of whether the sale may be in exchange for the bonds and stock of the vendee company. In these days of consolidations, reorganizations, and mergers of corporations it frequently happens that the purchase price is paid in the stock and bonds of the purchasing company. The question then arises whether the selling company has power to take stock and bonds in payment, and whether it may compel its stockholders

held void at the instance of a dissenting stockholder. Boston, etc. R. R. *v.* Graham, 60 N. E. Rep. 405 (Mass. 1901). As to such an appraisement, see also § 671, *infra.*

[1] Bank of China *v.* Morse, 168 N. Y. 458 (1901). In this case a New York subscriber to stock in an English corporation was sued by the company for the amount of such subscription, such company having been reorganized under the peculiar English statutes. The court refused to enforce the liability on the ground that the funds were not for the purpose of paying debts of the old corporation, but were partially for the purposes of the new corporation which the New York subscriber did not become interested in and had no notice thereof, and on the further ground that the reorganization scheme was practically a sale by the old company to the new company.

[2] Freeman *v.* Sea View Hotel Co., 57 N. J. Eq. 68 (1898). A sale of the entire property is different from the sale of the whole of its business, and the former may be legal where the latter would be illegal. Ritchie *v.* Vermillion Min. Co., 1 Ont. L. Rep. 654 (1901).

[3] See ch. XLIV, *infra;* Banks *v.* Judah, 8 Conn. 145 (1830), holding that long delay of a dissenting stockholder in bringing suit will bar his remedy. This, perhaps, is the first reorganization case that is to be found in the books. The whole business of the corporation cannot be sold out except by unanimous consent of the stockholders, but a stockholder who acquiesces in it cannot afterwards complain. Feld *v.* Roanoke Inv. Co., 123 Mo. 609 (1894). Where a part of a charter is illegal, and a new corporation is formed to take over the property and debts and issue share for share of stock in the old, a stockholder who assented cannot now refuse to take the new stock. Glymont Imp. etc. Co. *v.* Toller, 80 Md. 278 (1894). Five years after a corporation has sold all its property to another corporation, and received the consideration, it cannot maintain a bill to set aside the sale as *ultra vires,* the rights of third parties having intervened in the meantime. Bear Valley, etc. Co. *v.* Savings, etc. Co., 117 Fed. Rep. 941 (1902).

[4] See ch. LII, *infra.*

to accept such stock and bonds upon a distribution of the assets of such selling company. The general rule has been that the stock of the vendee company received by the vendor company in payment for the property cannot be forced upon dissenting stockholders of the vendor company in a distribution of its assets. They are entitled to money. Such of them as do not wish to accept the stock of the new corporation are entitled to the value of their stock in the old corporation in cash, and may have an injunction until they are secured.[1] A stockholder may enjoin a sale of all the

[1] State *v.* Bailey, 16 Ind. 46 (1861); Kelly *v.* Mariposa Land, etc. Co., 4 Hun, 632 (1875). *Cf.* New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322 (1861); s. c., 15 N. J. Eq. 418 (1862). *Contra,* Sawyer *v.* Dubuque Printing Co., 77 Iowa, 242 (1889). The New York courts refused to hold a New York stockholder in an English corporation liable for his unpaid subscription where under a plan of reorganization, sanctioned by the English courts, in accordance with English law, the amount collected is to go to the reorganized company, while other stockholders need not pay their subscriptions if they take part in the reorganized company and pay a small sum, especially where, if all the stockholders paid in full, the amount would be more than necessary to pay the debts. Bank of China *v.* Morse, 168 N. Y. 458 (1901). Under an English floating debenture, stockholders have no right to sell out the entire property to another corporation in exchange for stock unless the debenture holders consent, Foster *v.* Borax Co., [1899] 2 Ch. 130, or unless money is deposited in court to pay the dissenting debenture holders. Foster *v.* Borax Co., [1899] 2 Ch. 130, 137. Under a statute authorizing one company to sell out to another for any consideration that may be agreed upon between them, it is legal that the consideration be a right extended by the new company to the old stockholders to demand partly paid up stock of the new company within a limited time, a dissenting stockholder being given the right to have the fairness of the proposed sale passed upon by the court. It is the duty of the stockholder in such a case to attend the meeting and vote against it if he objects. It is no excuse that he was ill or abroad or negligent in dissenting under the English statute. Burdett-Coutts *v.* True Blood, etc. Ltd., [1899] 2 Ch. 616. It is not legal for a receiver, even under an order of the court, to sell nearly all the property of the company to another corporation in exchange for stock of the latter to be given to stockholders of the former, with a provision that dissenting stockholders should be paid on a certain basis which is different from stock of the former corporation acquired by the latter corporation. People *v.* Anglo-American, etc. Assoc., 60 N. Y. App. Div. 389 (1901). A minor who has subscribed and paid for stock in a corporation, which corporation was afterwards merged in another corporation, for stock of the latter, cannot recover back his money from the second corporation. White *v.* Mount Pleasant, etc. Corp., 172 Mass. 462 (1899). Even though an officer of a mortgagor owns a majority of the stock, and is also a creditor, and promotes a suit for a receivership and sale of the corporate property, yet he may purchase at the foreclosure sale, even at a nominal figure, and a corporation to which he transfers it in exchange for the latter's capital stock may be a *bona fide* purchaser for value, even though it is chargeable with notice of all the facts, and may insure the property for its own benefit and not

corporate property to another corporation in exchange for the stock and mortgage bonds of the latter, even though the corporation offers to pay in cash the full value of his stock. Not even a statute can deprive a stockholder of this right. To compel the stockholder to take such cash would be compelling him to sell his stock.[1] To compel the stockholders of the old corporation to accept the

for the benefit of an underlying mortgage. Farmers', etc. Co. *v.* Penn, etc. Co., 103 Fed. Rep. 132, 157 (1900). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the persons so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. Smith *v.* Smith, etc. Co., 84 N. W. Rep. 144 (Mich. 1900). Taylor *v.* North Star, etc. Co., 79 Cal. 285 (1889), holds that laches may bar the stockholders' right to object. Although a corporation is authorized by its charter "to take stock" in other corporations, this does not authorize it to sell all its property to another corporation in payment for stock of that corporation to be distributed among the stockholders of the vendor corporation. Elyton Land Co. *v.* Dowdell, 113 Ala. 177 (1896). Where a corporation sells its business for stock in another company, it may distribute the stock among those of its stockholders who are willing to take it; but any stockholder may demand money instead. If he accepts the stock, however, he cannot afterwards complain. Feld *v.* Roanoke Inv. Co., 123 Mo. 603 (1894). Where a company is reorganized by a new company buying the property of the old, and giving the stock of the new company to the old company in payment therefor, the transaction being carried out by 160,165 shares out of 164,211 shares, over 4,000 shares not being represented, the old company cannot distribute the stock among the stockholders unless the company is dissolved. Kohl *v.* Lilienthal, 81 Cal. 378 (1889); 94 N. W. Rep. 19.

[1] Morris *v.* Elyton, etc. Co., 125 Ala. 263 (1900). A statute forbidding the officers of a mining corporation from selling its property, without such sale being approved by a certain proportion of the stock at a meeting of the stockholders, does not authorize a sale of all the assets of a prosperous mining corporation as against the dissent of minority stockholders, where such sale is not for cash but for the capital stock of a foreign corporation, even though such latter company offers to pay a fixed price in cash to stockholders who do not care to take new stock in exchange for the old. A minority stockholder may enjoin the sale even though the selling corporation offers to give to such minority stockholder a bond that the dissenting stockholders should receive the value of their stock. A court has no power to compel dissenting stockholders to so dispose of their shares *in invito*. Forrester *v.* Boston, etc. Co., 21 Mont. 544, 565 (1898). A by-law, even though passed upon the organization of the company, cannot legally provide that upon a sale of the company's property for stock in another company, the stock going to dissenting stockholders might be sold in such manner as the old company thought fit, and the proceeds paid over to the dissenting stockholder, where the statute provided that the interest of dissenting stockholders should be ascertained by arbitration. Payne *v.* Cork Co., [1900] 1 Ch. 308. See 88 L. T. Rep. 337.

stock of the new corporation in payment for their interest in the old would be in effect to compel them to join the new corporation, or, what is the same thing, compel them to consent to a consolidation.[1] A well-considered case in the United States circuit court of appeals, however, takes a different view of the law and holds that where one railroad company is authorized by statute to sell its railroad property and franchises to another company, it may receive in payment therefor shares of stock in the vendee company, and its stockholders are obliged to accept such payment in stock.[2] This conclusion is certainly logical and puts all the stockholders on the same basis, although it is open to the objection that it forces dissenting stockholders into a new enterprise and business which they may not have contemplated. On the other hand, if dissenting stockholders must be paid in cash, another difficulty arises. The only way to ascertain the real value of the property, if the sale is to a new corporation, in which a majority of the old stockholdors are interested, is by a public sale of the property. The dissenting stockholders may insist upon this, in such a case. The supreme court of the United States has so decided. The majority stockholders have no right, upon dissolution, to sell the corporate prop-

[1] *Ex parte* Bagshaw, L. R. 4 Eq. 341 (1867); McCurdy *v.* Myers, 44 Pa. St. 535 (1863); Frothingham *v.* Barney, 6 Hun, 366 (1876); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858). A single stockholder may enjoin his company from selling substantially all its property to another company for shares of stock in the latter. Carter *v.* Producers', etc. Co., 164 Pa. St. 463 (1894).

[2] Farmers', etc. Co. *v.* Toledo, etc. R. R., 54 Fed. Rep. 759 (1893). Judge Taft dissented from this conclusion. A dissenting stockholder may enjoin a New Jersey street railway company from selling its property to another street railway company in exchange for stock of the latter, unless such sale is made in connection with dissolution proceedings. He may enjoin a sale of the property to a Washington street railway company for twenty thousand shares of the full-paid stock of the latter, where dissenting stockholders of the former are to be paid only $35 cash in lieu of each share of the Washington corporation, which he would be entitled to. On its face this is an issue of the Washington stock at $35 per share, and is in violation of the Washington statutes. The court said: "To the extent of sixty-five per cent. of the issue the increase of capital stock will be, therefore, 'fictitious' and, according to the constitution, 'void.' Such a scheme ought not to be forced upon an unwilling stockholder of the New Jersey company." Moreover, it being illegal in Washington for one corporation to own stock in another corporation, a New Jersey corporation cannot legally own stock in a Washington street railway company. Coler *v.* Tacoma Ry. etc., 54 Atl. Rep. 413 (N. J. 1903). Where the statute authorizes corporations to consolidate, a stockholder cannot object thereto on the ground that he is given stock in the consolidated company instead of cash, and even though the authorized capital stock of the consolidated company is much larger than that of the constituent company and no provision has been made for the issue of the balance. Mayfield *v.* Alton, etc. Co., 65 N. E. Rep. 100 (Ill. 1902). See also Metcalf *v.* American, etc. Co., 122 Fed. Rep. 115 (1903).

erty to a new corporation for stock in the latter, and then say to the minority, "We have formed a new company to conduct the business of this old corporation, and we have fixed the value of the shares of the old corporation. We propose to take the whole of it and pay you for your shares at that valuation, unless you come into the new corporation, taking shares in it in payment of your shares in the old one."[1] At the public sale the majority stockholders may buy in the property;[2] but they have no right to buy it at private sale at a price which they themselves put upon it. Where, however, the price is a fair one, and all stockholders are allowed to participate, it is not likely that a court would order a public sale, there being no tangible prospect of benefit from such a public sale.[3] As to a sale of the corporate property for purchase-money bonds in payment, this is equivalent to a sale for money payable in the future, and hence the transaction is not open to the same objections as in the case of stock. Actual fraud, however, will of course always invalidate such a sale.[4] Frequently the statutes provide for buying out dissenting minority stockholders at the appraised value of their stock.[5] Such a statute exists in New York.[6] Sometimes a more formal condemnation is authorized.[7]

[1] Mason *v.* Pewabic Min. Co., 133 U. S. 50 (1890). The result of this Pewabic Mining Company litigation was that the original sale of the property for $50,000 was set aside, and the property then sold for $710,000. See Mason *v.* Pewabic Min. Co., 66 Fed. Rep. 391 (1894). *Cf.* Treadwell *v.* Salisbury Mfg. Co., 73 Mass. 393 (1856). See also Buford *v.* Keokuk, etc. Co., 3 Mo. App. 159 (1876); Black *v.* Delaware, etc. Canal Co., 22 N. J. Eq. 130, 415 (1871); s. c., 24 N. J. Eq. 455 (1873); Lauman *v.* Lebanon Valley R. R., 30 Pa. St. 42 (1858).

[2] A reorganization committee representing a part of the stockholders may buy in the property at a public sale by the directors, the business being financially embarrassed, and the price being a fair one. Hayden *v.* Official, etc. Co., 42 Fed. Rep. 875 (1890). See also ch. LII, *infra.*

[3] See § 662, *supra*, and § 892, *infra.* Where the articles of association of an unincorporated joint-stock association authorize dissolution at any time upon the vote of a majority in interest, such dissolution may be had, although it is for the purpose of transferring all the assets to a foreign corporation for stock of the latter, the privilege, however, being given to each stockholder to receive payment in cash on the basis of a certain valuation of the assets, which valuation is fair and adequate. Francis *v.* Taylor, 31 N. Y. Misc. Rep. 187 (1900).

[4] See § 884, *infra.*

[5] Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute the lessee runs the risk of the lease being held void at the instance of a dissenting stockholder. Boston, etc. R. R. *v.* Graham, 60 N. E. Rep. 405 (Mass. 1901). In determining

[6] See Laws 1901, ch. 130.

[7] See § 896, *infra.*

A question may also arise as to whether the selling corporation has power to acquire the stock and bonds of another corporation; but it seems that where all the stockholders of the company accepting the stock assent, no one else can object.[1] By unanimous

the value of a dissenting stockholder's stock which is condemned, in connection with a lease in accordance with the statute, it is immaterial that the stock three years prior thereto was worth more, but that on account of bad management its value had diminished; and it is immaterial that three years prior thereto a lease might have been made at a higher rental. The market value of the stock after the lease may be shown, even though the condemnation was by reason of such lease. The regular market value should be the basis of the award. Gregg *v.* Northern R. R., 67 N. H. 452 (1893). A provision in a general act authorizing leases that a dissenting stockholder may have the value of his stock appraised and paid is legal. Dickinson *v.* Consolidated, etc. Co., 114 Fed. Rep. 232 (1902). Where, in order "to enable the company to keep its stock in the ownership of stockholders of its own choosing," each stockholder enters into an agreement with the corporation that in case he wishes to sell his stock it shall first be appraised and then offered to the corporation before it is offered to any one else, the refusal of the board of directors to make an appraisal, in accordance with the agreement, does not render the corporation liable in damages, inasmuch as it is clear that even though the stock were appraised, the corporation would not buy it. Whiton *v.* Batchelder, etc. Corp., 179 Mass. 169 (1901). Under the English Companies Act all the property of a company may be sold to another company, but provision is made for the protection of the minority by paying them the value of their shares. *Re* London, etc. Bread Co., 62 L. T. Rep. 224 (1890). See also Baring-Gould *v.* Sharpington, etc. Syndicate, [1899] 2 Ch. 80. In England it seems that under the statutory power of one company to sell out to another, the sale may be for cash, and the minority are bound, even though the majority own the purchasing company. But all the cash must be paid, and not merely the part that goes to the minority. Holst *v.* Sydney, etc. Ry., 69 L. T. Rep. 132 (1893). Where, upon the voluntary dissolution of a corporation, a reorganization scheme is carried out by which the property is turned over to a new company for its shares and a reasonable time is fixed within which the old stockholders must exercise their option to take stock or have it sold by the liquidator, a stockholder cannot exercise his option after that time, although he was ignorant of the whole matter, nor can he have the scheme set aside. Postlethwaite *v.* Port Phillip, etc. Co., L. R. 43 Ch. D. 552 (1889); Weston *v.* New Guston Co., 62 L. T. Rep. 275 (1889); s. c., 60 L. T. Rep. 805; aff'd, 64 L. T. Rep. 815. Where an appraisal of the stock of a dissenting stockholder is made under a statute authorizing a consolidation, and there is no market value for the stock, the award is like an unliquidated account and bears interest only after the appraisers' report. Trask *v.* Peekskill Plow Works, 6 Hun, 236 (1875). Where, according to contract, stock sold to the corporation is appraised by the corporation, and the appraised price is actually paid to and received by the stockholder, he cannot maintain a bill to obtain a larger price, but must either rescind or sue at law. Tuttle *v.* Batchelder, etc. Co., 170 Mass. 315 (1898).

[1] Although a corporation cannot purchase or deal in stocks of other corporations unless expressly authorized by law so to do, yet it may take stock in payment for a debt. And where all the stockholders of a manufacturing cor-

consent of the stockholders it is legal for a private corporation to sell all its property to another company, take its stock in payment,

poration consent to the sale of all its property to another corporation in exchange for stock in the latter, even though the former corporation was forbidden by statute to purchase the stock of other corporations, the corporation may then sell the stock, and the vendee cannot set up *ultra vires* on the part of the vendor. Holmes, etc. Co. *v.* Holmes, etc. Co., 127 N. Y. 252 (1891). A contract whereby a corporation agrees to sell all its property to another corporation for bonds and stock of the latter company cannot be enforced, nor be the basis of damages for breach, inasmuch as one corporation has no power to buy the stock of another corporation. Easun *v.* Buckeye Brewing Co., 51 Fed. Rep. 156 (1892). An offer of a corporation to sell out, in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company, where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. Bi-Spool, etc. Co. *v.* Acme Mfg. Co., 153 Mass. 404 (1891). The stockholders of a corporation may, together with the directors, cause the corporate property to be sold to a new corporation in exchange for the stock of the latter. A pledgee of stock in the former corporation cannot after the sale undo the sale or hold the latter corporation liable. His remedy is against the pledgor and the first corporation. Leathers *v.* Janney, 41 La. Ann. 1120 (1889), holding also that a purchasing corporation is not bound to see that the selling corporation distributes the stock of the former legally among the stockholders of the latter corporation. Where a consolidation is effected by one company buying all the stock of another company, and, just before the transaction is completed, the company whose stock is thus sold issues a dividend of interbearing securities in order to defraud the purchasing company, the latter may, by a bill in equity, have such securities canceled. Bailey *v.* Citizens' Gaslight Co., 27 N. J. Eq. 196 (1876). A corporation organized to deal in the stock of a stockyard corporation and hold personal and real estate may buy competing stockyards; and may buy the stock of a contemplated competing company; also buy, guarantee, and sell the bonds of such competing company; also pay money to settle suits against the first-named stockyard company, and to bind stockyard men not to erect competing yards for a specified term of years within a certain territory; and may sell any or all of the above property and right to the first-named company. Ellerman *v.* Chicago, etc. Co., 49 N. J. Eq. 217 (1891). A Michigan capsule company has no right or power to sell all its property to a New Jersey capsule company — a combination company — in exchange for or payment of stock of such New Jersey company. The agreement so to do cannot be enforced, even though every stockholder assented to it. Merz Capsule Co. *v.* U. S. Capsule Co., 67 Fed. Rep. 414 (1895). Even though it be illegal for an irrigation company to subscribe for the stock of a land company, yet where it does so subscribe and turns in property in payment, and the stock is taken in the name of its secretary individually and not as secretary, the company may compel him to turn over the stock, even though he has pledged it for his personal debt, the pledgee, however, having taken with knowledge of all the facts. Bear River, etc. Co. *v.* Hanley, 15 Utah, 506 (1897). See in general 54 Atl. Rep. 413.

and divide the stock among the stockholders, all creditors being paid.[1]

[1] Where an iron manufacturing concern owns an iron manufacturing plant and stocks in an ore company and a railway company and a steamboat company and other corporations, and also a farm, and by consent of all the partners the firm is transformed into a corporation which takes all the property, including the stocks and the farm, one of the participants cannot afterwards complain that it was illegal for the corporation to acquire such stocks and the farm. Burden *v.* Burden, 159 N. Y. Rep. 287 (1899). In the case of Hoene *v.* Pollak, 118 Ala. 617 (1898), where one corporation sold all its property to another corporation for stock of the latter, the stock of the latter was issued directly to the stockholders of the former. A committee appointed by the stockholders to sell the property for stock in a new corporation and dissolve the old corporation and distribute the assets may be liable to the stockholders, if, after making such sale. they delay in dissolving the old corporation and distributing the assets until the new stock becomes worthless. Their liability is a question of negligence for the jury. *In re* Lincoln, etc. Co., 190 Pa. St. 124 (1899). See also §§ 548, 671, *supra*, and § 766, *infra.* The distribution of the stock of the vendee corporation among the stockholders of the vendor corporation amounts to a distribution of the capital stock of the vendor corporation among its stockholders. But this is not necessarily illegal. See §§ 3, 641, *supra.* A statutory liability for dividends paid out of the capital stock abrogates all common-law liability, and if such statute does not prohibit such dividends they may be declared and paid subject to such liability. People *v.* Barker, 141 N. Y. 251 (1894). The company may distribute the assets, provided all creditors are paid. Rorke *v.* Thomas, 56 N. Y. 559 (1874). See, to same effect, cases in § 670, *supra.* A corporate creditor cannot maintain a bill to enjoin the declaration of a dividend out of the capital stock. Mills *v.* Northern Ry., L. R. 5 Ch. App. 621 (1870). *Cf.* ch. XXXII, *supra.* Where a company leases its property to another company at a nominal rental, and the stockholders of the first company transfer their stock to the second company in exchange for stock of the latter, no dividend is involved, and a tax on dividends of the first corporation does not attach. Allegheny *v.* Pittsburgh, etc. R. R., 179 Pa. St. 414 (1897). Practically, there was a division of the corporate assets among the stockholders in the case of Boston, etc. Co. *v.* Bankers', etc. Co., 36 Fed. Rep. 288; aff'd *sub nom.* United Lines Tel. Co. *v.* Boston, etc. Co., 147 U. S. 431 (1893). In this case the usual and simple process of one company selling all its property to the other company, and taking purchase-money mortgage bonds in payment, and then distributing the bonds among its stockholders, was not adopted, but the mortgage was given by the vendor company, the object being not to have the mortgage cover existing property of the vendee company. The vendee company at the same time agreed to construct new lines and place them under the mortgage. The whole scheme was awkward, and was sustained by the courts only after prolonged litigation. In a suit to compel stockholders of a foreign corporation to discover and account for corporate property illegally divided among them, the property must be definitely described. Service on the corporation by publication is insufficient. King *v.* Sullivan, 93 Ga. 621 (1894). If the stockholders and corporate creditors who are prejudiced thereby do not object, a going corporation may sell all its property to another corporation, payment being by the issue

A solvent copartnership may, by consent of the whole firm, merge itself into a corporation, proper provision being made for the payment of creditors.[1] Where a person who holds property which

of stock of the latter corporation to the stockholders of the former corporation, together with the right to such stockholders to subscribe for additional stock in the purchasing corporation. Dissenting stockholders who under protest subscribe for the new stock, and then wait eighteen months before commencing legal proceedings, are estopped from objecting. Post *v.* Beacon, etc. Co., 84 Fed. Rep. 371 (1898). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment, and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). The sale of a business of a corporation which does not specifically transfer the trade name and good will does not enable a purchaser of the business from the corporation to claim such trade name. Cutter *v.* Gudebrod, etc. Co., 44 N. Y. App. Div. 605 (1899). Where a company is in difficulties and an agreement is made by which creditors are given the right to sell all the assets in case the business does not succeed within a certain time, and they do so, the purchaser has no right to organize a corporation having the same name as the old corporation, unless that was a part of the original agreement, and not even a majority of the stockholders have a right to vote to allow such use of the name, unless there is a new consideration therefor. Armington *v.* Palmer, 21 R. I. 109 (1898). Even though a Colorado corporation is organized for the issue of stock in exchange for stock in a Kansas corporation, and a stockholder in the latter assigns his Kansas certificate to another person and causes the Colorado corporation to issue its stock to such other person, yet if he fails to have the transfer recorded in the books of the Kansas corporation he is liable on such Kansas stock. Pine *v.* Western, etc. Bank, 65 Pac. Rep. 690 (Kan. 1901). Even though a Nebraska railroad corporation sells all its property to an Illinois railroad corporation in exchange for stock of the latter, which is issued to the stockholders of the former, the latter does not thereby become a Nebraska corporation, preventing the removal of cases to the federal court. Walters *v.* Chicago, etc. R. R., 104 Fed. Rep. 377 (1900). A corporate creditor cannot attack a sale of all the assets of the corporation for a valuable consideration and in good faith, even though such sale was not formally authorized by the board of directors or stockholders. Magowan *v.* Groneweg, 86 N. W. Rep. 626 (So. Dak. 1901).

[1] Partners who merge their partnership into a corporation and take stock in payment, thereby waive liens which existed in the partnership. Francklyn *v.* Sprague, 121 U. S. 215 (1887). A solvent mercantile firm may transfer all their assets to a new corporation in payment for stock, and then pledge the stock to certain of their creditors. Coaldale Coal Co. *v.* State Bank, 142 Pa. St. 288 (1891). Where a person sells goods to a corporation and agrees to take payment in stock, he must take the stock at par, even though its actual and market value is much less than par. Tilkey *v.* Augusta, etc. R. R., 83 Ga. 757 (1889). Where two members of a firm give notice of a dissolution of the firm, and then transfer all the assets to a newly-formed corporation, the court will place all the property in the hands of the third member of the firm for the purpose of winding it up. Macdonald *v.* Trojan, etc. Co., 10 N. Y. Supp. 91 (1890). Where by agreement a part-

belongs to another person sells the property for stock in a corporation, the latter person may claim the stock.[1] If one corporation sells out to another for stock of the latter, a stockholder in the former may sue the purchasing corporation for his part of such stock, it not having been delivered.[2]

nership is merged into a corporation, and then one partner is refused his part of the stock, he may sue for an accounting and payment in cash. Crosby Lumber Co. *v.* Smith, 51 Fed. Rep. 63 (1892). Under a partnership agreement providing for incorporation, part of the partners may incorporate, transfer the property to the corporation, and compel the other partners to pay in to the corporation the amounts of money contemplated by the partnership agreement before the stock is issued to them. Hennessy *v.* Griggs, 1 N. D. 52 (1890). A corporation formed to purchase the assets of a firm may sue on claims of such firm which have been assigned to it, and the firm are not proper parties to the suit. Lottman, etc. Co. *v.* Houston, etc. Co., 38 S. W. Rep. 357 (Tex. 1896). Although two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division of control. Baumgarten *v.* Nichols, 69 Hun, 216 (1893). A partnership consisting of responsible persons may sell its business for stock to a corporation organized for that purpose. The creditors of the partnership cannot claim a lien on the property. Bristol, etc. Trust Co. *v.* Jonesboro, etc. Trust Co., 101 Tenn. 545 (1898). Where a person sells his business to a corporation for the stock of the latter, with the agreement of the latter to indorse the notes of the vendor, such indorsements are legal. Nat. Bank of Commerce *v.* Allen, 90 Fed. Rep. 545 (1898). Where an individual transfers all his property to a corporation in exchange for its capital stock and a mortgage, neither he nor the corporation can subsequently attack the transaction. Burke, etc. Co. *v.* Wells, etc. Co., 60 Pac. Rep. 87 (Idaho, 1900).

[1] Chapman *v.* Porter, 69 N. Y. 276 (1877); *Re* Gilbert, 104 N. Y. 212 (1887).

[2] The court said: "We have of late refused to be always and utterly trammeled by the logic derived from corporate existence where it only serves to distort or hide the truth." Anthony *v.* American Glucose Co., 146 N. Y. 407 (1895). Where one company is sold out to another company on the basis of the latter company issuing its stock share for share for the stock of the former company, a stockholder of the former company may sue the latter company for his stock without joining the old company or any of the old stockholders. Fletcher *v.* Newark, etc. Co., 55 N. J. Eq. 47 (1896). Where by the terms of a lease of all the corporate property the rent is to be paid directly to the stockholders as dividends, and a prior mortgage of the lessee is foreclosed, and the lease is not assumed by the receiver, a stockholder of the lessor cannot object to a subsequent arrangement between the lessor and the reorganized company of the lessee by which a certain sum is paid to the lessor to be used for other purposes than dividends. Central, etc. Co. *v.* Farmers', etc. Co., 112 Fed. Rep. 81 (1901). Where various properties are transferred to a coal company for stock on the further understanding that all moneys already expended on such properties should be repaid in bonds of a railway to be guaranteed by the coal

§ 672. *Corporate creditors' rights where the corporation sells all its property to another corporation for stock of the latter — Rights and remedies of creditors of an individual or partnership, all of whose assets are transferred to a corporation in exchange for stock or bonds.*— Where a corporation sells all its property for cash there is no difficulty in regard to creditors, the sale being an honest one, inasmuch as the cash must be applied to the corporate debts before any distribution is made among the stockholders. But where the property is sold for stock a more difficult question arises. A creditor of the corporation then has several remedies open to him. He may subject the stock to the payment of his debt;[1] and if the stock-

company, but such distribution of bonds is never made on account of the impossibility of such a guaranty being legally made, one of the parties who turned in his property may hold the coal company liable in damages for the amount of money expended by him on the property before turning it in for stock. Crown, etc. Co. *v.* Thomas, 177 Ill. 534 (1898). A contract between two companies, by which one buys out the other and agrees to issue certain securities to stockholders of the vendor does not give such stockholders a direct right as against the purchasing company. *Re* Metropolitan, etc. Co., [1900] 2 Ch. 671. Although a new company with the same name and capital stock buys out the old, yet a stockholder in the old cannot compel a transfer of his stock on the books of the new. Huggins *v.* Milwaukee B. Co., 10 Wash. 579 (1895). Where the sale of one company to another was induced by fraud, the vendor may rescind, even though the stock of the vendor was canceled as a part of the sale. Texas, etc. Assoc. *v.* Dublin, etc. Co., 38 S. W. Rep. 404 (Tex. 1896). Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum specified in the contract of sale. Chicago, etc. Ry. *v.* Hoyt, 89 Wis. 314 (1895). Where the assets of a corporation are turned over to a new corporation and all the stockholders exchange their stock for new stock, they cannot afterwards claim that a surplus of the old corporation should have been divided. Boynton *v.* Roe, 114 Mich. 401 (1897). As to a suit to collect guaranteed dividends, see § 775, *infra.*

[1] Corporate creditors may object to the company selling out all its property to another corporation and receiving pay in the stock of the latter corporation. Such stock may be subjected by the creditors to their debts, or the conveyance may be set aside and the company wound up as insolvent. Vance *v.* McNab, etc. Co., 92 Tenn. 47 (1892); Fort Payne Bank *v.* Alabama Sanitarium, 103 Ala. 358 (1894). Where the corporation sells all its assets, and the purchasing corporation gives its bonds to the stockholders of the former, such bonds belong to the corporate creditors. Peters *v.* Fort Madison Const. Co., 72 Iowa, 405 (1887). Where a railroad is sold, the proceeds cannot be distributed among the stockholders without paying creditors. Where bonds are received in payment and distributed among the stockholders and income bondholders, the general creditors may reach such bonds. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). Where the stockholders distribute the assets of the corporation among them-

holders have distributed the stock among themselves without paying the corporate debts, he may compel them to return the stock and apply it to his debt;[1] or he may levy an attachment or execution upon the property which was transferred;[2] or, after obtaining

selves, leaving enough, as they suppose, to pay the debts of the company, and it turns out that the amount left is not sufficient, the stockholders must pay back enough to liquidate such debts. Grant *v.* Ross, 100 Ky. 44 (1896). A treasurer cannot interplead between the stockholders and a corporate creditor who is seeking to reach bonds received by the corporation in payment for its property. Stone *v.* Reed, 152 Mass. 179 (1890). Where the officers of a bank use its funds to buy property, which they then turn in to a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property, at their option. Farmers', etc. Bank *v.* Kimball Milling Co., 1 S. D. 388 (1890). Where a mortgagee in possession of the property leases it with other property and takes stock in payment, he must account to the mortgagor for the dividends received on the stock representing the mortgaged property. The stock is impressed with a trust character. Entries on the stock ledger and corporate books are competent evidence of the issue. Chapman *v.* Porter, 69 N. Y. 276 (1877).

[1] Where the stockholders distribute the assets among themselves, a creditor may follow the assets. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498 (1890). Creditors may reach stock which the corporation, which becomes insolvent, has distributed without a dividend. McKusick *v.* Seymour, etc. Co., 48 Minn. 172 (1892). Where a corporation sells its property to another corporation for stock of the latter to be delivered to stockholders of the former, the creditors of the former may hold each stockholder liable for the amount received by him, or such creditors may follow the property itself. Vance *v.* McNabb, etc. Co., 48 S. W. Rep. 235 (Tenn. 1897). Where a construction company distributes its assets among its stockholders without paying its creditors, the stockholders may be compelled to disgorge to the extent of the debts so remaining unpaid. Grant *v.* Southern Contract Co. etc., 47 S. W. Rep. 1091 (Ky. 1898).

[2] A creditor of an insolvent corporation may attach its property which has been transferred by it to another corporation in payment for the whole capital stock of the latter corporation. McVicker *v.* American Opera Co., 40 Fed. Rep. 861 (1889). A judgment creditor of an insolvent corporation may levy on and sell under execution the property of the corporation which has been conveyed to a new company, under a reorganization plan to which all of the old stockholders and most of the creditors have assented. Montgomery Web Co. *v.* Dienelt, 133 Pa. St. 585 (1890). A creditor of the corporation that sells out all its property to another corporation for stock in the latter may levy an execution on the property on the ground that it is conveyed in fraud of creditors. Couse *v.* Columbia, etc. Co., 33 Atl. Rep. 297 (N. J. 1895). A stockholder, to whom an insolvent corporation has transferred all its property in exchange for his stock, cannot enjoin a judgment creditor from selling out such assets under execution against the corporation. Moffat *v.* Smith, 101 Fed. Rep. 771 (1900). Where a corporation that is in debt transfers all its assets to a new corporation in exchange for the stock of the latter, a creditor of the former may levy an attachment on such assets. Buckwalter *v.* Whipple, 41 S. E. Rep. 1010 (Ga. 1902).

an unsatisfied judgment against the corporation,[1] he may file a bill in equity to set aside the sale as being in fraud of creditors;[2] or

[1] A corporate creditor seeking to reach the assets of the company which have been distributed among the stockholders, upon a sale of all the property of the company, cannot file a bill in equity for that purpose until he has first obtained judgment against the company. Swan, etc. Co. *v.* Frank, 148 U. S. 603 (1893); Central R. R. *v.* Pettus, 113 U. S. 116 (1885). A creditor of a stockholder cannot complain that all the corporate property was sold to the stockholders for their stock. Wagner *v.* Marple, 10 Tex. Civ. App. 505 (1895).

[2] In a judgment creditor's suit to reach assets of an insolvent corporation which have been turned over to the stockholders in fraud of creditors, the judgment of the creditor against the corporation cannot be impeached except by fraud and jurisdiction. All of the stockholders need not be joined, but if any stockholder wishes the equities adjusted as between the various stockholders, he can file a cross-bill. Singer *v.* Hutchinson, 183 Ill. 606 (1900). A creditor may file a bill to set aside a transfer of all the assets of a corporation without consideration, leaving the company insolvent, and to compel the officers to account therefor. South Bend, etc. Co. *v.* George C. Cribb Co., 81 N. W. Rep. 675 (Wis. 1900). Where one company has sold all of its assets to another company, a creditor of the former may file a bill in equity against the latter to collect from the assets so transferred, even though the damages are unliquidated, the bill charging that the sale was not in good faith and the transaction being practically a consolidation. Vicksburg, etc. Co. *v.* Citizens' Tel. Co., 79 Miss. 341 (1901). A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given, and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid and may be set aside by a judgment creditor of the selling corporation. Summers *v.* Glenwood, etc. Co., 86 N. W. Rep. 749 (So. Dak. 1901). A judgment creditor who causes fraudulent preferences by an insolvent corporation to be set aside does not thereby himself obtain a preference over other creditors who did not institute proceedings. Lodi, etc. Co. *v.* National, etc. Co., 41 N. Y. App. Div. 535 (1899). Where a New Jersey corporation is sold out to a New York corporation, a judgment creditor of the former may file a bill in New York to reach the assets of the former corporation, and may join as a party defendant a director in the former corporation who brought about the transfer of such assets. Clokey *v.* International, etc. Co., 28 N. Y. Misc. Rep. 326 (1899). Where, in a foreclosure suit and before sale, the corporation and the bondholders agree to rent the railroad to another company, and do so rent it at a rental which meets the interest but leaves nothing for the unsecured creditors, the latter may have the railroad subjected to the payment of their debts. Farmers', etc. Co. *v.* Missouri, etc. Ry., 21 Fed. Rep. 264 (1884). Although one company owns a majority of the stock of another company, and the property of the latter company is leased to the former at a fixed rental, the rent to be paid to bondholders of the latter, a judgment creditor of the latter cannot have the lease set aside unless he can show that the income of the latter company is more than sufficient to pay the rental, there being no proof that the rental was unfair, and there being proof that the rental is more than the company earned. The principle that the owner of a majority of the stock will not be permitted to defraud stockholders or creditors does not apply.

under some circumstances he may hold liable the corporation that purchased the property from the corporation that is indebted to

Sidell *v.* Missouri Pac. Ry., 78 Fed. Rep. 724 (1897). Where a brewery company is dissolved in order that its assets may be sold and consolidated with other breweries, a person who had a bottling contract with it may follow its assets and subject them to his claim. Schleider *v.* Dielman, 44 La. Ann. 462 (1892). Where a creditor of a corporation seeks to reach property which has been fraudulently conveyed away by the company, he need not make the corporation a party defendant to the suit which he brings against the party who received the property. Blanc *v.* Paymaster Min. Co., 95 Cal. 524 (1892). The formation of a new corporation and a transfer to it of all the assets of the old one may be a fraud on the creditors of the old corporation. San Francisco, etc. R. R. *v.* Bee, 48 Cal. 398 (1874). It is legal for a coal corporation, with the assent of all its stockholders, to sell all its property to its president, and for him to pay therefor in cash and by a mortgage on the property so purchased, he also agreeing to pay all the debts of the company. Payment was made directly to the stockholders, and they transferred their stock to him in addition to the transfer of the property. A subsequent creditor of the company who knew all of the facts cannot complain. Parke, etc. Co. *v.* Terre Haute, etc. Co., 129 Ind. 73 (1891). A creditor whose claim for $1,000 is contested cannot have a conveyance of all the corporate property to another corporation set aside. Missouri, etc. Co. *v.* Reinhard, 114 Mo. 218 (1893). Contract creditors cannot cause a *bona fide* sale of all the property of a corporation to be set aside merely because the corporation — a going concern — is insolvent. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). The Tennessee statute against liens prior to labor and damage claims does not give such claims a lien ahead of an out-and-out *bona fide* sale of the property. Chattanooga, etc. R. R. *v.* Evans, 66 Fed. Rep. 809 (1895). Where all the stock of a corporation is sold to a vendee, who then takes possession of the corporate assets and ignores the corporate existence, the court may construe this as a sale of the corporate assets. Cusick *v.* Bartlett, 91 Me. 153 (1898). It has been held by the lower court in New York that a creditor of a solvent corporation cannot maintain a bill in equity to reach corporate property that has been transferred to another corporation in exchange for stock of the latter, even though such stock has been divided among the vendor's stockholders, where it is shown that there was no actual fraud and that the creditor's claim was in dispute at the time of the conveyance. Hurd *v.* New York, etc. Co., 52 N. Y. App. Div. 467 (1900). Where a corporation is under contract to pay royalties, and subsequently all its assets are sold to another corporation for stock of the latter, which is distributed among the stockholders of the former, and subsequent royalties are not paid, judgment therefor may be obtained against the old corporation, and, upon execution returned unsatisfied, a bill in equity may then be filed to reach the assets so transferred to the new corporation. Wilson *v.* Aeolian Co., 64 N. Y. App. Div. 337 (1901). Where one corporation transfers all its property to another in consideration of the issue of the stock of the latter to the stockholders of the former, a superintendent and patentee having a contract with the former corporation by which he is entitled to twenty-five per cent. of all profits from manufacturing, use, or sale under said patents, in addition to his salary, and also an interest in all machines sold, may file a bill for an actual ac-

him.[1] But any unreasonable delay on the part of the creditor in applying for relief will be fatal to his application.[2] Where all the property of a telegraph company is sold and the proceeds dis-

counting as to the value of his interest so transferred to the new corporation, and may join all the stockholders as parties defendant. Schaake v. Eagle, etc. Co., 135 Cal. 472 (1901). Even though a corporation is put into a receiver's hands, under a statute relative to insolvent corporations, and notice for the presentation of claims is given, and, in accordance with the statute, all claims not presented within four months are barred and the property is then sold, yet a non-resident creditor who had no actual notice may attack the proceedings on the ground that they were fraudulent and for the purpose of reorganizing the company in fraud of creditors. Dobson v. Peck Bros. & Co., 103 Fed. Rep. 904 (1900). A general creditor of a solvent corporation cannot maintain a bill in equity against a person to whom the corporation has assigned all its property. Ames & Harris v. Sabin, 107 Fed. Rep. 582 (1901). An insolvent Ohio corporation may transfer all its assets to a New Jersey corporation which assumes all the debts. The bondholders of the Ohio corporation cannot object. Such bondholders become creditors of the New Jersey corporation. Blake v. Domestic, etc. Co., 38 Atl. Rep. 241 (N. J. 1897). Even though a railroad company has guaranteed the bonds of another railroad company, and then sells all its property to a third railroad company, yet the guaranteed bondholders cannot have a receiver appointed of the price received on such sale, nor can they prevent a distribution of the price among the stockholders of the selling company, unless it is shown that thereby the guarantor is made insolvent. Guilmartin v. Middle G. & A. Ry., 101 Ga. 565 (1897).

[1] See § 673, *infra.*

[2] Seven years' delay on the part of an alleged creditor of the old company is fatal to any relief. Townsend v. St. Louis, Sandoval, etc. Co., 159 U. S. 21 (1895). A creditor of a corporation who wishes to object to a transfer of its assets to another corporation must do so promptly after he learns of the same, and a delay of three or four years, during which others become creditors of the new corporation and the latter become insolvent, will bar his claim for an equitable lien on the assets. Anthony v. Campbell, 112 Fed. Rep. 212 (1901). Where one of the partners in a firm organized to locate, develop, and operate mines does not turn into the firm a mine located by him, but transfers the same to a corporation for stock, and the other partners delay for two years after knowledge thereof before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money and the stock may have passed into other hands, the court will refuse relief, inasmuch as the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to claim an interest if it turned out to be valuable. Curtis v. Lakin, 94 Fed. Rep. 251 (1899). Where the corporate creditor delays and allows the corporation taking over the property to incur debts, he cannot then complain. Vaughn v. Comet, etc. Co., 21 Colo. 54 (1895). Corporate creditors of an insolvent corporation may set aside a sale of all its property to another corporation for bonds of the latter, the bonds being then distributed among stockholders of the former, even though such creditors knew of and acquiesced in the sale at the time. Fort Payne Bank v. Alabama Sanitarium, 103 Ala. 358 (1894). Creditors who assent to a corporation turning over all its assets to a partnership, and agree to accept the partnership as their debtor, cannot

tributed among the stockholders, a creditor of the company may, by a bill in equity, compel the stockholders to pay the claim against the corporation, the proceeds being a trust fund.[1] Even though a sale of all the corporate property to an individual may be invalid as to corporate creditors, yet a purchaser cannot defend against the price on the ground of such invalidity.[2]

Where the officers of the corporation have aided in transferring its assets to another corporation, a civil action for damages for a conspiracy to defraud may lie.[3] The receiver of an insolvent corporation which has been rendered insolvent by reason of its assets having been disposed of by another corporation may hold its directors liable for the loss, and his suit may be at law or in equity.[4] Where the purchasing company is a mere "dummy" for the selling company, a creditor of the latter may sometimes disregard the identity of the purchasing company.[5] An insolvent corporation cannot transfer all its assets to one of its directors upon his guarantee to pay all the debts. A creditor may file a bill to set aside a sale by such director of part of the assets to one of the creditors in discharge of a debt.[6] The agreement of a creditor of a corporation to take stock in a proposed reorganized company may be revoked by the creditor at any time before actual performance.[7] The creditor of a corporation may garnishee a person owing such corporation on a subscription for stock, even though such corporation has sold its assets to another corporation.[8] Where an insolvent corporation sells its assets for bonds and stock in another corporation, it may sell such bonds and stock to one of its directors at a fair price, no actual fraud being involved.[9]

afterwards complain of the transaction. Tenney *v.* Ballard, etc. Co., 17 Tex. Civ. App. 144 (1897).

1 Baltimore, etc. Tel. Co. *v.* Interstate, etc. Tel. Co., 54 Fed. Rep. 50 (1893).

2 Clapp *v.* Allen, 20 Ind. App. 263 (1898).

3 Russell *v.* Post, 138 U. S. 425 (1891). Where a corporation turns over all its assets to its president to pay its debts, and he pays all but one debt and then distributes the balance among the stockholders, he is personally liable on that one debt, the amount turned over by him to the stockholders being sufficient to pay it. Carter *v.* Forbes, etc. Co., 22 Tex. Civ. App. 549 (1900).

4 Mason *v.* Henry, 152 N. Y. 529 (1897).

5 See §§ 6, 663, *supra*, and § 709, *infra*.

6 Berney Nat. Bank *v.* Guyon, 111 Ala. 491 (1896). As against corporate creditors the company cannot trade off all its assets for other property, where the latter property is not of a character to be used to pay debts, even though ultimately it will probably be very valuable, such trade being with the general manager of the company. Levins *v.* Peeples, etc. Co., 38 S. W. Rep. 733 (Tenn. 1896). *Cf.* 33 S. Rep. 866.

7 Providence, etc. Co. *v.* Kent, etc. Co., 19 R. I. 561 (1896).

8 Prentice *v.* United States, etc. Co., 78 Fed. Rep. 106 (1897). In Long *v.* Evening News Assoc., 113 Mich. 261 (1897), a judgment creditor of the corporation that had sold all its assets to another corporation in payment of a debt garnished the latter for his debt.

9 Graham *v.* Carr, 41 S. E. Rep. 379 (N. C. 1902).

The rules above laid down are applicable in most respects to a sale by a partnership of all its property to a corporation in exchange for stock. Such sales often are made in order to merge a solvent copartnership into a corporation. They are also made sometimes by an embarrassed or insolvent firm. In such a case the creditors of the firm may object. They may levy an attachment or execution on the property,[1] or reach the stock,[2] or file a bill in equity to set the sale aside.[3]

[1] Booth *v.* Bunce, 33 N. Y. 139 (1865); San Francisco, etc. R. R. *v.* Bee, 48 Cal. 398 (1874). Creditors of an insolvent individual who transfers his property to a corporation for stock may attach the property on the ground that the act hindered and delayed creditors. Dolan *v.* Wilkerson, 57 Kan. 758 (1897). Creditors of a person who sells his property to a corporation for stock of the latter cannot attach the corporation as garnishee, inasmuch as they may levy on the stock. Plaut *v.* Billings-Drew Co., 127 Mich. 11 (1901). Where an insolvent partnership sells all its assets to a corporation for stock of the latter, a judgment creditor of such partnership may levy on such assets, inasmuch as the stock so received had no value, the corporation itself becoming insolvent within two months. Mulford *v.* Doremus, 45 Atl. Rep. 688 (N. J. 1900). A creditor of an insolvent individual who transfers his property to a corporation in exchange for stock and then distributes the stock *pro rata* among his creditors may levy an attachment upon the property as having been transferred with the result of delaying creditors. Curran *v.* Rothschild, 14 Colo. App. 497 (1900). A creditor of an insolvent firm which has turned over all its assets to a corporation for stock may levy upon the property so transferred, especially where one creditor was given a part of the stock for his debt. Colorado, etc. Co. *v.* Acres, etc. Co., 70 Pac. Rep. 954 (Colo. 1902).

[2] Where a firm turns all its property into a corporation for stock, a firm creditor cannot reach the stock of one member of the firm in preference to other creditors of that member. Singer, etc. Co. *v.* Carpenter, 125 Ill. 117 (1888). If the partnership is insolvent, then the stock issued is "watered," and the subscribers are liable as though no payment was attempted. Sayler *v.* Simpson, 45 Ohio St. 141 (1888).

[3] The creditors of a person may, by bill in equity, set aside a transfer of all his property to a corporation in exchange for shares of stock. Strieby *v.* Clinton, etc. Co., 29 Atl. Rep. 589 (N. J. 1894). Judgment creditors of an individual may file a bill to set aside a transfer of his property to a corporation for stock, the stock having been distributed among his relatives. Metcalf *v.* Arnold, 110 Ala. 180 (1896). Where a person deeds land to a corporation for stock, but does not record it until the date when he makes an assignment, and there was no delivery of the deed except to himself as president, the deed may be set aside. Taylor *v.* Seiter, 65 N. E. Rep. 433 (Ill. 1902). Where an insolvent person transfers all his property to a corporation for stock and bonds and practically ignores the corporate existence, except to transfer certain of its property to his sons for services, and he then transfers property to his wife, his creditors may have the transfer set aside as fraudulent. Goodale *v.* Wheeler, 68 Pac. Rep. 753 (Oreg. 1902). A judgment creditor of a partnership may set aside a transfer of its property to a corporation in exchange for stock of that corporation. Buell *v.* Rope, 6 N. Y. App. Div. 113 (1896). In Tradesmen's Nat. Bank *v.*

Even though a partnership becomes incorporated, yet a party who has dealt with the partnership, and supposes that he is still

Young, 15 N. Y. App. Div. 109 (1897), the court refused to set aside a transfer of all the assets of an insolvent partnership to a corporation for stock, inasmuch as the creditors of the partnership would secure more by having the transaction stand than set aside. Where one member of a firm buys out the other member and gives his note, and then forms a corporation and turns in the property for stock, and the corporation becomes insolvent, the property cannot be turned over to the retiring partner in payment of such note. Hall *v.* Goodnight, 138 Mo. 576 (1896). Where an insolvent person transfers his property to a corporation for all the stock of the corporation, and the corporation assumes a certain debt of such person, and subsequently conveys its property to such creditor, the whole plan being in order to make payment that way, other creditors of the corporation may object. Folsom *v.* Detrick, etc. Co., 85 Md. 52 (1897). Where an insolvent individual transfers all his property to a corporation for stock, and his principal creditor acquiesces and loans money to the corporation, and then takes the notes of the corporation for the old debt which such creditor had against the insolvent individual, the transaction is illegal as against other creditors of the corporation. Craig *v.* California, etc. Co., 30 Oreg. 43 (1896). Where a corporation is formed to make advances to an insolvent copartnership, taking a lien on the property of the latter, and the latter continues the business in its own name and turns over the proceeds of the sales to the former, the scheme is illegal as giving the firm a false credit and as being inconsistent with the nature of a chattel mortgage. Mathews *v.* Hardt, 37 N. Y. Misc. Rep. 653 (1902). A deed of land to a corporation for stock will not be set aside at the instance of creditors of the grantor where the corporation has other property and took the property in question in good faith, even though the grantor immediately transferred the stock to his relatives. Shumaker *v.* Davidson, 87 N. W. Rep. 441 (Iowa, 1901). In the case of Collins *v.* Stofer's Ex'rs, 52 S. W. Rep. 940 (Ky. 1899), the court held that where the purchaser at foreclosure sale of a gas plant sold the property to an individual on credit, and the latter, instead of operating it himself, operates it in the name of the insolvent corporation, creditors who become such thereafter have no lien prior to the purchase-money lien of the vendor of the property, no deed by the latter having been made. Where a husband and wife accumulate property by their joint efforts and transfer it to a corporation for stock, a creditor of the husband may subject one-half of the stock to the payment of his debt. Croarkin *v.* Hutchinson, 187 Ill. 633 (1900). Where a partnership buys goods in the name of a person as agent and afterwards incorporates, and the corporation makes purchases in the same name as agent, the members of the former firm are liable for the goods so bought for the corporation if the vendor had no notice of the incorporation. Bynum *v.* Clark, 125 N. C. 352 (1899). A transfer of a business by an insolvent person to a corporation for stock is void under the statute of Elizabeth as defeating and delaying creditors. *Re* Carey, Sol. Jour., June 8, 1895, p. 541. A receiver of the corporation was appointed in Bonner *v.* Villaume, etc. Co., N. Y. L. J., Feb. 14, 1895 (Com. Pl.). A conveyance of real estate to a corporation for all its shares of stock is fraudulent as against a mechanic's lien. Gross *v.* Daly, 5 Daly, 540 (1875). Creditors of an insolvent individual who has transferred his property to a corporation may file a bill to set aside the sale and to have the property

dealing with it, may hold the partners liable for goods furnished after the incorporation.[1] If an insolvent person sells his property to a corporation for practically all of the capital stock of the latter, and his creditors attach not only the stock but also the property, the corporation may compromise with the creditors and buy such stock and the creditors' interest in the property.[2] Where preferences are not forbidden, an insolvent person may transfer his property to a corporation in exchange for stock of the latter and pledge such stock with a portion of its creditors. The other creditors cannot set aside the transfer as being in fraud of creditors where the corporation owned other property also and was organized in good faith. The creditors, however, may reach any such stock which the debtor has fraudulently disposed of.[3]

sold. Cass *v.* Sutherland, 98 Wis. 551 (1898). A creditor of an insolvent individual may cause to be set aside a transfer of all his property to a corporation formed for that purpose in exchange for stock. Reille *v.* Reid, 28 Ont. Rep. 497 (1897). In *Ex parte* Kenmore, etc. Co., 50 S. C. 140 (1897), the court allowed the corporate creditors to participate with the creditors of the insolvent debtor in the assets that had been turned over to the corporation for stock. A creditor of an insolvent person may treat as void a conveyance of all his property to a corporation in exchange for its shares of stock. He may file a bill to set aside the conveyance. Terhune *v.* Skinner, 45 N. J. Eq. 344 (1889). In an action by a judgment creditor of a partnership to set aside a conveyance of all its property to a corporation in consideration of its stock, the corporation, its mortgagee, the copartners, and creditors assenting to the transfer are all necessary parties. National Broadway Bank *v.* Yuengling, 58 Hun, 474 (1890). A judgment creditor of a failing firm may set aside an assignment of their property to a corporation formed to take over the property, even though the shares of stock have been sold. Gardner *v.* Keogh Mfg. Co., 63 Hun, 519 (1892). Creditors of a firm that is transformed into a corporation may pursue the firm's assets so transferred. Williams *v.* Colby, 6 N. Y. Supp. 459 (1889). Where partnership assets are transferred to a corporation in payment for its stock, and the corporation pays part of the debts of the partnership and becomes insolvent, a member of the partnership who individually gave security for some of the partnership debts cannot claim a lien on the corporate assets in priority to corporate creditors. *Re* Warner, 82 Mich. 624 (1890).

[1] Reid *v.* Kreling's Sons' Co., 125 Cal. 117 (1899). Where a firm sells its business to a corporation, but the employees are not given actual notice thereof, and the business continues, the firm may be liable for an injury incurred in the course of the business. Goodwin *v.* Smith, 66 S. W. Rep. 179 (Ky. 1902). See also § 243, *supra. Cf.* 54 Atl. Rep. 356.

[2] Sutton *v.* Dudley, 193 Pa. St. 194 (1899). Where an individual who owes a debt transfers property to a corporation, and later the corporation, with the consent of all the stockholders and creditors, gives a bill of sale of certain property to pay such debt, the corporation itself cannot subsequently complain. Quee Drug Co. *v.* Plaut, 55 N. Y. App. Div. 87 (1900).

[3] Fischer *v.* Campbell, 101 Fed. Rep. 156 (1900). An insolvent individual may transfer his property to a corporation for stock and pledge the stock to

§ 673. *A corporation taking over all the property of another corporation may be liable for the debts of the latter.*— The general rule undoubtedly is that a corporation which purchases all the property of another corporation is not liable for the debts of the latter.[1]

one of his creditors. Haring *v.* Hamilton, 107 Wis. 112 (1900). An insolvent partnership may transfer its property to a corporation in exchange for stock and then give the stock to certain of its creditors. Such a transaction is merely a method of giving a preference allowable at common law. Troy *v.* Morse, 22 Wash. 280 (1900). Where preferences by an insolvent debtor are allowed, such insolvent debtor may turn over his property to a corporation in exchange for stock of the latter and may transfer such stock to one of his creditors, it being proved that this was a good business move and that no property was covered up thereby. Scripps *v.* Crawford, 123 Mich. 173 (1900). Where an insolvent person transfers all his property to a corporation in exchange for its stock and then pledges the stock to a few of his creditors, the transfer is a preference within the meaning of the bankruptcy act, and may be set aside, and is also illegal at common law where the transfer was intended to place the stock beyond the reach of his creditors. Allen *v.* French, 180 Mass. 487 (1901). A transfer by an insolvent person of all his property to a corporation for stock is not fraudulent as a matter of law, and where it was done with the knowledge of all his creditors, and the stock was then with their knowledge transferred to a person who guaranteed payment of the debts to the extent of thirty-five per cent., a single creditor who stands out for fifty per cent. will not be allowed to set aside the transfer. Kingman & Co. *v.* Mowry, 182 Ill. 256 (1899). But where such assignment was not in good faith a judgment creditor may cause it to be set aside. Hinkley *v.* Reed, 182 Ill. 440 (1899). In the case of First National Bank, etc. *v.* F. C. Trebein Co., 59 Ohio St. 316 (1898), where an insolvent person formed a corporation and transferred all his property to the corporation in exchange for the stock thereof, and then transferred the stock to certain of his creditors as collateral security, the court held that as a court of equity it would set aside the transfer as being fraudulent and also on the ground that the fiction of corporate existence will be disregarded where fraud is involved. See § 663, *supra.*

[1] Gray *v.* National Steamship Co., 115 U. S. 116 (1885). Even though a corporation transfers all its property to another corporation on a contract made prior to incorporation of the latter, yet the latter is not liable unless it accepted the property with knowledge of the contract and upon an express or implied undertaking to carry it out. Holyoke, etc. Co. *v.* United States, etc. Co., 65 N. E. Rep. 54 (Mass. 1902). A railroad corporation which purchases the property of another railroad corporation is not liable, upon the dissolution of the latter, for a tort committed by it. Chesapeake, etc. R. R. *v.* Griest, 85 Ky. 619 (1887). *Cf.* Batterson *v.* Chicago, etc. Ry., 53 Mich. 125 (1884). See also § 890, *infra.* And, in general, that the new corporation is not liable for the debts of the old, see Ewing *v.* Composite B. S. Co., 169 Mass. 72 (1897); Port Gibson *v.* Moore, 21 Miss. 157 (1849); Shaw *v.* Norfolk County R. R., 82 Mass. 407 (1860); Pennsylvania Transp. Co.'s Appeal, 101 Pa. St. 576 (1882); Smith *v.* Chicago, etc. Ry., 18 Wis. 17 (1864); Neff *v.* Wolf River Boom Co., 50 Wis. 585 (1880); Houston, etc. R. R. *v.* Shirley, 54 Tex. 125 (1880); Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8 (1835); Menasha *v.* Milwaukee, etc. R. R., 52 Wis. 414 (1881); Lake Erie, etc.

Nevertheless there are circumstances under which the purchasing corporation is liable for the debts of the old company. Thus, where the purchasing corporation assumes all liabilities, a creditor of the

Ry. *v.* Griffin, 92 Ind. 487 (1883); Gilman *v.* Sheboygan, etc. R. R., 37 Wis. 317 (1875); Sappington *v.* Little Rock, etc. R. R., 37 Ark. 23 (1881); Cook *v.* Detroit, etc. Ry., 43 Mich. 349 (1880). Where property is to be turned in to a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it. Rathbun *v.* Snow, 123 N. Y. 343 (1890). See also, on this subject, ch. LII, *infra*, as to the liability of a purchaser of a railroad at a foreclosure sale. Where two banks are consolidated into a third bank, the stock of the new bank being issued in exchange for stock of the old, the new bank is not liable on the debts of either of the old banks. Donnally *v.* Hearndon, 41 W. Va. 519 (1895). A new bank which takes over a part of the assets of another bank is not liable for the debts of the latter, even though the individuals interested in both banks are practically the same. Campbell *v.* Farmers', etc. Bank, 49 Neb. 143 (1896). A purchasing corporation is not liable unless it has expressly assumed such liability. Fernschild *v.* Yuengling Brewing Co., 15 N. Y. App. Div. 29 (1897); aff'd, 154 N. Y. 667.

A corporation which issues stock in payment for the assets of a partnership is not liable for taxes assessed against the partnership, unless it has assumed the same. Lamkin *v.* Baldwin, etc. Co., 72 Conn. 57 (1899). A company that buys all the assets of another company is not liable for the debts of the latter unless there is an express contract to that effect, it being shown that the latter is able to pay its own debts. Advance, etc. *v.* Penn. etc. Co., 195 Pa. St. 602 (1900). A street railway company which purchases the street railways and property of another company is not bound to honor passes issued by the latter, even though such passes were issued for rights of way. Wallace *v.* Ann Arbor, etc. Ry., 121 Mich. 588 (1899). A telephone company that purchases all the property and assets of another telephone company is not liable for damages for personal injuries due to the negligence of the latter. Chase *v.* Michigan, etc. Co., 80 N. W. Rep. 717 (Mich. 1899). A railroad company is not liable for the debts of a defunct company that started work and abandoned the work, even though an irregular transfer of its assets was made by the latter to the former. Gulf, etc. Ry. *v.* Winder, 63 S. W. Rep. 1043 (Tex. 1901). Even though a bank as mortgagee of a glass factory takes possession and undertakes to continue the business in the name of the glass company, yet the bank cannot be held liable on a contract of the latter, inasmuch as the bank had no authority to carry on such business. Louis Bletz & Co. *v.* Bank of Kentucky, 55 S. W. Rep. 697 (Ky. 1900). Even though a New York corporation organizes a West Virginia corporation and transfers to the latter all its property, and the latter is managed by the same parties, yet the latter is not liable on a contract of the old corporation. Goldmark *v.* Magnolia, etc. Co., 44 N. Y. App. Div. 35 (1899). Even though a person buys all the stock, bonds, and property of a corporation, and a suit is pending against the corporation for negligence, yet he is not liable for a judgment thereon. Tilley *v.* Coykendall, 69 N. Y. App. Div. 92 (1902). Where a lessee corporation transfers all its property to a new corporation in exchange for the stock of the latter, the latter is liable on the lease. Higgins *v.* California, etc. Co., 122 Cal. 373 (1898). Where a corpora-

vendor corporation may in some jurisdictions sue the vendee corporation on his claim;[1] but in jurisdictions where a contract between two persons for the benefit of a third cannot be enforced by

tion sells all its property to another corporation for stock of the latter, to be given to stockholders of the former, an infant stockholder in the old corporation may hold the latter liable for the value of the stock, after he becomes of age, even though he consented to the transaction and took new stock, which he afterwards returned. White *v.* New Bedford, etc. Corp., 178 Mass. 20 (1901). Where the mortgaged property is burned and the insurance money is paid over to the trustee, and the trustee, with the consent of all the bondholders and in pursuance of an order of the court, pays over the money to the reorganized company on representations that the money will be used to rebuild the buildings, and the reorganized company uses only part of the money for that purpose, a bill in equity to compel the new company to account for the remaining part and to apply it to the rebuilding of the buildings will not lie. Dallett *v.* Staten Island, etc. Co., 61 N. J. Eq. 39 (1901).

[1] Tecumseh Nat. Bank *v.* Best, 50 Neb. 518 (1897). Where one company buys out another and assumes the debts of the latter, a creditor of the latter company may assign his claim as collateral security; but the pledgee is not bound to institute suit to collect such claim, and is not liable for failure so to do, even though the claim is finally lost. Sampson *v.* Fox, 109 Ala. 662 (1896). A purchasing company may be held liable on the debts of the vendor company where the former expressly agrees in the contract of purchase to pay said debts. Noll *v.* Chattanooga Co., 38 S. W. Rep. 287 (Tenn. 1896). Where a *de facto* corporation incurs debts, and subsequently a new corporation legally organized takes over the business and assumes the debts, the creditors of the *de facto* corporation may hold the latter corporation liable. Calumet Paper Co. *v.* Stotts Inv. Co., 96 Iowa, 147 (1895). Where a corporation sells all its property to another corporation in payment for stock of the latter, and the new corporation assumes all the liabilities of the old corporation, a creditor of the old corporation may sue the new corporation on his claim. Friedenwald Co. *v.* Asheville Tobacco Works, 117 N. C. 544 (1895). Even though one corporation assumes all the liabilities of another corporation, the remedy of a creditor to enforce such liability against the former corporation is in equity and not in law. Harvey *v.* Maine, etc. Co., 92 Me. 115 (1898). Where one company buys all the assets and assumes all the liabilities of another, the court may appoint a receiver of the latter to enforce such liabilities against the former. Barber *v.* International Co., 48 Atl. Rep. 758 (Conn. 1901). Where one railroad owns all the stock of another railroad, and takes a transfer of its property, subject to its debts, it is liable for a tort committed by such other railroad. Louisville, etc. Co. *v.* Biddell, 66 S. W. Rep. 34 (Ky. 1902). In Texas, where, after judgment against a corporation, it is dissolved and a new corporation takes over all its assets and assumes all its obligations, the judgment may be enforced against the new corporation. Proctor *v.* San Antonio, etc. Ry., 62 S. W. Rep. 938 (Tex. 1901). Where one company is sold to another, the latter assuming the debts of the former, a creditor of the former may hold the latter liable, and it is no defense that the sale was *ultra vires*. Rehberg *v.* Tontine Surety Co., 91 N. W. Rep. 132 (Mich. 1902). Where an insolvent corporation transfers its assets to a new corporation, which agrees to pay the debts of the former, the liability of the latter may be enforced by creditors of

the latter, a different rule prevails.[1] In New York a judgment creditor of a company whose assets have been transferred to another company in a consolidation, in exchange for stock of the latter, issued to stockholders of the former, may hold the consolidated company liable on his judgment.[2]

It is also a principle of law that a corporation buying all the property of another corporation, and paying therefor in stock of the former corporation issued to the stockholders of the latter corporation, must either pay the obligations of the latter corporation or have the property sold to pay such obligations.[3] A creditor of

the former corporation. Island City Sav. Bank *v.* Sachtleben, 3 S. W. Rep. 733 (Tex. 1887). Where a reorganized company continues and assumes payment of a liability of the old company, and new advances are made thereunder, the new company is liable thereon. Baker *v.* Harpster, 42 Kan. 511 (1889). Where the assets of a corporation are transferred to a party who agrees to pay the debts, the creditors may enforce the agreement and collect from him. Dimmick *v.* Register, 92 Ala. 458 (1891). Where a corporation is formed to take over the business of a loaning agent, and does so, and carries on the business for five years without any new agreement, it is bound by the terms of the agreement between the agent and his principal. North Am. etc. T. Co. *v.* Colonial, etc. Co., 83 Fed. Rep. 796 (1897). A corporation may give a mortgage to raise an attachment which was levied on land prior to its purchase by the corporation. Leonard, etc. Co. *v.* Bank of America, 86 Fed. Rep. 502 (1898).

[1] Even though one company assumes the payment of the bonds of another company, yet this does not entitle the holder of such bonds to hold the former company liable by a suit in his own name, the bonds being already out at the time the debt was assumed by the former company. The rule might be different where the former company has assets which in equity belong to the bondholders or where the bondholder is the party interested. National Bank *v.* Grand Lodge, 98 U. S. 123 (1878). Even though by a reorganization plan a new company is to assume certain floating debts of the old company, whose property is purchased at the foreclosure sale, yet the holders of such debts have no claim, either in law or in equity, against the new company. Columbus, etc. R. R. Appeals, 109 Fed. Rep. 177 (1901). *Cf.* 120 Fed. Rep. 925.

[2] Hurd *v.* N. Y. etc. Co., 167 N. Y. 89 (1901), rev'g 52 N. Y. App. Div. 467. Where a corporation as licensee of patents consolidates with another corporation, the consolidated company, if it continues to manufacture the articles, is liable under the provisions of the license, even for similar articles not manufactured under the patents, the original license contract being to that effect. Wilson *v.* Mechanical, etc. Co., 170 N. Y. 542 (1902). A consolidation differs from a sale by one company to another in that a creditor of one of the consolidated companies may hold the consolidated company liable on his claim. Morrison *v.* American Snuff Co., 79 Miss. 330 (1901). Where one street railway company transfers all its property to another street railway company for bonds and stock of the latter, to be distributed among the bondholders and stockholders of the former, in exchange for their bonds and stock in the former, the purchasing company is liable on the debts of the selling company, the transaction being practically a consolidation. Shadford *v.* Detroit, etc. Ry., 89 N. W. Rep. 960 (Mich. 1902).

[3] Grenell *v.* Detroit, etc. Co., 112 Mich.

the old company may sue the new company to charge the assets taken over by it with payment of the old company's debts, and may recover his *pro rata* share of the value thereof.[1] A mere device by which corporate property is sold under an execution, is purchased by a person interested in the corporation, and then transferred to a new corporation having the same stockholders as the old one, is

70 (1897). In Massachusetts the remedy of a creditor of a corporation which has sold its assets to another corporation for stock is at law and not in equity. The new corporation is not liable on the debt. Ewing *v.* Composite B. S. Co., 169 Mass. 72 (1897).

[1] First Nat. Bank *v.* Chattanooga, etc. Co., 97 Tenn. 308 (1896). Where an insolvent corporation causes land owned by it to be conveyed to a new corporation formed by its directors, and in which its directors subscribed for stock, and both corporations pass into the hands of receivers, the subscriptions for stock in the new corporation may be collected for the benefit of creditors of the old corporation. Butler *v.* Cockrill, 73 Fed. Rep. 945 (1896). A corporation may be liable for the debts of another corporation whose property it takes, to the extent that such property is impressed with a trust. In this case all the property of an insolvent company was leased to another company. Chicago, etc. Ry. *v.* Third Nat. Bank, 134 U. S. 276 (1890). Where railroad property purchased at foreclosure sale was transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals held that such corporation "paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors." Vilas *v.* Page, 106 N. Y. 439, 465 (1887). In some cases the creditors of the old company may follow its property into the hands of a new company to which the property is sold by an ordinary sale. Marshall *v.* Western, etc. R. R., 92 N. C. 322 (1885); Western N. C. R. R. *v.* Rollins, 82 N. C. 523 (1880); Young *v.* Rollins, 85 N. C. 485 (1881), involving a receiver. A creditor holding an unpaid promissory note cannot by bill in equity bring in the directors to hold them liable for false representations, and also claim that the company was not duly incorporated, and also bring in a subsequent corporation that took all the assets of the first, and also bring in those persons who finally obtained such assets,— all in one bill brought to collect the debt. Jefferson Nat. Bank *v.* Texas Inv. Co., 74 Tex. 421 (1889). Where a company leases all its property to another, the stockholders in both companies being the same, a mechanic's lien good against the latter is good also against the former. Hatcher *v.* United Leasing Co., 75 Fed. Rep. 368 (1896). A new corporation taking the assets of an old corporation is liable to creditors of the latter to the extent of the property so taken. Brum *v.* Merchants' Mut. Ins. Co., 16 Fed. Rep. 140 (1883); Hibernia Ins. Co. *v.* New Orleans Transp. Co., 13 Fed. Rep. 516 (1882); Hibernia Ins. Co. *v.* St. Louis, etc. Co., 10 Fed. Rep. 596 (1882). For a case where the stockholders of the new corporation gave a bond to pay the debts of the old one, see Planters' Ins. Co. *v.* Wicks, 4 S. W. Rep. 172 (Tenn. 1887). Where a corporation sells all its property to another corporation in exchange for stock of the latter, a creditor of the former may hold the latter liable to the extent of the value of the property so turned over. United States, etc. Co. *v.* Isaacs, 23 Ind. App. 533 (1899). The creditors of an insolvent corporation which transfers all its property to another corporation for stock of the latter may hold the latter liable for the value of such property. Hurd *v.* New York, etc. Co., 29 N. Y. Misc. Rep. 183 (1889).

void as against creditors of the first corporation. They may hold the new corporation liable to the extent of the value of the property so conveyed.[1] A foreclosure which is brought about by the stockholders for the purpose of buying in the property and reorganizing the property so as to protect the mortgage bondholders and also the stockholders, but to cut off the claims of unsecured creditors, and particularly to cut off a guaranty on the bonds of another corporation, is illegal, and if such facts are proved the foreclosure sale will be set aside.[2] Where the officers of a corporation in their individual capacity took part in a transaction before the corporation was formed, whereby a business was taken over by the corporation on an agreement that title should not pass until payment was made, the corporation takes with notice of the facts.[3] Where a

[1] Hancock *v.* Holbrook, 40 La. Ann. 53 (1888). See also Railroad *v.* Howard, 7 Wall. 392 (1868). Where the officers and stockholders of one corporation form another, and convey all the property of the former to it in fraud of creditors, the latter will be regarded as a continuation of the former, and a court of equity will hold the assets of the latter liable for a debt of the former, though there has been no recovery of judgment for the debt. Blanc *v.* Paymaster Min. Co., 95 Cal. 524 (1892). A sale of one railroad to another may be in fraud of creditors of the former, and even a subsequent foreclosure may be in pursuance of the same scheme. A suit against it may be at law and the questions submitted to a jury. Houston, etc. Ry. *v.* Shirley, 24 S. W. Rep. 809 (Tex. 1894). In Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894), a contractor was harassed and prevented from completing his contract by the company, which had passed under the control of another company that was seeking to get a land grant that had been given conditionally to the former company. The contractor was ruined, the road not completed, and the second company got the land grant by a subsequent legislative act. The contractor got judgment against the first company, and then filed a bill against the second company to reach the land, charging conspiracy, bribery, and fraud. The court, overruling the decision below, held that a demurrer to the bill was not good. See also §§ 674, 890, *infra*.

[2] Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 674 (1899), the court saying (p. 683): "No such proceedings can be rightfully carried to consummation which recognize and preserve an interest in the stockholders without also recognizing and preserving the interests, not merely of the mortgagee, but of every creditor of the corporation. In other words, if the bondholder wishes to foreclose and exclude inferior lienholders or general unsecured creditors and stockholders he may do so, but a foreclosure which attempts to preserve any interest or right of the mortgagor in the property after the sale must necessarily secure and preserve the prior rights of general creditors thereof. This is based on the familiar rule that the stockholders' interest in the property is subordinate to the rights of creditors; first of secured and then of unsecured creditors. And any arrangement of the parties by which the subordinate rights and interests of the stockholders are attempted to be secured at the expense of the prior rights of either class of creditors comes within judicial denunciation."

[3] Adams *v.* Roscoe, etc. Co., 159 N. Y. 176 (1899). Where one of the organizers of the corporation, who is also its presi-

person owning all the stock of a corporation sells it under circumstances which induce the purchaser to believe that the former has no claim against the corporation, he may be enjoined from enforcing any such claim.[1] The subject of "dummy" corporations is considered elsewhere.[2] Sometimes the statutes of the state make the purchasing corporation liable, especially in cases of consolidation.[3]

Similar rules to the above prevail as to liability of a corporation that issues stock in payment for the property of an insolvent individual or copartnership. A corporation that has taken over the property of a partnership is not liable for the debts of the latter unless there was an express contract assuming such liability, or the transaction was a mere continuation of the partnership.[4] A corporation taking over the business of a partnership may assume any

dent, sells goods to it for stock, the corporation is protected in its title, even though it turns out that he held part of the goods to sell on commission, but if he retains the stock and the company is dissolved, it is bound to respect the rights of the owner of the goods in distributing its assets. Wyeth *v.* Renz-Bowles Co., 66 S. W. Rep. 825 (Ky. 1902).

[1] Given *v.* Times-Republican, etc. Co., 114 Fed. Rep. 92 (1902).

[2] See §§ 663, 664, *supra.*

[3] See cases in § 897, *infra*, relative to consolidation; also Indianola R. R. *v.* Fryer, 56 Tex. 609 (1882); Louisville, etc. Ry. *v.* Boney, 117 Ind. 501 (1888); Indianapolis, etc. R. R. *v.* Jones, 29 Ind. 465 (1868); Columbus, etc. Ry. *v.* Powell, 40 Ind. 37 (1872); Montgomery, etc. R. R. *v.* Boring, 51 Ga. 582 (1874); Thompson *v.* Abbott, 61 Mo. 176 (1875), where the property of the old was given by the legislature to the new corporation — a municipal case. See also Rome, etc. R. R. *v.* Ontario, etc. R. R., 16 Hun, 445 (1879). Where the consolidated company is by statute liable for the debts of the old company, a creditor of one of the latter who has the right to demand stock in exchange may demand the same of the consolidated company and hold it liable in damages if it refuses. John Hancock, etc. Co. *v.* Worcester, etc. R. R., 149 Mass. 214 (1889). A creditor of an old corporation may follow its property into the hands of a consolidated company to which it was transferred, stock being therefor issued to the old stockholders. Martin *v.* Zellerbach, 38 Cal. 300 (1869).

[4] Austin *v.* Tecumseh Nat. Bank, 49 Neb. 412 (1896). *Cf.* Reed Bros. Co. *v.* First Nat. Bank, 46 Neb. 168 (1895). See § 890, *infra.* A corporation to which an insolvent firm has transferred their property for stock is not liable on the debts of such individuals unless it has expressly assumed or has ratified or adopted the same. Hart, etc. *v.* Coryell, 8 Kan. App. 496 (1898). Where a creditor of an individual consents to his transferring his property to a corporation for stock, which the creditor then takes as collateral security, such creditor cannot hold the corporation liable on the debt even though the corporation afterward voluntarily gave a note and a mortgage to secure the same. State, etc. *v.* A. F. Shapleigh, etc. Co., 147 Mo. 366 (1898). A corporation to which an insolvent individual transfers all his property in exchange for stock of the corporation is not liable on a chattel mortgage which it gives to one of the creditors of such individual, the corporation not having assumed the debt. Durlacher *v.* Frazer, 8 Wyo. 58 (1898).

There are decisions, however, to the contrary as follows: Where a partnership incorporates a company and transfers to that company all the firm's

contract of the latter, but the assumption of one contract does not prove the assumption of other contracts. The assumption of such a contract may arise by the corporation proceeding to live up to it and carry it out.[1]

§ 674. *Rights and liabilities of mortgagees of a corporation that purchases property and issues stock in payment therefor.*— Where a corporation transfers all its property to another corporation, and the latter company immediately gives a mortgage on all the property, a judgment creditor of the former company may cause the sale and the mortgage to be set aside as a fraud upon his rights, and the property may be subjected to the payment of his debt.[2]

assets in exchange for stock, the corporation is liable for the debts of the partnership. Such transaction is not a purchase, but simply a change in the mode of doing business. Andres v. Morgan, 63 Ohio St. 236 (1900). Where an insolvent firm purchases goods on credit by false representations and then transfers its assets to a corporation without consideration, the vendor may follow the proceeds of the goods into the hands of the corporation. Sheffield v. Mitchell, 31 N. Y. App. Div. 266 (1898). Under the facts in Breman, etc. Bank v. Branch, etc. Co., 104 Mo. 425 (1891), it was held that a corporation organized by a business man, and to which he had conveyed all his property, was liable on his note, although it had not assumed any of his debts. See also Fort Worth Pub. Co. v. Hitson, 80 Tex. 216 (1891). Where a partnership turns itself into a corporation, the latter is not a *bona fide* holder of notes owned by the former. McElwee Mfg. Co. v. Trowbridge, 62 Hun, 471 (1891). A corporation taking all the assets of a partnership under an agreement with the partners that it would pay the liabilities to the extent of the assets cannot be made liable on a debt due one of the partners until it is ascertained that the assets exceed the liabilities and until it has agreed to pay the liabilities. Adams v. Empire, etc. Co., 4 N. Y. Supp. 738 (1889). As regards the power of the corporation to assume the obligations of the copartnership, see McLellan v. Detroit File Works, 56 Mich. 579 (1885). A corporation may be liable for the debts of the partnership where it has placed such liabilities on its books as a part of the corporate liabilities, and upon becoming insolvent the corporation may give a preference to such liabilities. Shufeldt v. Smith, 139 Mo. 367 (1897).

[1] Hall v. Herter, 83 Hun, 19 (1894). A corporation succeeding a firm may, by carrying out a contract of the firm, assume the obligation thereof. Hall v. Herter, 90 Hun, 280 (1895); aff'd, 157 N. Y. 694. Where a firm is turned into a corporation, the latter may assume a contract of the former for a purchase of lumber, by adopting it through its manager. Pratt v. Oshkosh Match Co., 89 Wis. 406 (1895). Where the corporation assumes the debts of the partnership which it buys out, its liability is not released by the fact that the partnership subsequently gives notes for such debts. Johnston v. Gumbel, 19 S. Rep. 100 (Miss. 1895).

[2] And a receiver will be appointed. Cole v. Millerton Iron Co., 133 N. Y. 164 (1892). A corporate creditor may attack a transfer of all the corporate property to another corporation, even though the latter agrees to pay the debts of the former. A trustee of a mortgage given by the vendee company on the property is not *bona fide* when the officers of the two companies are

Where a corporation issues stock for property it is not a *bona fide* purchaser of that property.[1] But a claim against one company, which is assumed by another company upon the latter company buying out the former, is not to be paid out of the assets of the latter company in preference to a mortgage upon all of its property.[2]

In case property is sold to the corporation for shares of stock, and the corporation issues a mortgage on the property and refuses to deliver the stock, the claim of the vendor for damages does not have priority over the mortgage.[3]

Where a stockholder of a vendor corporation sets aside the sale of the railroad as *ultra vires*, a mortgage given by the vendee corporation is void. The bondholders are, however, entitled to enforce payment from any other property owned by the vendee.[4]

A mortgage by a consolidated railroad may not take precedence over the unsecured debts of the constituent companies, and by statute the consolidated company may be liable for those debts, unless the articles of consolidation provide otherwise.[5] Although

the same and the trustee knew thereof. The bondholders are chargeable with notice of facts known to the trustee. Cole *v.* Millerton Iron Co., 59 Hun, 217 (1891). Bondholders who took with notice that the property was received by the corporation from another corporation in payment for stock, and that the latter corporation was in debt, cannot hold as against such creditors. Blair *v.* St. Louis, etc. R. R., 22 Fed. Rep. 36 (1884). Where a corporation conveys all its property to another corporation in payment for its stock, the latter corporation agreeing to pay all the debts of the former, a mortgagee of the latter company takes precedence over the judgment of a creditor of the former company, such judgment being subsequent to the mortgage. Blair *v.* St. Louis, etc. R. R., 25 Fed. Rep. 684 (1885). But *contra*, if the mortgagee took with actual knowledge. Blair *v.* St. Louis, etc. R. R., 24 Fed. Rep. 148 (1885). A creditor of a corporation owning an uncompleted railroad cannot claim a lien thereon prior to that of the mortgage of a subsequent corporation which purchased the road, when there never was any record evidence of any lien and the subsequent corporation had no actual notice of the claim. Blair *v.* St. Louis, etc. R. R., 27 Fed. Rep. 176 (1886). A sale of one railroad to another may be in fraud of creditors of the former, and even a subsequent foreclosure may be in pursuance of the same scheme. A suit against it may be at law and the questions submitted to a jury. Houston, etc. Ry. *v.* Shirley, 24 S. W. Rep. 809 (Tex. 1894).

[1] Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892). *Cf.* § 727, *infra*, on notice, and § 890, *infra*.

[2] Fogg *v.* Blair, 133 U. S. 534 (1890). See also § 860, *infra*.

[3] Farmers', etc. Co. *v.* Toledo, etc. R. R., 54 Fed. Rep. 759 (1893).

[4] Knoxville *v.* Knoxville, etc. R. R., 22 Fed. Rep. 758 (1884).

[5] Compton *v.* Jesup, 167 U. S. 1 (1897). *Cf.* Tysen *v.* Wabash Ry., 15 Fed. Rep. 763 (1883); but see Wabash, etc. Ry. *v.* Ham, 114 U. S. 587 (1885). The case of Compton *v.* Wabash, etc. Ry., 45 Ohio St. 592 (1888), passed upon the same bonds, and it was held that these bonds constituted a lien on the property of the old company, and were prior in right to the mortgage bonds of the con-

a corporation sells all its property to an individnal for purchase-money mortgage bonds, and distributes these bonds among its stockholders without paying the creditors, nevertheless a *bona fide* purchaser of such bonds is protected as against the corporate creditors.[1]

Where an insolvent corporation gives a mortgage to secure bonds and insists that its creditors shall accept the bonds in payment of its debts or else have recourse to the equity of redemption, the mortgage is illegal, and a suit to foreclose may be contested by a receiver of the corporation.[2]

Even though an insolvent partnership is turned into a corporation, and bonds of the corporation are given to a creditor of the partnership for his debt, yet such bonds may be legal.[3]

solidated company: refusing to follow Wabash, etc. Ry. *v.* Ham, 114 U. S. 587 (1885). General creditors of a road that is consolidated with another have no equitable lien on the bonds issued by the consolidated company. Hervey *v.* Illinois Mid. Ry., 28 Fed. Rep. 169 (1884). Mortgage bonds issued in exchange for notes held by a former company must be clearly and fully explained in a foreclosure suit based thereon. Central Trust Co. *v.* Worcester Cycle Mfg. Co., 90 Fed. Rep. 584 (1898).

[1] A former decree in a court of equity against the trustee of the mortgage in regard to the matter does not bind the bondholders, although a suit at law against the trustee would have bound them. Lebeck *v.* Fort Payne Bank, 115 Ala. 447 (1897). Where a municipality is the vendor of land to a corporation and brings suit to set aside the transfer as fraudulent and illegal, and joins the three trustees of a mortgage of the corporation as parties defendant and serves them by publication, and, two of the trustees having died, causes successors to be appointed by the court, and obtains decrees against the corporation and the trustees of the mortgage canceling their title to the land, the decree is effective; and even though the mortgage is afterwards foreclosed, the purchaser at such sale takes no title to such land, he having waited thirty years before attacking such decree. Bump *v.* Butler County, 93 Fed. Rep. 290 (1899). On the other hand, where a municipality delays for thirty years in complaining of fraud and illegality whereby it conveyed land to a corporation, the court will not grant it any relief. Rummel *v.* Butler County, 93 Fed. Rep. 304 (1899).

[2] Jenkins *v.* John Good, etc. Co., 56 N. Y. App. Div. 573 (1900). An insolvent New Jersey corporation cannot, as against some of its creditors, issue mortgage bonds to other creditors. Skirm *v.* Eastern, etc. Co., 57 N. J. Eq. 179 (1898). It is a disposal of property for the purpose of hindering and delaying creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. National Bank *v.* Sprague, 21 N. J. Eq. 530 (1870).

[3] Seligman *v.* Prince, [1895] 2 Ch. 617. Where a corporation is in debt, and in order to enable it to borrow money the chief stockholder, who is also in debt, transfers valuable property to the corporation, and then the corporation gives a mortgage upon all its property, including the property so transferred, a *bona fide* holder of the bonds is pro-

§§ 675-677. *Consolidations, leases, and sales of railroads.*— This subject is considered elsewhere.[1]

§ 678. *A corporation cannot be a partner in a partnership.*— This is an old principle of law, but it is subject to exceptions. It is held to be an *ultra vires* act, because the stockholders are entitled to have their directors conduct the business without sharing that power with a partner.[2] But if a partnership has been formed with an individual, the latter cannot throw the business into statutory insolvency proceedings;[3] and the corporation cannot avoid the payment of a liability which the partnership has incurred;[4] nor can an obligation to the corporation be repudiated on that ground.[5] The

tected as against a creditor of the stockholder. King *v.* Holland T. Co., 8 N. Y. App. Div. 112 (1896). In the case of Badger *v.* Sutton, 30 N. Y. App. Div. 294 (1898), where an insolvent person and corporation had transferred their property to another corporation and had taken back purchase-money mortgage bonds, the court set the transaction aside at the instance of creditors of the former.

[1] See §§ 892-897, *infra.*

[2] "It is a violation of law for corporations to enter into a partnership," and their charters may be forfeited for the offense. People *v.* North River, etc. Co., 121 N. Y. 582, 623 (1890). A contract between two companies, by which one is to name four of the six directors of the other (and is also to sell the stock of the latter, carry out its contracts, and pay dividends on its stock), is illegal. James *v.* Eve, L. R. 6 H. L. 335 (1873).

[3] Whittenton Mills *v.* Upton, 76 Mass. 582 (1858).

[4] Catskill Bank *v.* Gray, 14 Barb. 471 (1852). *Contra,* Gunn *v.* Central R. R. etc. Co., 74 Ga. 509 (1885), where a railroad was held not liable for injuries to a passenger sustained while traveling upon a boat operated by the road and an individual as partners. But see Block *v.* Fitchburg R. R., 139 Mass. 308 (1885). A corporation and a person to whom it has agreed to sell its property may be liable as partners to creditors of the former. Cleveland Paper Co. *v.* Courier Co., 67 Mich. 152 (1887). A corporation cannot avoid liability for the debt of a firm, in which firm it is a member, on the ground that it had no power to become a partner. Cameron *v.* First, etc. Bank, 34 S. W. Rep. 178 (Tex. 1896). Under the New York statutes bonds may be issued to take up past-due notes, and where the business of a partnership and of a corporation is carried on as one institution, such bonds are valid, even though some of the notes so taken up grew out of the business of the partnership, but were indorsed by the corporation. Matter of Snyder, 29 N. Y. Misc. Rep. 1 (1899). A corporation as a member of a copartnership may be liable on a note given by said copartnership and indorsed by the corporation. Johnson *v.* Weed, etc. Co., 103 Wis. 291 (1899).

[5] French *v.* Donohue, 29 Minn. 111 (1882). A corporation may enforce an accounting in a partnership of which it is a member. Standard Oil Co. *v.* Scofield, 16 Abb. N. Cas. 372 (1885). Where in an *ultra vires* contract two railroads are operated as one, and more of the income is used to repair one railroad than the other, the latter may sue the former for reimbursement. Nashua, etc. R. R. *v.* Boston, etc. R. R., 164 Mass. 222 (1895). Where a national bank forms a partnership to operate a mill, it may recover moneys loaned by the bank to the partnership. Although the manager of the mill is vice-president of the bank, yet the bank is not liable for his

cash which a corporation has invested in a copartnership as a partner cannot be recovered back by the corporation after the insolvency of the partnership, as against creditors of the partnership, even though the corporation had no power to so invest.[1] If the corporation has but one stockholder, he may make it a partner in a partnership.[2] Sometimes the relationship is held to be that of principal and agent instead of partnership.[3] Where a corporation has been a partner in a partnership, it must account to the other partners, even though such partnership was illegal.[4] The corporation also

mismanagement. The bank as a partner is, however, chargeable with notice of a rule of its other partner, a joint-stock association, that no money should be borrowed except by the board of directors of the latter. Cameron *v.* First Nat. Bank, 4 Tex. Civ. App. 309 (1893). A party receiving work and materials from a partnership consisting of a corporation and an individual cannot defend against the price on the ground that the corporation had no right to enter a partnership. Wilson *v.* Carter, etc. Co., 46 W. Va. 469 (1899). A firm consisting of an individual and a foreign corporation which is not authorized to do business in the state cannot enforce a contract in the state. Harris *v.* Columbia, etc. Co., 67 S. W. Rep. 811 (Tenn. 1901).

[1] Wallerstein *v.* Ervin, 112 Fed. Rep. 124 (1901). Where a corporation has entered into a copartnership which becomes insolvent it cannot, as against other creditors, file claims as a creditor of such copartnership on the ground that the copartnership was *ultra vires*. *In re* Ervin, 109 Fed. Rep. 135 (1901).

[2] Allen *v.* Woonsocket Co., 11 R. I. 288 (1876).

[3] Marine Bank *v.* Ogden, 29 Ill. 248 (1862). In Holmes *v.* Old Colony R. R., 71 Mass. 58 (1855), where the corporation shared in the profits only, no partnership was held to exist. A lease whereby the lessee is to pay the operating expense and the interest on the debt and the cost of betterments, and is then to pay one-half of the balance to the lessor, is not a copartnership, inasmuch as the lessor is not to pay any losses. South Carolina, etc. R. R. *v.* Augusta, etc. R. R., 107 Ga. 164 (1899). Even though a corporation in renting premises is to receive a proportion of the gross receipts in excess of a specified rental, yet this is not a partnership and is legal. Nantasket, etc. Co. *v.* Shea, 65 N. E. Rep. 57 (Mass. 1902). A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902). While a corporation cannot be a partner, yet it may share profits in a contract on which it makes advances. L. J. Mestier & Co. *v.* A. Chevalier, etc. Co., 32 S. Rep. 520 (La. 1901). A mining corporation may at common law lease its property for five years for a rental, payable in a certain portion of the product of the mine. A stockholder cannot complain, even though the contract be an error of judgment. Hennessy *v.* Muhleman, 40 N. Y. App. Div. 175 (1899).

[4] Boyd *v.* American, etc. Co., 182 Pa. St. 206 (1897). Where all the creditors, including a corporation, form a partnership to dispose of the assets, and the assets are so disposed of, the corporation

may enforce the provisions of the contract.[1] A corporation that has entered into a partnership for a certain period of time cannot recover damages for the failure of the other party to continue the partnership during that time.[2] There have been many dicta to the effect that a corporation cannot be a partner;[3] and the question has arisen indirectly in many cases involving railroad traffic and pooling contracts,[4] and in still other cases where illegal combinations in restraint of trade have been made;[5] but there are few authorities bearing directly on the subject.[6]

§ 679. *A corporation cannot be an executor or an administrator or a trustee, unless specially authorized by statute.*— The duties of the office are personal and incapable of being delegated to an agent. Since a corporation acts only through agents, it cannot assume the duties of an executor.[7] A person who makes a note to a corpora-

cannot defend against a bill for an accounting on the ground that it was *ultra vires* for it to enter the partnership. Kelly *v.* Biddle, 180 Mass. 147 (1901). A corporation cannot be a partner, and hence where two corporations carry on the business jointly in an assumed name the assets belong one-half to each. Geurinck *v.* Alcott, 66 Ohio St. 94 (1902).

[1] A contract whereby a manufacturing corporation and all of its stockholders agree to sell a certain proportion of the capital stock of said company, and to substitute two persons nominated by the vendee as directors in such corporation, is not presumed to be *ultra vires*, and a provision in such contract that the purchaser will carry on the business and divide profits every six months may be enforced by the corporation. Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884).

[2] Sabine, etc. Co. *v.* Bancroft, 16 Tex. Civ. App. 170 (1897). A mere allegation that one company is liable for the debts of another on the ground that they are partners is an insufficient allegation. White *v.* Pecos, etc. Co., 18 Tex. Civ. App. 634 (1898).

[3] New York, etc. Canal Co. *v.* Fulton Bank, 7 Wend. 412 (1831). *Cf.* 1 Lindley, Partn., p. 86.

[4] See ch. LIII, *infra.*

[5] Ch. XXIX, *supra.*

[6] A stage company may be a co-owner of a stage line with an individual. Calvert *v.* Idaho Stage Co., 25 Oreg. 412 (1894). In State *v.* Port Royal, etc. Ry., 79 Fed. Rep. 397 (1897), a lease of a railroad seems to have been owned by a corporation and an individual as partners. A corporation owning waterworks outside of a city may agree to furnish water to one inside the city, the general distribution of the water to be under the joint control of two agents, each corporation appointing one, and the profits to be divided equally. San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549 (1895). A corporation may enter into a land speculation with an individual, the profits and losses to be divided equally, if the corporation is to have entire control of the business. Bates *v.* Coronado Beach Co., 109 Cal. 160 (1895). Where a railroad company is interested in the construction of a connecting line, it is liable for the services of an attorney employed by it in connection therewith. St. Louis, etc. R. R. *v.* Kirkpatrick, 52 Kan. 104 (1893).

[7] Georgetown College *v.* Browne, 34 Md. 450 (1871), where it was also held that a corporation will not be allowed, as in England, to designate a person to administer with the will annexed. See also *Re* Thompson, 33 Barb. 334 (1861).

tion as administrator, however, cannot defeat it by alleging that the corporation was not authorized to act as such.[1] The charter of the corporation may, however, expressly authorize it to act as executor or trustee. But where the statutes of a state provide that no foreign corporation shall transact business which a domestic corporation cannot transact, and domestic corporations are not allowed to act as executors, a foreign corporation cannot act as such in the state.[2]

As to trusts the rule is not so rigid. The old rule that corporations could not take property in trust for the use of others is now obsolete.[3] A corporation may be a trustee to hold property in trust for purposes within the corporate power.[4] If a corporation be incompetent to act as trustee, the devise or grant will not thereby become void; a court of equity will appoint a proper trustee to carry out and execute the trust.[5] It is no defense to an action by a bondholder to reach a sinking fund that the corporation holding the fund had no charter right to act as custodian, and that such custodian had illegally guaranteed the bonds.[6]

§ 680. *Stockholder's right to prevent the corporation from undertaking a new business.*— It is *ultra vires* of a corporation to undertake to carry on a business which is not fairly within the scope of the business described in its charter. When such an attempt is made on the part of the directors or a majority of the stockholders, a dissenting stockholder may insist upon the corporate business being confined to the limits of the corporate charter; and he may enjoin or set aside any acts which do not conform to those limits.

[1] Union, etc. Co. *v.* Wright, 58 S. W. Rep. 755 (Tenn. 1900).

[2] Farmers', etc. Co. *v.* Smith, 51 Atl. Rep. 609 (Conn. 1902).

[3] Vidal *v.* Girard, 2 How. 127, 187 (1844), where Mr. Justice Story said: "Where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust in the same manner and to the same extent as a private person may do;" Chapin *v.* Winchester School Dist., 35 N. H. 445 (1857), holding that a corporation may be trustee of a charity if consistent with the object of its creation. See also § 694, *infra;* Phillips Academy *v.* King, 12 Mass. 546 (1815), holding that a corporation aggregate may be a trustee; Perry, Trusts, § 42 *et seq.;* Robertson *v.* Bullions, 11 N. Y. 243 (1854), a religious society. *Re* Howe, 1 Paige, 214 (1828), holds that, while corporations cannot be trustees in matters in which they have no interest, yet if property be devised or granted to a corporation upon trust, partly for itself and partly for another, it may execute the trust. One mission society corporation may take property in trust for another mission society corporation. Sheldon *v.* Chappell, 47 Hun, 59 (1888).

[4] White *v.* Rice, 112 Mich. 403 (1897).

[5] Vidal *v.* Girard, 2 How. 127, 187 (1844); Chapin *v.* Winchester School Dist., 35 N. H. 445 (1857).

[6] Central, etc. Co. *v.* Farmers', etc. Co., 116 Fed. Rep. 700 (1901).

Thus, a corporation formed to manufacture iron cannot go into the flour and mill business.[1]

§ 681. *Miscellaneous ultra vires acts — Enforcement of ultra vires contracts.*— A judgment on an *ultra vires* contract may be impeached to the same extent that the contract itself might have been impeached.[2] A contract whereby a manufacturing corporation and all of its stockholders agreed to sell a certain proportion of the capital stock of said company and to substitute two persons nominated by the vendee as directors in such corporation is not presumed to be *ultra vires*, and a provision in such contract that the purchaser will carry on the business and divide profits every six months may be enforced by the corporation.[3] Even though a note given by one insurance company to purchase the business of another insurance company is not legal, yet if the assets of the corporation that issued the note are used to take it up, the money cannot be recovered back.[4] Although a department store corporation furnishes a dentist, as a part of its business, without chartered right so to do and in violation of a statute regulating dentistry, it cannot set up this defense in a suit against it for malpractice.[5] Even though a corporation is selling its product below cost, in order to force another corporation to combine with it, yet a stockholder in the former cannot enjoin such sales, where neither of the corporations has a natural monopoly, and no bad faith or palpably bad judgment is shown.[6]

In a suit by a lessee to enjoin the lessor from taking possession of the property for an alleged breach of the lease, the lessee cannot set up that the lease was *ultra vires*, at the same time retaining the past benefits of the lease.[7] A contract of a corporation is legal if it is not expressly prohibited, and if it has "a natural and reasonable tendency to aid in the accomplishment of the objects for which the corporation was created."[8]

[1] Cherokee Iron Co. *v.* Jones, 52 Ga. 276 (1874). See also § 681, *infra*.

[2] Great, etc. Ry. *v.* Charlebois, [1899] A. C. 114.

[3] Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884).

[4] McClure *v.* Trask, 161 N. Y. 82 (1899).

[5] Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244 (1901).

[6] Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). *Mandamus* will not be granted to allow a stockholder to examine the books of the company where such stockholder owns only one-thirtieth of one per cent. of the preferred stock, and his reason for examining the books is that he believes the company is selling its product at less than cost by reason of competition, and that consequently he has received no dividends, it not being shown that the market price of the stock has been decreased. Matter of Pierson, 28 N. Y. Misc. Rep. 726 (1899); aff'd, 44 N. Y. App. Div. 215.

[7] Pittsburgh, etc. R. R. *v.* Altoona, etc. R. R., 196 Pa. St. 452 (1900).

[8] Colorado, etc. Co. *v.* American, etc. Co., 97 Fed. Rep. 843 (1899).

An agreement of a national bank that it will pay all checks of a person is not enforcible by a party who cashes such checks relying on such agreement, it appearing that the bank had no funds of the former to meet such checks. This is an *ultra vires* contract of guaranty.[1] Where the statutes in existence at the time of incorporation provide for the extension of corporate charters, a stockholder cannot prevent the corporation from extending its existence in accordance with such statutes.[2] Where a bank carries on a mercantile business without the charter right to do so, and fails, the creditors of the bank in its legitimate business will be preferred over the creditors in the mercantile business.[3]

A corporation organized to manufacture railway cars has no power to lay out a town around its works and build twenty-two hundred homes to lease to its employees, to build and run a hotel and saloon, and also a theater, a gas plant, a system of water-works and a brick plant, and to own and run a farm for supplies to sell and for its employees, and to own stock in other corporations manufacturing and selling bar iron and railroad spikes; but may erect an office building containing more space than it requires at the time, and may purchase more real estate than it actually requires at the time, and may supply liquor to passengers on its cars, and may sell surplus steam power.[4] The board of directors of an insurance company have no power to employ an agent on a basis which will give the agent an interest in premiums for ten years, and certainly an executive committee has no such power.[5] A stockholder in a hotel company cannot enjoin the managers from leasing a part of the property for other purposes, there being sufficient accommodation left for the hotel.[6] And it has been held that a stockholder cannot enjoin his corporation from paying money to a rival company to induce the latter to discontinue business.[7] But any misapplication or waste of the property of a corporation may be remedied by a member thereof.[8] It is illegal for the directors or a majority of the stockholders to give away the assets of the corporation for the promotion of other enterprises.[9] Nevertheless a note given by

[1] Bowen *v.* Needles, etc. Bank, 94 Fed. Rep. 925 (1899).

[2] Smith *v.* Eastwood, etc. Co., 58 N. J. Eq. 331 (1899).

[3] State *v.* Bank of Hemingford, 58 Neb. 818 (1899).

[4] The state may bring *quo warranto* proceedings to forfeit the charter. It is no defense that the usurpations had continued for many years to the knowledge of the state, or that a legislative committee had reported that the real estate was properly taxed. People *v.* Pullman's Palace Car Co., 175 Ill. 125 (1898).

[5] Caldwell *v.* Mutual, etc. Assoc., 53 N. Y. App. Div. 245 (1900).

[6] Simpson *v.* Westminster, etc. Co., 8 H. L. Cas. 712 (1860).

[7] Leslie *v.* Lorillard, 110 N. Y. 519 (1888).

[8] Armstrong *v.* Church Soc., 13 Grant Ch. (U. C.) 552 (1867).

[9] See § 64, *supra*, and §§ 775, 909,

an improvement company to adjust a contract by which it had agreed to give a right of way, terminals, and a bonus to a street railway may be enforced.[1] An improvement company having wide powers may give a part of its stock to a railway company, in order to have the road built to the property of the improvement company. A stockholder who has voted therefor cannot afterwards complain.[2] A street railroad may donate money to a baseball park.[3] And a land-improvement company may agree to pay one-third of the expense of a bridge in the public highway.[4] A bank has no power to make a donation to a paper mill.[5] A stockholder may enjoin any act on the part of the state which is in violation of the charter

infra. Back pay cannot be voted to the directors. It is an illegal gift. See § 657, *supra.* But an educational institution may donate money to the construction of a railroad. Louisville, etc. R. R. *v.* St. Rose Literary Soc., 91 Ky. 395 (1891). A town-site corporation may give away certain lots and give a sum of money to a party who, in consideration thereof, agrees to remove a barn, etc., to another location. Sherman, etc. Co. *v.* Russell, 46 Kan. 382 (1891); Sherman, etc. Co. *v.* Fletcher, 46 Kan. 524 (1891). A railroad cannot be held liable on its contract to pay for the examination of mines of which the railroad is the outlet. George *v.* Nevada Cent. R. R., 22 Nev. 228 (1894). But directors may compromise corporate claims. Frankfort Bank *v.* Johnson, 24 Me. 490 (1844), and § 750, *infra.* Directors cannot legally pay out money which is not owed. Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 30 (1820). Directors should not use corporate funds to sue for a libel on themselves as directors; but where the stockholders were informed of the payment it will not be disturbed. Studdert *v.* Grosvenor, L. R. 33 Ch. D. 528 (1886). The money of a city cannot be used to buy a gold chain for the mayor. Attorney-General *v.* Batley, 26 L. T. Rep. 392 (1872). Nor to give extra pay to a clerk. *Ex parte* Mellish, 8 L. T. Rep. 47 (1863). Nor can lodge funds be given to outside charitable purposes. Polar Star Lodge *v.* Polar Star Lodge, 16 La. Ann. 53 (1861). Where a stockholders' meeting has recommended that a week's extra pay, as a gratuity to the workmen of a manufacturing corporation, be given, and the directors give it, a dissenting stockholder cannot hold the directors liable therefor. Hampson *v.* Price's, etc. Co., 45 L. J. (Ch.) 437 (1876); Clarke *v.* Imperial Gas Light & C. Co., 4 B. & Ad. 315 (1832), upholding a grant of an annuity to a disabled clerk. A bank may make a gift to the children of a deceased superintendent. Henderson *v.* Bank of Australasia, L. R. 40 Ch. D. 170 (1888). As against its creditors, a corporation cannot give away any part of its assets. Mason *v.* Fischer, etc. Co., 21 S. Rep. 5 (Miss. 1896).

[1] Llano Imp. etc. Co. *v.* Pacific Imp. Co., 66 Fed. Rep. 526 (1895).

[2] McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262 (1893). A business corporation may donate money to secure the location of a postoffice near its place of business. B. S. Green Co. *v.* Blodgett, 159 Ill. 169 (1895).

[3] Temple, etc. Ry. *v.* Hellman, 103 Cal. 634 (1894).

[4] Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294 (1894). The directors may regulate the rates and may give away free passes within reasonable limits. Hasson *v.* Venango Bridge Co., 1 Pa. Dist. 521 (1892).

[5] Robertson *v.* Buffalo, etc. Bank, 40 Neb. 235 (1894).

which it granted to the corporation. It was to enjoin a tax by the state under such circumstances that the case of Dodge *v.* Woolsey [1] arose.

Even though a national bank buys bonds which it has no power to buy, and agrees to sell back to the vendor at a certain price, yet it cannot set up a plea of *ultra vires* when it is sued by the vendor for refusal to resell.[2] Even if a navigation company purchases a hotel property *ultra vires*, yet its lessee cannot refuse to pay the rent on that ground, nor can bondsmen for the payment of such rent defend on that ground.[3]

A stockholder in a company organized to purchase a certain mine may enjoin the company from purchasing a mine in another country, even though the certificate of incorporation contains some general powers.[4]

Even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue.[5]

A national bank has power to take a lease of land and erect an office building thereon for its own use and for the purpose of renting what it does not need.[6]

A corporation may be liable on its agreement to give a percentage of its profits to a manufacturer of certain machinery, other corporations having also agreed to do the same.[7]

A savings bank and trust company cannot be held liable for losses on speculations in cotton, although it represented that its orders were for responsible customers.[8]

The contract of a railroad company not to oppose the passage

[1] 18 How. 331 (1855). The court, however, refused to sustain a stockholder's action to enjoin the corporation from paying a license tax imposed by the United States government in the case of Corbus *v.* Alaska, etc. Co., 187 U. S. 455 (1903). Stockholders may enjoin the company from discounting paper usuriously and in a manner contrary to its charter, *i. e.*, without the paper being passed on by the directors. The injunction lies on the ground that the charter is endangered. Manderson *v.* Commercial Bank, 28 Pa. St. 379 (1857).

[2] Logan County Bank *v.* Townsend, 139 U. S. 67 (1891); s. c., 3 S. W. Rep. 122 (Ky. 1887).

[3] Nantasket, etc. Co. *v.* Shea, 65 N. E. Rep. 57 (Mass. 1902).

[4] Stephens *v.* Mysore, etc. Co., 86 L. T. Rep. 221 (1902).

[5] Anderson *v.* Midland Ry., 85 L. T. Rep. 408 (1901).

[6] Brown *v.* Schleier, 118 Fed. Rep. 981 (1902), holding also that a receiver in a national bank cannot maintain a suit to recover back from the lessor of premises to the bank the rent and cost of improvements, on the ground that the lease was *ultra vires*, especially where the lease has been in existence for ten years.

[7] Good *v.* Daland, 121 N. Y. 1 (1890).

[8] Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135 (1890); s. c., 44 Hun, 412.

of a law giving land to another corporation, the land to be divided subsequently, is illegal and not enforceable.[1]

Many instances and examples of what acts and contracts of a railroad corporation are *ultra vires* are given elsewhere.[2]

After a land company has purchased a stock of goods and sold them, it cannot defeat an action for the price of the sale to it by the defense of *ultra vires*. The contract has been executed.[3]

A manufacturing corporation cannot enforce a contract of sale of oil to it, which it bought to resell.[4]

Where a manufacturing corporation enters into a contract with a municipality to build conduits, such contract is *ultra vires*, and for a breach thereof by the municipality before the contract is carried out the company cannot collect damages.[5]

Although an educational institution is operating a ferry without power so to do, yet, if a person is injured by the ferry, the institution is liable in damages.[6]

Where the lessee of a car-company plant repudiates the lease on the ground of *ultra vires* and refuses to pay rent, and the court holds that it cannot be compelled to pay rent, the lessor company may compel the lessee to pay for the property so taken, including the value of the contracts taken over.[7]

A corporation receiving goods *ultra vires* to sell on commission is nevertheless liable for breach of contract as to the price of the sale.[8]

An iron and steel manufacturing company has no power to operate a public or private warehouse. Hence warehouse receipts issued by the corporation on its own property are not protected like the ordinary warehouse receipts, and corporate creditors who hold such receipts are not protected thereby, and the transaction may not amount to a pledge.[9]

[1] Chippewa, etc. Ry. *v.* Chicago, etc. Ry., 75 Wis. 224 (1889).

[2] See § 909, *infra*.

[3] Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890).

[4] Bosshardt, etc. Co. *v.* Crescent Oil Co., 171 Pa. St. 109 (1895).

[5] Safety, etc. Co. *v.* Baltimore, 74 Fed. Rep. 363 (1896).

[6] Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 (1893).

[7] In Pullman's P. C. Co. *v.* Central Transp. Co., 171 U. S. 138 (1898), the court held that, where a lease of property was *ultra vires* and void, the only compensation for the actual use would be for the tangible property, and not for the good-will, patents, and contracts which expired during the lease. Accordingly, where the stipulated rental was $264,000 a year, the lower court allowed for use the value of the capital stock of the lessor, inasmuch as such value had been consumed in connection with the lease, and such value was fixed at upwards of $2,500,000 and interest, but the supreme court reduced the compensation to $727,000 and interest, being the actual value of the tangible property.

[8] Union Hardware Co. *v.* Plume, etc. Co., 58 Conn. 219 (1889).

[9] Franklin Nat. Bank *v.* Whitehead, 149 Ind. 560 (1898).

Where one railroad company agrees to expend certain money on another railroad, and the repayment of the money is guaranteed by a third person, such third person cannot repudiate the guaranty after the money has been expended, on the ground that the act was *ultra vires.*[1]

A bank sued as bailee for a loss of a special deposit cannot set up *ultra vires.*[2]

A bank cashier cannot buy boots and shoes for another person in the name of the bank.[3]

A party with whom an iron company contracts to deliver ice cannot recover damages for a breach of the contract.[4]

A warehouse company will not be allowed to set up *ultra vires* as a defense to notes given by it in payment for grain, the articles of incorporation having provided therefor, although probably illegally so.[5]

A land company must pay for services rendered in organizing other companies to rent and locate on the land of the former.[6]

Many other examples and illustrations of *ultra vires* acts and *intra vires* acts are given in the notes hereto.

[1] Alexandria, etc. R. R. *v.* Johnson, 58 Kan. 175 (1897).

[2] First Nat. Bank *v.* Strang, 138 Ill. 347 (1891); Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82 (1880).

[3] North Star, etc. Co. *v.* Stebbins, 2 S. D. 74 (1891).

[4] Simmons *v.* Troy Ironworks, 92 Ala. 427 (1890).

[5] Carson City Sav. Bank *v.* Carson City Elev. Co., 90 Mich. 550 (1892).

[6] Schurr *v.* New York, etc. Co., 18 N. Y. Supp. 454 (1892).

[7] In Safety, etc. Co. *v.* Mayor, 74 Fed. Rep. 363, 370 (1896), the court said in regard to *ultra vires* acts: "It is evident that no general principle can be laid down whereby, with absolute certainty, it can be determined that many transactions are or are not among the incidents to the business of a corporation authorized by its charter. The answer to the question must depend upon the facts of each particular case." See cases in § 909.

Federal Courts: See the cases at the end of this section. A receiver cannot have a contract of a corporation set aside as *ultra vires* and cannot recover back payments already made thereon, especially where the contract was carried out by the corporation for several years, and was then canceled by mutual agreement before the receiver was appointed, the contract in this case being a ninety-nine year lease of real estate to a bank, upon which real estate the bank erected a building for its own use and for rental. Brown *v.* Schleier, 112 Fed. Rep. 577 (1901). A corporation formed to publish a paper in a particular trade may publish a directory of that particular trade. Jewelers', etc. Co. *v.* Jacobs, 109 Fed. Rep. 509 (1901). A stockholder in a corporation cannot maintain a bill to enjoin the payment by the corporation of the tax imposed by act of congress upon such corporation for doing business in Alaska. Corbus *v.* Alaska, etc. Co., 99 Fed. Rep. 334 (1899). A bank which as pledgee causes by its statements a party to purchase the stock held in pledge may be held liable in damages if such statements were false. Hindman *v.* First Nat. Bank, etc., 98 Fed. Rep. 562 (1899). A state bank has no power to purchase stock in a national bank as an invest-

Out of the various cases set forth in this chapter a few general rules may be clearly drawn and stated. First, there is no clearly-

ment, and hence is not liable on such stock in case the national bank becomes insolvent. Schofield *v.* Goodrich, etc. Co., 98 Fed. Rep. 271 (1899). A national bank has power to purchase the assets and assume the liabilities of another national bank. Scofield *v.* State Nat. Bank, etc., 97 Fed. Rep. 282 (1899). Although a hardware corporation has no power to become a stockholder in and borrower from a building association, yet if it does so it cannot repudiate a mortgage which it gave in connection with the transaction. Bowman *v.* Foster, etc. Co., 94 Fed. Rep. 592 (1899). A stockholder may enjoin the corporation from obeying an illegal order of railroad commissioners of a state requiring shippers to pay a war revenue stamp tax. Dinsmore *v.* Southern, etc. Co., 92 Fed. Rep. 714 (1899). A stockholder in a railroad corporation that has taken a lease from another railroad corporation cannot object thereto on the ground that the lessor had no power originally to acquire and own the railroad. Rogers *v.* Nashville, etc. Ry., 91 Fed. Rep. 299 (1898). Under the statute authorizing corporations for any lawful "business" or "pursuit," a corporation may be formed to guarantee the bonds of an educational institution, and at any rate the stockholders in such corporation cannot question the power of the corporation to make such guaranty. Maxwell *v.* Akin, 89 Fed. Rep. 178 (1898). Even though a contract by which one railroad operates another is *ultra vires*, and even though the operating road by another *ultra vires* contract consents to a mortgage being placed upon the other road, and agrees to protect the latter by paying the interest if necessary, nevertheless, in case of a default and foreclosure, the operating road cannot claim a lien for betterments in priority to such mortgage. Terre Haute & I. R. R. *v.* Harrison, 88 Fed. Rep. 913 (1898). A corporation organized to manufacture and sell cotton-seed oil cannot legally buy fertilizers and sell the same for a profit, and hence notes given therefor are void. Richmond, etc. Co. *v.* Farmers', etc., 119 Fed. Rep. 709 (1902). Even though it may be *ultra vires* for a national bank to take charge of securities and collect and reinvest the proceeds, yet the bank must account for the same. Emmerling *v.* First Nat. Bank, etc., 97 Fed. Rep. 739 (1899). A national bank may give a bond to secure funds deposited with it. State of Nebraska *v.* First Nat. Bank, 88 Fed. Rep. 947 (1898). A national bank owning stock in a savings bank may defeat the statutory liability attached thereto by a plea of *ultra vires*. California Bank *v.* Kennedy, 167 U. S. 362 (1897). *Cf.* Citizens' State Bank *v.* Hawkins, 71 Fed. Rep. 369 (1896), and Cooper Ins. Co. *v.* Hawkins, 71 Fed. Rep. 372 (1896). Notes given by a lumber manufacturing corporation to pay for stock in a bank cannot be enforced. Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384. A corporation is presumed to have power to purchase a patent whose use pertains to the business indicated by the name of the corporation. Dorsey, etc. Co. *v.* Marsh, 6 Fish. Pat. Cas. 387 (1873); s. c., 7 Fed. Cas. 939. In Germania, etc. Co. *v.* Boynton, 71 Fed. Rep. 797 (1896), it was held that even though every stockholder and director acquiesces in corporate bonds being issued to secure the private debt of an officer, yet that a party receiving such bonds with notice could not enforce them. A national bank may agree that a person going security on an attachment bond will be protected by the bank, although the bond is not given for the benefit of the bank. Seeber *v.* Commercial Nat. Bank, 77 Fed. Rep. 957 (1897). See 189 U. S. 122.

Alabama: A mining company is not liable for the price of goods which it purchases to carry on an *ultra vires*

defined principle of law that determines whether a particular act is *ultra vires* or *intra vires*. The courts are becoming more liberal, and many acts which fifty years ago would have been held to be

mercantile business. Chewacla Lime Works *v.* Dismukes, 87 Ala. 344 (1889). Where a lime and limestone corporation engages in the mercantile business, it is not liable for the price of goods sold and delivered to it. Chewacla Lime Works *v.* Dismukes, 87 Ala. 344 (1889).

California: Vandall *v.* South San Francisco Dock Co., 40 Cal. 83 (1870), holding that a corporation empowered to buy, *improve*, etc., real estate may appropriate a portion of its funds to a railroad in consideration of lower rates and more frequent trains. Where an improvement company engages in the hotel business, it cannot repudiate the liabilities of an innkeeper on the ground that the hotel business was beyond its powers. Magee *v.* Pacific Imp. Co., 98 Cal. 678 (1893). A mortgagor of land to a national bank cannot defend against it on the ground that the bank had no power to take the mortgage. Camp *v.* Land, 122 Cal. 167 (1898).

Colorado: Minority stockholders may complain when the majority hold stockholders' meetings out of the state, keep no office or books in the state, appropriate treasury stock, etc. Jones *v.* Pearl Min. Co., 20 Colo. 417 (1894). An improvement company has no power to purchase a cause of action for damages to land, by reason of a public improvement, even though prior thereto it had purchased the land itself, and if it sues the city for such damages the defense of *ultra vires* is good. City of Pueblo *v.* Shutt Inv. Co., 67 Pac. Rep. 162 (Colo. 1901).

Dakota: A party who loans money to a corporation, knowing that the money is to be used by the company to buy shares of its own capital stock, cannot collect his debt, the act being *ultra vires*. Adams, etc. Co. *v.* Deyette, 8 S. D. 119 (1895).

Georgia: A bank which buys in a manufactory on an execution sale, in order to protect itself, may carry on the business and is liable for debts incurred thereby. Reynolds *v.* Simpson, 74 Ga. 454 (1885). A cotton ginning company cannot defend against its note in *bona fide* hands, given by the company to purchase an ice machine, especially where there is no attempt to rescind. Towers, etc. Co. *v.* Inman, 96 Ga. 506 (1895). Where one corporation sells its property to another, and, after part payment is made, the president of the vendee turns back the property, but the vendee corporation sues for the return of the property, such vendee corporation cannot afterwards claim that the transaction was *ultra vires*. Steele Lumber Co. *v.* Laurens Lumber Co., 98 Ga. 329 (1896). Where a corporation sues on notes which it has purchased, the defense of *ultra vires* is not sufficient. The answer must be more specific. Hart *v.* Phenix, etc. Co., 113 Ga. 859 (1901).

Illinois: A building corporation being sued for breach of its contract to keep property insured cannot set up that it had no power to insure. Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453 (1872). A bank may establish a savings department and may pay interest on the savings deposits, and may assign in trust certain securities to secure such deposits. Ward *v.* Johnson, 95 Ill. 215 (1880). Having enjoyed the benefits of a contract, a corporation cannot refuse payment of the amount due on the plea of *ultra vires*. So held where a brewing company took a lease of a saloon. Heims Brewing Co. *v.* Flannery, 137 Ill. 309 (1891). Inasmuch as a national bank cannot transact business until authorized so to do by the comptroller of the currency, a lease made before such consent is void, and the only re-

ultra vires would now be held to be *intra vires*. The courts have gradually enlarged the *implied* powers of ordinary corporations, until now such corporations may do almost anything that an indi-

covery can be for use and occupation. McCormick *v.* Market Nat. Bank, 162 Ill. 100 (1896). A building association having statutory power to purchase land on which it has a lien has no power to purchase land upon which it has no lien, and hence the association cannot be held liable for a deficiency in the foreclosure of a mortgage which rested upon such property, when purchased by the association and which the association assumed, it being shown also that the transaction had not been authorized by the board of directors, but that on the contrary they repudiated it. National, etc. Assoc. *v.* Home, etc. Bank, 181 Ill. 35 (1899). A corporation organized to carry on the brewing business and to manufacture and sell soda water may rent a place for a "saloon," inasmuch as such "saloon" may be to sell soda water only. Brewer, etc. Co. *v.* Boddie, 181 Ill. 622 (1899). A brewing company cannot become surety on an appeal bond, even though thereby it continues to sell beer to the appealing party. The company is not liable. Best, etc. Co. *v.* Klassen, 185 Ill. 37 (1900). The plea of *ultra vires* may be interposed in a collateral proceeding only when the corporation has performed an act which it is not under any circumstances authorized to perform, even in part. Rector *v.* Hartford Deposit Co., 60 N. E. Rep. 528 (Ill. 1901). A second mortgagee cannot complain that the first mortgage has been purchased *ultra vires* by a corporation. Daniels *v.* Belvidere, etc. Assoc., 61 N. E. Rep. 1031 (Ill. 1901). A water-power corporation organized under a special act of the legislature by which the various owners of riparian rights and of the dam and of the water-power therefrom became interested in such company, no stock being issued, but each owner of water-power being entitled to one vote, cannot maintain suit against a city for diverting the water where the title to the water rights was not vested in the corporation, the business of the corporation being to maintain the dam and raceways and preserve the water-power, the expense being paid by assessment. Elgin, etc. Co. *v.* City of Elgin, 62 N. E. Rep. 929 (Ill. 1902). A company organized to deal in pneumatic bells is not liable for the price of mica washers delivered to it on its contract to pay for the same. Chicago, etc. Co. *v.* Jones, etc. Co., 91 Ill. App. 547 (1899).

Indiana: Even though a person loaning money on the bonds and mortgage of a corporation knows that the money is to be used for an *ultra vires* purpose, yet he may enforce the same. Wright *v.* Hughes, 119 Ind. 324 (1889). Where a lumber company becomes surety on the bond of a contractor against mechanics' liens on a building which he is about to build and for which the company is to furnish the lumber, the defense of *ultra vires* is not good. G. F. Wittmer, etc. Co. *v.* Rice, 23 Ind. App. 586 (1900). See also §§ 774, 775, *infra.* A person loaning money to a corporation on its note may collect it, even though he knew the money was to be used for an *ultra vires* purpose, provided he did not take part in such use, and such use was not made a condition of the loan. Marion, etc. Co. *v.* Crescent, etc. Co., 61 N. E. Rep. 688 (Ind. 1901).

Iowa: When the corporation sues on a contract assigned to it, its want of power to take the assignment must be proved by the defendant. Wardner, etc. Co. *v.* Jack, 82 Iowa, 435 (1891). Where the statute requires gas and electric-light franchises to be voted on by the people, an electric-light company is not liable in damages for fail-

vidual may do, provided the state and the stockholders and creditors do not object. In the case of railroads the courts are more strict. The public are interested in the acts and operations of rail-

ure to supply the number of lights called for by its contract with the city, where the people had not voted on the franchise. Even though the city had paid for lights furnished, this is the rule. Keokuk *v.* Ft. Wayne Elec. Co., 90 Iowa, 67 (1894). A mutual insurance company cannot take insurance from a stockholder on a premium paid. In case of a loss the company may defend on that ground. *In re* Mutual, etc. Ins. Co., 107 Iowa, 143 (1899). An insurance company cannot defend against a policy on the ground that the assessments called for by the policy were lower than was allowed by the charter of the company. Watts *v.* Equitable, etc. Assoc., 82 N. W. Rep. 441 (Iowa, 1900).

Kansas: A town-site company may be liable for the contract of its general agent with a store-keeper guaranteeing that a railroad would be constructed to the town site within a certain time. Arkansas Valley, etc. Co. *v.* Lincoln, 56 Kan. 145 (1895). An opera house company which has taken stock in a building association, in order to obtain a loan, cannot repudiate the loan on the ground that it was not authorized to take such stock. Blue, etc. Co. *v.* Mercantile, etc. Assoc., 53 Pac. Rep. 761 (Kan. 1898). In the case of City of Kansas City *v.* Wyandotte, etc. Co., 61 Pac. Rep. 317 (Kan. 1900), the court said: "The plea of *ultra vires*, when interposed for or against a corporation, ought not to be permitted to prevail when it would not advance justice," and the court applied this rule to the defense of a city against a gas bill. A corporation organized to do a real estate business may act as agent in taking charge of real estate, collecting rents, etc. Neosho, etc. Co. *v.* Hannum, 63 Pac. Rep. 92 (Kan. 1900).

Kentucky: Warehouse receipts issued by a glass manufacturing company do not create a lien on the property mentioned in the receipts. Bell, etc. Co. *v.* Kentucky, etc. Co., 48 S. W. Rep. 440 (Ky. 1898). A gas company organized to carry on business under a specified contract with a city has power to accept a new franchise in lieu thereof. Keith *v.* Johnson, 59 S. W. Rep. 487 (Ky. 1900). A corporation cannot hold its agent liable for money which it paid him to buy articles which it had no power to buy, the goods having been delivered. Louisville, etc. Co. *v.* Stewart, 70 S. W. Rep. 285 (Ky. 1902).

Louisiana: The state may enjoin a foreign railroad company from carrying on the warehouse business, except so far as the same is incidental to the railroad business, the charter of such company not including warehouse business as a business in itself. State *v.* Southern, etc. Co., 52 La. Ann. 1822 (1900).

Maryland: A contract by a packet company to pay for harbor improvements is *ultra vires* and not enforceable. Abbott *v.* Baltimore, etc. Co., 1 Md. Ch. 542 (1850).

Massachusetts: City Hotel *v.* Dickinson, 72 Mass. 586 (1856), holds that a hotel company may let a part of its building for shops. A ferry company having a surplus boat may rent it. Brown *v.* Winnisimmet Co., 93 Mass. 326 (1865). A company engaged in manufacturing and selling glass may purchase glass in order to keep up its stock. Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315 (1873). In Dupee *v.* Boston Water Power Co., 114 Mass. 37 (1873), the sale by the company of surplus land, receiving in payment stock of the corporation itself, was upheld as against a dissenting stockholder's action. A bank which has bought in property on a foreclosure sale, with a secret agreement that it

roads. Hence, ordinarily, the courts will not sustain the acts of railroads in selling, leasing, or mortgaging their property, or en-

will hold the property in trust for certain purposes, cannot repudiate the trust on the ground that it is *ultra vires.* Whitney *v.* Leominster Sav. Bank, 141 Mass. 85 (1886). A manufacturing corporation which runs a store and sells goods may collect for goods thus sold, though the sales were made by its undisclosed agent. Slater Woollen Co. *v.* Lamb, 143 Mass. 420 (1887); Chester Glass Co. *v.* Dewey, 16 Mass. 94 (1819). Stockholders cannot enjoin an *intra vires* act on the ground that it was promised that the corporation would not enter into that act. Converse *v.* Hood, 149 Mass. 471 (1889). Although the charter of a water-works company limits the amount of property which it may hold, yet, if it holds a greater amount, a municipality cannot condemn the property on the basis of the charter limit. Only the state can object that the company holds more property than is allowed by law. West Springfield *v.* West Springfield Aqueduct Co., 167 Mass. 128 (1896). The general incorporating law of Massachusetts, which does not allow incorporation for manufacturing liquor, does not prevent incorporation for selling liquor, and hence a foreign corporation may sell liquor in that state. Enterprise, etc. Co. *v.* Grimes, 173 Mass. 252 (1899).

Michigan: A person who has taken from a corporation an exclusive right to manufacture under a patent, and has so manufactured, cannot defeat an action for the royalties agreed upon for the goods already manufactured by alleging that the contract was *ultra vires.* Hall Mfg. Co. *v.* American, etc. Co., 48 Mich. 331 (1882). A person having sold and partly delivered an article to a corporation which the corporation had no right to purchase may refuse to complete delivery, and may sue for the part delivered. Day *v.* Spiral, etc. Co., 57 Mich. 146 (1885). A subscriber or donator of money to a factory cannot prevent its moving away if it is a losing enterprise. Ayres *v.* Dutton, 87 Mich. 528 (1891). A corporation that has purchased a judgment and collected it cannot refuse to pay the vendor of the judgment on the ground of *ultra vires.* Clement, etc. Co. *v.* Michigan, etc. Co., 110 Mich. 458 (1896). Where a corporation organized to do a jewelry business is really a scheme to carry on an illegal and fraudulent investment business, a person defrauded may file a bill in equity to hold the corporation and its officers and stockholders personally liable and enjoin them from disposing of the assets and for discovery. Edwards *v.* Michigan, etc. Co., 92 N. W. Rep. 491 (Mich. 1902).

Minnesota: The admission that a contract was executed by a corporation is an admission that the corporation had power to make it, and the officer had power to sign it. Bausman *v.* Credit Guarantee Co., 47 Minn. 377 (1891). A corporation organized to improve a river for driving logs cannot itself drive logs or collect therefor. Northwestern, etc. Co. *v.* O'Brien, 75 Minn. 335 (1899).

Mississippi: A corporation may offer a reward for the detection of criminals who have committed a crime against it. Norwood, etc. Co. *v.* Andrews, 71 Miss. 641 (1894). Although two cotton compress companies have agreed to consolidate, and have put their property in the hands of a governing committee to manage until a new charter is obtained, yet either corporation may withdraw from the arrangement, it being *ultra vires.* Greenville, etc. Co. *v.* Planters', etc. Co., 70 Miss. 669 (1893). A loan in excess of the amount allowed by charter may nevertheless be collected. Fargason *v.* Oxford, etc. Co., 78 Miss. 65 (1900).

Missouri: A coal mining and transporting corporation may purchase and use a steamboat for transporting coal.

gaging in any outside business, unless the public assent through the legislature. But as to the ordinary private corporation the rules of *ultra vires* have been greatly relaxed.

Callaway, etc. Co. *v.* Clark, 32 Mo. 305 (1862). A contract to convey land for purposes of speculation to a company in consideration of a certain location of a railroad was held unenforceable as against public policy. Pacific R. R. *v.* Seely, 45 Mo. 212 (1870). See also § 650, *supra*. A private party seeking to enjoin a corporation from using public property which the city has leased to such corporation cannot set up that the lessee corporation is acting *ultra vires.* Only the state or the stockholders can raise that objection. Belcher, etc. Co. *v.* St. Louis, etc. Co., 101 Mo. 192 (1890). It is *ultra vires* for a bank to allow an overdraft. Market Street Bank *v.* Stump, 2 Mo. App. 545 (1876). A pledge is not illegal though it secures a greater amount than the pledgee bank is entitled to loan to one person. McClintock *v.* Central Bank, etc., 120 Mo. 127 (1894). A trust company authorized to accept deposits and pay interest thereon has no power to accept deposits without paying interest thereon. State *v.* Lincoln Trust Co., 144 Mo. 562 (1898).

Montana: A corporation having a claim against another corporation may purchase a lien on the property of the latter corporation in order to protect its claim. Mahoney *v.* Butte Hardware Co., 19 Mont. 377 (1897).

Nebraska: A general denial does not raise the defense of *ultra vires.* Citizens' State Bank *v.* Pence, 81 N. W. Rep. 623 (Neb. 1900).

New Jersey: While it is true that a stockholder may enjoin his company from proceeding with its business, if the objects thereof have become unattainable or illegal, yet an unconstitutional statute in Indiana forbidding the piping of natural gas to places outside of the state does not justify the suit of a stockholder in a New Jersey construction company to enjoin his company from proceeding to construct a pipe line from Indiana to Chicago. Benedict *v.* Columbus Const. Co., 49 N. J. Eq. 23 (1891). A stockholder may enjoin the company from removing the plant from the state, where the charter provides for the manufacturing to be done in the state. Stickle *v.* Liberty, etc. Co., 32 Atl. Rep. 708 (N. J. 1895). The fact that a charter authorizes a corporation to do business at a certain place outside of the state does not prevent its doing business in other states. Meredith *v.* New Jersey, etc. Co., 59 N. J. Eq. 257 (1899); aff'd, 60 N. J. Eq. 445 (1900). In a suit to enjoin a corporation from engaging in *ultra vires* business the articles of incorporation should be alleged in part at least. Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901). A minority stockholder cannot enjoin the company from issuing its stock in payment for the stock of other similar companies on the ground that the price to be paid is excessive and that three of the directors are interested as stockholders in the other companies, where he does not prove that the price is excessive, and it appears that the stockholders will have to approve the transaction before the directors can issue the stock, and it appears also that the plaintiff owns but a very small amount of stock. Geer *v.* Amalgamated, etc. Co., 61 N. J. Eq. 364 (1901).

New York: It is within the power of a bank to receive special deposits of bonds, etc., for safe-keeping, gratuitously and for mere accommodation, and the bank is liable for their loss by gross negligence. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82 (1880). A corporation and stockholders agreed to turn over to defendant and others the control, but the latter were to account for rafts built. *Held,* they could not set up *ultra vires.* Each of the defend-

Second, the decision in any particular case turns largely on the questions of who is complaining; against whom the complaint is made; and what relief is sought. The stockholder's action is

ants is liable for all as to accounting. Rider Life Raft Co. *v.* Roach, 97 N. Y. 378 (1884). A lock company sued for the price of locks sold to it by a company incorporated to manufacture firearms cannot defeat the suit by setting up that the latter corporation had no power to manufacture such articles. Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875). One director may enjoin other directors from using corporate funds to buy liabilities of an insolvent competing concern for the purpose of suing thereon, and from paying money to prevent the rival concern getting its work done. Colles *v.* Trow, etc. Co., 11 Hun, 397 (1877). A manufacturing corporation selling a store with a guaranty of the continued patronage of its employees, or else a fixed sum as indemnity, is liable thereon. De Groff *v.* American Linen T. Co., 21 N. Y. 124 (1860). A smelting corporation may purchase smelting works. Moss *v.* Averell, 10 N. Y. 449 (1853). Persons who with a corporation jointly purchase property cannot defend against the price by alleging that it was *ultra vires* of the corporation to purchase. State *v.* Woram, 6 Hill, 33 (1843). In Lafond *v.* Deems, 81 N. Y. 507 (1880), a voluntary benevolent association, having been compelled to hire more room than it needed, was held to have power to fit up and let the portion not required. Temple Grove Seminary *v.* Cramer, 98 N. Y. 121 (1885), holds that a seminary of learning may let its building as a boarding-house during the summer vacation. A rural cemetery company may sell a large number of its lots, although the vendee intends to resell them. Palmer *v.* Cypress Hill Cemetery, 122 N. Y. 429 (1890). A corporation organized to act as a broker in buying and selling grain is subject to the same rule as regards gambling contracts that individuals are. Peck *v.* Doran, etc. Co., 57 Hun, 343 (1890). Power to manufacture and sell goods does not give power to buy and sell goods. People *v.* Campbell, 144 N. Y. 166 (1894), a taxation case. Even if the agreement of a building association with a member is *ultra vires* in that the association agrees to pay more than it ought, yet if the member has carried out his part of the contract and made full payments, he is entitled to the amount the association has agreed to pay, the latter being "estopped from asserting its own wrong and cannot be excused from payment upon the plea that the contract was beyond its power." Vought *v.* Eastern Bldg. etc. Assoc., 172 N. Y. 508 (1902). A receiver of a savings bank may enforce a bond given to it by an individual agreeing to pay to the bank a certain sum if it would continue business, which the bank did. Hurd *v.* Kelly, 78 N. Y. 588 (1879), aff'g 17 Hun, 327 (1879). A manufacturing corporation borrowing bonds in order to use them as collateral to a loan is liable to the owner for their return. Beckwith *v.* Rochester Iron, etc. Co., 12 N. Y. Week. Dig. 528 (1881). A brewery company may guarantee the rent of a saloon-keeper who buys his beer of the company. Koehler & Co. *v.* Reinheimer, 26 N. Y. App. Div. 1 (1898). An indorser of a corporate note cannot set up that such note is *ultra vires*. Donohoe *v.* Meeker, 35 N. Y. App. Div. 43 (1898). A mining company has no power to furnish the play and performers for a theatre, and a contract to that effect cannot be enforced, even though all the stockholders, except the owner of four shares, assent thereto. Broadway, etc. Co. *v.* Dessau Co., 45 N. Y. App. Div. 475 (1899). A corporation is bound by its superintendent's employment of an undertaker to bury an em-

looked upon most favorably if he is not guilty of delay. But an action by the state to enjoin the act or to forfeit franchises is an unusual, extraordinary, and somewhat harsh remedy, and is not fa-

ployee killed in the employ of the company. Noll *v.* Archer-Pancoast Co., 60 N. Y. App. Div. 414 (1901). *Ultra vires* is an affirmative defense and must be pleaded. Keating *v.* American, etc. Co., 62 N. Y. App. Div. 501 (1901). The defense of *ultra vires* is not good unless pleaded. Hess *v.* Sloane, 66 N. Y. App. Div. 522 (1901). Where the president of a bank is acting as the agent of a person and sells to the latter securities of the bank by means of false representations, the bank is liable, even though the purchaser did not know that the sale was in behalf of the bank. Carr *v.* National Bank & L. Co., 167 N. Y. 375 (1901). In general see also p. 1608, *sub.*

North Carolina: Gruber *v.* Washington, etc. R. R., 92 N. C. 1 (1885), holds that a lumber company, in providing transportation for its product, could, as incidental to its business, carry the goods of others and also passengers.

Ohio: A corporation in acquiring the assets of a partnership may acquire a cause of action which the latter has against another corporation for negligence and may enforce such cause of action, even though it would have had no power to buy it separately from the other property. Central, etc. Co. *v.* Capital, etc. Co., 60 Ohio St. 96 (1899). A college need not obtain an amendment to its charter in order to add a new subject to its curriculum. State *v.* Hygeia, etc. College, 60 Ohio St. 122 (1899).

Oregon: A hardware company is liable for lime purchased, even though it was not organized for the purpose of dealing in that commodity. *Re* Pendleton, etc. Co., 24 Oreg. 330 (1893). A corporation may by its charter be given the power to act as an attorney in fact, and it may execute a deed as such attorney. Killingsworth *v.* Portland Trust Co., 18 Oreg. 351 (1890). A lumber manufacturing company may take an assignment of a judgment and bring suit thereon. Capital, etc. Co. *v.* Learned, 36 Oreg. 544 (1899).

Pennsylvania: A stockholder may enjoin his company from doing acts forbidden by statute. Sparhawk *v.* Union Pass. Ry., 54 Pa. St. 401, 452 (1867). A corporation with power to own land and promote settlement may build saw-mills and erect a hotel. Watts's Appeal, 78 Pa. St. 370 (1875). A corporation with power to manufacture and supply gas may deal in gas appliances. Malone *v.* Lancaster, etc. Co., 182 Pa. St. 309 (1897). A corporation has no right to change the grade of its road as fixed by its charter when such change would place it in a different category under the statutes relative to railroads. Western, etc. Ry. *v.* Buffalo, etc. Ry., 193 Pa. St. 127 (1899). In a suit by a bridge company against a street railway for tolls, in accordance with a contract, the street railway cannot set up that all the stock of the bridge company has been purchased by the city and that the purchase was *ultra vires.* Monongahela, etc. Co. *v.* Pittsburg, etc. Co., 196 Pa. St. 25 (1900).

South Carolina: A building association which has obtained a subscription on an *ultra vires* agreement as to repayment is liable in a suit at law for the money so paid to it. Williamson *v.* Eastern, etc. Assoc., 54 S. C. 582 (1899).

Tennessee: A manufacturing company is liable for goods purchased by a store owned by it. Searight *v.* Payne, 6 Lea (Tenn.), 283 (1880), where an iron furnace company ran a store. Where an insurance company has issued a policy which is not authorized by its charter, the policy cannot be enforced by the party who is insured. The court

vored by the courts. So, also, an action by the corporation itself, or by the party contracted with, to repudiate an *ultra vires* act is not favored by the courts. Such an action is an attempt by a party to evade the contract by means of principles of law which both par-

said in a dictum that his remedy is a suit in disaffirmance and for an accounting. Miller *v.* Insurance Co., 92 Tenn. 167 (1893). Even though an ice company purchases, without power so to do, beer from a brewing company, and even though it passes into a receiver's hands, yet the latter may file a petition asking in the alternative to be allowed the price, or, if the contract is disaffirmed, the value thereof. Tennessee Ice Co. *v.* Raine, 64 S. W. Rep. 29 (Tenn. 1901). In this case the court said that all the authorities hold that a corporation obtaining the benefits of an *ultra vires* contract is estopped from defending against the contract on the ground that it is *ultra vires*, but that while in many of the states the corporation cannot prevent recovery on the contract according to its terms, yet that in other states the recovery is on a *quantum meruit* or on a *quantum valebat.*

Texas: The maker of a note cannot set up that the payee corporation discounted it *ultra vires.* Logan *v.* Texas, etc. Assoc., 8 Tex. Civ. App. 490 (1894). Where a corporation has taken a lease of a wharf from a city, it cannot avoid the payment of rental, after using the premises, on the ground of *ultra vires.* Corpus Christi *v.* Central, etc. Co., 8 Tex. Civ. App. 94 (1894). Where a bank has agreed to see that a vendor of feed is paid, the vendee being a depositor in the bank, and an arrangement having been made between him and the bank for such payment, the bank cannot avoid payment on the ground that its agreement was *ultra vires.* First Nat. Bank *v.* Greenville, etc. Co., 60 S. W. Rep. 828 (Tex. 1901). In Texas it is held that where a corporate contract is executed, and the corporation has received the benefits of it, the corporation cannot invoke its want of power as a defense to the contract. Continental, etc. Assoc. *v.* Masonic, etc. Co., 62 S. W. Rep. 930 (Tex. 1901).

Vermont: A manufacturing company is liable for goods purchased by a store owned by it. Dauchy *v.* Brown, 24 Vt. 197 (1852). As regards the charter or corporate power to confer a degree, see Townshend *v.* Gray, 62 Vt. 373 (1890).

Washington: A lumber company may become surety on a building contractor's bond where it is customary for such companies so to do in order to obtain business. Wheeler, etc. Co. *v.* Everett Land Co., 14 Wash. 630 (1896). Where a corporation dealing in other goods buys clothing and uses the same to fill certain orders, it cannot then recover back the purchase price. Graton, etc. Co. *v.* Redelsheimer, 68 Pac. Rep. 879 (Wash. 1902).

Wisconsin: Where a river packet company purchases grain and pays partly therefor, it may recover back the money paid, but not damages for refusal of vendor to deliver. Northwestern, etc. Co. *v.* Shaw, 37 Wis. 655 (1875). A corporation formed to make and sell beer may guarantee the rent of a customer. Winterfield *v.* Cream City B. Co., 96 Wis. 239 (1897). "The doctrine of *ultra vires* cannot be invoked by a corporation for the purpose of escaping a burden resulting from a contract so far executed that the corporation has received the benefit thereof. That most wholesome doctrine is well established." Bullon *v.* Milwaukee, etc. Co., 109 Wis. 41 (1901). Forfeiture of a water-works grant from the city will not be decreed except in a clear case and where

ties have violated or waived the benefit of. The court is not swift to grant relief in such cases.

Third, if a contract or act is *ultra vires*, and has not yet been performed, either the corporation or the party contracted with may refuse to complete the contract. No damages can be collected for such refusal. So, also, if the contract has been partly performed, and the unperformed part is separable from the rest, either party may refuse to complete. But where one party has completely performed and carried out its part of the contract, the other party cannot refuse to perform, while at the same time retaining the benefits of performance by the first named party.[1]

no other punishment will adequately remedy the mischief. City of Ashland *v.* Ashland, etc. Co., 110 Wis. 94 (1901).

England: A suit by a copper trading company for damages against a person who had refused to accept iron which he had agreed to purchase of the plaintiff fails. Copper Miners *v.* Fox, 16 Q. B. 229 (1851). In Simpson *v.* Westminster, etc. Co., 8 H. L. Cas., 712 (1860), a lease by a hotel company of part of its building during its completion was held valid. A company formed to work a patent may purchase it. Leifchild's Case, L. R. 1 Eq. 231 (1865). Brokers employed by directors to sell property of the corporation cannot recover damages from the directors for a failure of sale due to the vendee alleging that the directors had no power to sell, it being proved by the directors that they did have such power. Wilson *v.* Miers, 10 C. B. (N. S.) 348 (1861). Where a stockholder institutes a suit to remedy a wrong to the corporation, and while it is pending new directors are elected and they proceed to carry on the suit at the corporate expense, any dissenting stockholder may enjoin such use of the corporate funds. To allow it would be to prejudice the suit. Kernaghan *v.* Williams, L. R. 6 Eq. 228 (1868). The organization of a company to carry on the lottery business in foreign countries was held legal in Macnee *v.* Persian Corp., L. R. 44 Ch. D. 306 (1890). A corporation which holds stock in another corporation may agree to surrender a part of such stock in order to enable the latter company to proceed with its business, and such surrender is not *ultra vires.* Thompson *v.* Trustees, etc. Corp., [1895] 2 Ch. 454. Where a company has to give a bond, and the bond is given by a director, the company is liable to him. Southern Counties Dep. Bank *v.* Boaler, 73 L. T. Rep. 155 (1895). A corporation is a "person," within the meaning of a statute rendering persons liable for misrepresenting the responsibility of another party. Hirst *v.* West, etc. Co., [1901] 2 K. B. 560.

Canada: A company receiving a deposit *ultra vires* is nevertheless bound to repay it. Walmsley *v.* Rent Guarantee Co., 29 Grant Ch. (Can.) 484 (1881).

[1] Speaking of *ultra vires* acts, the New York court of appeals said: "As artificial creations, they have no powers or faculties except those with which they were endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be, Is the act prohibited as prejudicial to some public interest, or is it an act not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea of *ultra vires* should not prevail when it would not advance justice, but on the contrary would accomplish legal wrong." Leslie *v.* Lorillard, 110 N. Y. 519 (1888). See also discussion in Camden, etc. R. R. *v.* May's Landing, etc. R. R., 48 N. J. L. 530 (1886); Mar-

The courts differ widely in their decisions on the enforceability of *ultra vires* contracts. The New York court of appeals, in a series of consistent and ably-reasoned decisions, has established the rule in that state that an *ultra vires* contract is enforceable if there has been part performance and the stockholders have not objected and the creditors have not been injured.[1] The New York court says that "that kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state."[2]

Practically the same conclusion has been reached in Massachusetts[3] and Wisconsin.[4]

In the federal courts, on the contrary, the old rule against *ultra vires* contracts is upheld in all its rigor and applied with all its severity. The tendency of modern jurisprudence to relax on that subject finds no favor in the federal courts.[5]

tin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890).

[1] Whitney Arms Co. *v.* Barlow, 63 N. Y. 62 (1875); Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890); Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24, 29–34, 37 (1896), per Andrews, Ch. J., reviewing many cases, discussing the subject in an able and exhaustive manner, and holding that past-due rent may be recovered on an *ultra vires* lease.

[2] Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333, 341 (1895); s. c., 157 N. Y. 697.

[3] Chief Justice Bigelow, in Brown *v.* Winnisimmet Co., 93 Mass. 326, 334 (1865), said: "We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated." In Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 (1893), the court said that an *ultra vires* contract not yet executed will not be enforced by the courts; but, "on the other hand, courts have frequently held that while such contracts, considered merely as contracts, are invalid, they involve no such element of moral or legal wrong as to forbid their enforcement, if there has been such action under them as to work injustice if they are set aside. Courts have been astute to discover something in the nature of an equitable estoppel against one who, after entering into such a contract, and inducing a change of condition by another party, attempts to avoid the contract by a plea of *ultra vires*. It is said that such a plea will not avail when to allow it would work injustice and accomplish legal wrong." The court, however, declined to pass upon this principle of law.

[4] The old rule of *ultra vires* has been changed so that now only the state or a party interested in the corporation can complain. Farwell Co. *v.* Wolf, 96 Wis. 10 (1897).

[5] "The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: the obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the

§ 682. *Personal liability of the directors and officers for ultra vires acts.*— There can be no doubt that, if the directors or officers of a company do acts clearly beyond their power, whereby loss ensues to the company, or dispose of its property or pay away its money without authority, they may be required to make good the loss out of their private estates.[1] Directors and officers have been held personally liable for libel prohibited by the company;[2] for infringement of trade-mark;[3] for loaning money in violation of

powers conferred upon it by law." McCormick *v.* Market Bank, 165 U. S. 538 549 (1897). See also the cases in the notes *supra.* "A railroad corporation, unless authorized by its act of incorporation or by other statutes so to do, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly *ultra vires,* unlawful and void, and incapable of being made good by ratification or estoppel." Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 552, 567 (1899). In Salt Lake City *v.* Hollister, 118 U. S. 263 (1886), the court said that in cases of *ultra vires* contracts, upon which corporations could not be sued, "the courts have gone a long way to enable parties who had parted with money and property on the faith of such a contract to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use." In a dictum in Jacksonville, etc. Nav. Co. *v.* Hooper, 160 U. S. 514, 524 (1896), the court emphasized the statement that no estoppel or part performance can sustain a contract that is forbidden by a charter or is contrary to public policy. See also Oregon Ry. etc. Co. *v.* Oregonian Ry., 130 U. S. 1 (1889); Pennsylvania R. R. *v.* Keokuk, etc. Co., 131 U. S. 371, 384, 389 (1889). "Every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public," and especially so as regards corporations organized under general laws. Central Transp. Co. *v.* Pullman's Palace Car Co., 139 U. S. 24, 49 (1891). The rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation becomes insolvent. Tod *v.* Kentucky Union Land Co., 57 Fed. Rep. 47 (1893).

[1] North Hudson, etc. Assoc. *v.* Childs, 82 Wis. 460 (1892), citing Thompson, Liab. Off. 375, § 16; Joint Stock Discount Co. *v.* Brown, L. R. 8 Eq. 381 (1869); *Re* Exchange Banking Co., L. R. 21 Ch. D. 519 (1882); Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. 130 (1829). See also the cases in § 702, *infra.*

[2] See § 15*b*, *supra.*

[3] A director who votes in favor of a resolution that the agents of a company manufacture and sell an infringing article is liable personally for such infringement, even though he acted in good faith and did not know that an infringement would be the result. National, etc. Co. *v.* Leland, 94 Fed. Rep. 502 (1899). An officer is not personally liable for an infringement by the corporation, unless it is insolvent or it is a mere dummy to protect others. Southern, etc. Assoc. *v.* Carey, 117 Fed. Rep. 325 (1902). The directors of a corporation may be included as parties defendant in a bill against the corporation for infringement of a trade-mark. They may be held liable so far as they took part in the infringement. Armstrong *v.* Savannah Soap Works, 53 Fed. Rep. 124 (1892); St. Louis Stamping Co. *v.*

the charter;[1] for exacting illegal rebates from a railroad;[2] for false representations;[3] for borrowing in excess of the company's

Quinby, 5 Ban. & Ard. 275 (1880); Goodyear *v.* Phelps, 3 Blatchf. 91 (1853); s. c., 10 Fed. Cas. 711; Smith *v.* Standard, etc. Co., 19 Fed. Rep. 826 (1883); Nichols *v.* Pearce, 7 Blatchf. 5 (1869); s. c., 18 Fed. Cas. 204. The directors and officers of a corporation which has infringed upon a patent cannot be held personally liable for the profits of such infringement. Mergenthaler, etc. Co. *v.* Ridder, 65 Fed. Rep. 853 (1895), reviewing the cases. A general agent of an infringing company is personally liable. Cramer *v.* Fry, 68 Fed. Rep. 201 (1895). A judgment against a corporation as to the infringement of a patent is not binding on the stockholders in subsequent suits against them, even though they were present at the trial and testified. Wilgus *v.* Germain, 72 Fed. Rep. 773 (1896). The officers, stockholders, and agents of a corporation may be enjoined from infringing a patent, even though the corporation itself is not within the jurisdiction of the court. Edison, etc. Co. *v.* Packard Elec. Co., 61 Fed. Rep. 1002 (1893), holding also that they are liable personally.

[1] See § 690, *infra*. A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. National Bank, etc. *v.* Wade, 84 Fed. Rep. 10 (1897). A stockholder in a bank may sue to compel the president to restore $45,000 which he caused the bank to loan without security, the money being used to pay a debt due to the president himself. Wickersham *v.* Crittenden, 93 Cal. 17 (1892).

[2] Where a corporation secures a rebate from a railroad company, not only on shipments made by it, but on shipments made by other parties, the active agents of such corporation receiving such moneys may be held personally liable to other shippers for such money. The court said that inasmuch as the company "was organized by the promoters, the defendants, simply for the purpose of consummating the illegal agreement, and shielding themselves from the consequences of receiving the illegal exactions made under it, the act of incorporating can be of no avail to them as a defense." Brundred *v.* Rice, 49 Ohio St. 640 (1892).

[3] See chs. IX and XX, *supra*. Individuals who own several railroads and consolidate them and issue bonds thereon, with a false and fraudulent statement that the bonds cover certain timber lands, are liable personally to the bondholders. O'Beirne *v.* Bullis, 158 N. Y. 466 (1899). A person who buys stock in a national bank relying on a report of the condition of the bank signed by directors, in accordance with the acts of congress, may hold the directors so signing the report personally liable in damages if it transpire that the report was absolutely false and that the stock was worthless, but he cannot hold liable the directors who did not sign the report. Gerner *v.* Mosher, 58 Neb. 135 (1899). See also Stuart *v.* Bank of Staplehurst, 57 Neb. 569 (1899). Where the president of a bank has been held liable in damages for deceit in inducing a person to purchase stock from the bank, he cannot compel the bank to reimburse him, on the ground that the bank had obtained the benefit of the act. Trimble *v.* Exchange Bank, 63 S. W. Rep. 1027 (Ky. 1901). A stockholder may hold the directors liable for false representations inducing him to loan money to the company where they told him that the company was solvent, when in fact it was insolvent, and they knew it so to be.

power;[1] for accepting bills without authority;[2] or contracting for the corporation when he had no authority so to do.[3] They may be liable for maintain ng a nuisance.[4] In an early and important case Chancellor Walworth sustained a stockholder's action to hold the corporate directors liable for corporate funds lost by speculation in the stocks of other corporations.[5] The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six years' statute of limitations is a bar to a stockholder's suit to hold them liable, no fraud being alleged.[6] The directors are personally liable where they advance corporate funds to the vendee of stock of the company in order to enable him to purchase the stock.[7]

Kinkler *v.* Junica, 84 Tex. 116 (1892). A director may buy stock from a stockholder at less than its real value, and there is no fraud in the fact that the director knew the real value while the stockholder did not. Crowell *v.* Jackson, 53 N. J. L. 656 (1891). See also § 320, *supra*. A stockholder cannot hold a director liable for the stock becoming worthless by reason of the fact that the director and others sold their stock, amounting to three-fourths of the stock, to the Cotton Seed Oil Trust, and that the trust then dissolved the corporation by a three-fourths vote as allowed by statute, although the director as such voted for the dissolution. Trisconi *v.* Winship, 43 La. Ann. 45 (1891). For a complaint seeking to hold national bank directors liable for the loss of money deposited, the deposit being induced by erroneous and fraudulent advertisements and reports as to the condition of the bank, see Prescott *v.* Haughey, 65 Fed. Rep. 653 (1895). A depositor, suing the directors of a bank for false statements inducing him to deposit in the bank, must allege that but for such statements he would have withdrawn his deposit before the failure. Brady *v.* Evans, 78 Fed. Rep. 558 (1897). Where a stockholder receives an offer for his stock and is persuaded not to sell by fraudulent representations of a director, he may hold the latter liable in damages. Rothmiller *v.* Stein, 143 N. Y. 581 (1894).

[1] See ch. XLVI, *infra.*

[2] See ch. XLVI, *infra.*

[3] An officer who signs the corporate name to a contract to bear part of the expense of a suit is personally liable therefor if he had no authority so to do. Solomon *v.* Penoyar, 89 Mich. 11 (1891). Officers incur no personal liability when avowedly contracting on behalf of the company. Beeson *v.* Lang, 85 Pa. St. 197 (1877).

[4] See § 15*b*, *supra.* The directors of a corporation organized to deal in hardware, merchandise, and powder are personally liable for damages due to an explosion of powder illegally stored in its warehouse, even though the directors did not know of the same, it being shown that if they had exercised ordinary diligence they would have known of it. Cameron *v.* Kenyon-Connell, etc. Co., 22 Mont. 312 (1899).

[5] Robinson *v.* Smith, 3 Paige, Ch. 222 (1832). See also Combination Trust Co. *v.* Weed, 2 Fed. Rep. 24 (1880); Hardon *v.* Newton, 14 Blatchf. 376 (1878); s. c., 11 Fed. Cas. 500; Smith *v.* Rathbun, 22 Hun, 150 (1880); Land Credit Co. *v.* Fermoy, 17 W. R. 562 (1869), where the directors used corporate funds to "rig the market," *i. e.*, to purchase and thereby sustain the market price of the stock. See 88 L. T. Rep. 194.

[6] Whitwam *v.* Watkin, 78 L. T. Rep. 188 (1898).

[7] Green *v.* Hedenberg, 159 Ill. 489 (1896). Where the treasurer uses the

Directors who knowingly authorize the issue of watered stock are liable therefor to the company.[1] Directors are not personally liable for damages due to negligence on the part of the corporation.[2] A director is not liable for failure to institute legal proceedings to set aside the *ultra vires* acts of other directors.[3] The directors of a national bank may be liable for money spent by the bank in operating a mill in which the bank had an interest.[4] Where the directors, upon an increase of the capital stock, issue a part of the stock for worthless notes, the directors, upon the bank becoming insolvent, are liable to the receiver for the par value of such stock, unless they can show the stock could not have been otherwise issued or sold.[5] Where the directors of a business corporation accept paper in its

funds of the corporation to pay for stock in the corporation itself, which he and other stockholders have purchased, he may be compelled, upon corporate insolvency, to refund the money, even though he took the funds from the treasury with the consent of all the stockholders. *Re* Brockway Mfg. Co., 89 Me. 121 (1896).

[1] London Trust Co. *v.* Mackenzie, 68 L. T. Rep. 380 (1893), the court saying, however, "If, acting fairly, honestly, and reasonably, directors mistake the legal powers of the company, they may not be made answerable; but if they in fact know, or with due care ought to have known, that the acts done are beyond the powers of the company, then, if they do those acts even in the honest belief of necessity in the interests of the company, they take the risk of the consequences." Where the directors issue stock to a mining expert at ninety cents on the dollar in consideration of an examination and report by him, they are liable to the company for the remaining ten cents on the dollar, but not for surplus value which the stock afterwards acquired. Hirsche *v.* Sims, [1894] A. C. 654. Directors may be personally liable for illegally issuing stock and afterwards paying to the stockholders a portion of the price received by the corporation for bonds and stock, the stock being contributed by the stockholders, but they are not liable jointly for money so paid to each of them separately as stockholders. Great Western, etc. Co. *v.* Harris' Estate, 111 Fed. Rep. 38 (1901). See also ch. III, *supra.*

[2] Demarest *v.* Flack, 128 N. Y. 205 (1891). A director is not personally liable for the negligence of the corporation in the construction of a building where he did not personally take part, even though it is alleged that an incompetent man was put in charge. Henry *v.* Brackenridge Lumber Co., 48 La. Ann. 950 (1896). See also § 724, *infra.* The directors of an amusement company are not personally liable, although they are a committee having charge of the construction of a general stand that falls and injures a person. Van Antwerp *v.* Linton, 89 Hun, 417 (1895); aff'd, 157 N. Y. 716. The directors are not personally liable for damages due to the negligence of a person employed by them to give a fireworks exhibition for the corporation. Bianki *v.* Greater, etc. Co., 92 N. W. Rep. 615 (Neb. 1902).

[3] *Re* Lands Allotment Co., [1894] 1 Ch. 616.

[4] Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898).

[5] Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898). Even though the stockholders of a bank assent to notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor. Coddington *v.* Canaday, 61 N. E. Rep. 567 (Ind. 1901).

name for accommodation, they are personally liable for payments made or liabilities incurred on such paper.[1] Where an officer causes a manufacturing company to indorse, for accommodation, the note of a party, all of whose goods it purchases, he is not personally liable to the former company unless it is proved that the directors and stockholders were ignorant thereof and hence did not acquiesce therein.[2] The directors are not personally liable for errors of judgment.[3] But the stockholders may sue the directors for gross mismanagement and for damages where fraudulent mortgages have been placed by them on the corporate property.[4] The president executing an ordinary guaranty in the name of the corporation without authority is personally liable thereon.[5] But where a bank has no power to make a guaranty, the officer signing the bank's name to such guaranty is not personally liable thereon.[6] A corporate agent who signs the corporate name to a note without authority is liable personally thereon.[7] An officer making a corporation note without authority is personally liable thereon.[8] The directors are not personally liable for attorney fees for services rendered in a voluntary dissolution of the company.[9] A director is not personally liable in damages to a property owner over whose premises the company's road runs without warrant.[10]

Various instances of the liability of directors and stockholders are given in the notes below.[11]

[1] Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893).

[2] Willard *v.* Holmes, 142 N. Y. 492 (1894).

[3] Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894).

[4] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

[5] Nelligan *v.* Campbell, 20 N. Y. Supp. 234 (1892).

[6] Thilmany *v.* Iowa, etc. Co., 108 Iowa, 357 (1899).

[7] Frankland *v.* Johnson, 147 Ill. 520 (1893).

[8] Miller *v.* Reynolds, 92 Hun, 400 (1895).

[9] Drew *v.* Longwell, 81 Hun, 144 (1894).

[10] Lamming *v.* Galusha, 81 Hun, 247 (1894); aff'd, 151 N. Y. 648, where it was also claimed that the incorporation had been insufficient.

[11] A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached. Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894). Where the statute provides for raising funds for a mutual insurance company by assessments, the bond of the directors to advance $100,000 to the company as needed is *ultra vires* and unenforceable. Goss *v.* Peters, 98 Mich. 112 (1893). In Beach *v.* Cooper, 72 Cal. 99 (1887), in a stockholder's suit to hold officers liable for paying $315,000 for a few months' loan of $140,000, the court held that the act was not a fraud *per se*, and that it was possible that the directors might explain it. See § 738, *infra*. A consignor of goods to a corporation to sell cannot hold the directors of the corporation personally liable for conversion where the consignor knew that the corporation had disposed of the property and he had acquiesced in such sale. Birdsell, etc. Co. *v.*

But directors are not liable for honest mistakes as to the legal extent of their authority;[1] nor are they liable to the company for an

Oglevee, 58 N. E. Rep. 231 (Ill. 1900). A statutory liability of stockholders in corporations, except manufacturing corporations, does not apply to a manufacturing corporation, even though it has engaged in a non-manufacturing business without authority from its charter. Senour, etc. Co. *v.* Church, etc. Co., 81 Minn. 294 (1900). Where the directors of a corporation sell out its assets in consideration of a person paying the debts, and the latter organizes a new corporation and gives to the old directors stock in the new corporation equal to their stock in the old, but does not give anything to the other stockholders of the old corporation, the directors and the person so purchasing the assets are liable to the old corporation for the value of the stock so given to the directors. A pledgee of the stock of the old corporation may bring suit for that purpose. Smith *v.* Smith, etc. Co., 125 Mich. 234 (1900). Even though the statute requiring banks loaning on real estate to loan not above fifty per cent. of their value, yet the directors are not personally liable because on foreclosure sale less than fifty per cent. is realized. The value may have depreciated. Colorado Savings Bank *v.* Evans, 12 Colo. App. Div. 334 (1898). Where all the assets of a corporation are transferred for stock of another corporation and such stock is sold by trustees of the former to pay its debts, the fact that one of the trustees subsequently buys a portion of the stock does not render him liable for such debts. Wing *v.* Charleroi, etc. Co., 112 Fed. Rep. 817 (1902). An officer of a corporation may be personally liable for funds of a trust estate which are received by him for the corporation after he knows that the corporation is insolvent. Anderson *v.* Daley, 38 N. Y. App. Div. 505 (1899). As to a suit against the company and also an employee for negligence, see Burch *v.* Caden Stone Co., 93 Fed. Rep. 181 (1899). A suit by a stockholder against the directors to hold them liable for violating the national bank act must be for the benefit of the corporation. Zinn *v.* Baxter, 65 Ohio St. 341 (1901). Directors are not liable to creditors for mismanagement unless actual fraud is shown. Wilson *v.* Stevens, 129 Ala. 630 (1901). The power of a private corporation to acquire land cannot be questioned by the grantor of land to the corporation, and moreover, even if the rule were otherwise, an agent who bought for the corporation as agent would not be personally liable. Ray *v.* Foster, 53 S. W. Rep. 54 (Tex. 1899). In Louisiana it is held that where a corporation organized to build railroads and carry on a plantation business carries on a store to supply its employees with merchandise, its stockholders are personally liable as to the merchandise business — that being *ultra vires.* Lehman *v.* Knapp, 48 La. Ann. 1148 (1896). In Powell *v.* Murray, 3 N. Y. App. Div. 273 (1896); aff'd, 157 N. Y. 717, where a company, formed to manufacture electric appliances and plant, issued stock in payment for a license to sell the product of a foreign corporation, it was held that the parties so receiving the stock were liable thereon, under the New York statute, as not being paid-up stock, such contract being *ultra vires.* An officer of a construction company who induces a party to buy stock owned by the company is not personally liable on the contract of the company to allow interest on instalments paid on such stock in advance. Hetfield *v.* Addicks, 154 Pa. St. 1 (1893). Directors are personally liable for losses of a corporation on

[1] Beattie *v.* Ebury, L. R. 7 Ch. 777 (1872), and L. R. 7 H. L. 102. See also § 702, *infra.*

ultra vires act which the company has ratified.[1] They may be liable where the corporation is but a "dummy," organized for a

account of unreasonable credit extended to another corporation in which the directors are interested. Stahn v. Catawba Mills, 53 S. C. 519 (1898). Where a mining company is practically reorganized by selling out to a new and larger company having the same directors, and the stock is sold to the public, if the prospectus discloses all the facts excepting the amount of property, which one of the directors made as a stockholder in the former company, he is not liable to the new company for such property as a promoter thereof, although it might have been ground for rescinding the contract of purchase. *Re* Lady Forrest, etc., [1901] 1 Ch. 582. In Minnesota by statute directors who participate in an *ultra vires* act are liable for all debts thereafter contracted, even though they go out of office. Citizens' State Bank *v.* Story, etc. Co., 87 N. W. Rep. 1016 (Minn. 1901). A suit in a state court against the officers of a national bank on the ground that they had violated the national bank act is removable to the United States court. Bailey *v.* Mosher, 95 Fed. Rep. 223 (1899). In a suit by creditors to hold directors personally liable for violating the statutes in the conduct of the corporate business, the creditors must clearly set forth the character and existence of the amount they claim. Boston, etc. R. R. *v.* Parr, 104 Fed. Rep. 695 (1900). Where the lease of a street railway has been made, in accordance with the vote of the stockholders and directors, a stockholder cannot hold the directors personally liable for not informing the stockholders of an offer to purchase the property, it not being shown that the offer was from a responsible party or that it would have made any difference in the stockholders' action. Strunk *v.* Owen, 199 Pa. St. 73 (1901). Where the statute renders the officers and stockholders of a foreign corporation liable for doing business in the state without filing a certificate, this does not prevent the company from suing on contracts. The courts will not extend the penalty. Kindel *v.* Beck, etc. Co., 19 Colo. 310 (1893), stating also that a statute which should restrict the right of a foreign corporation to deliver in the state goods manufactured by the company out of the state would be unconstitutional. Where an insolvent corporation turns over all its property to a new corporation formed for that purpose, and the new corporation turns over a portion of its assets to one of the directors of the old corporation without consideration, a creditor of the old corporation may hold the directors personally liable. South Bend, etc. Co. *v.* George, etc. Co., 97 Wis. 230 (1897). For various other instances of the liability of directors, see § 243, *supra*.

[1] "When the directors and officers of a corporation engage in *ultra vires* transactions, and thus cause damage to the corporation, they may be jointly and severally liable for such damage; and when sued for such damage, a subordinate officer cannot establish an absolute defense by showing that his transactions were assented to or even directed by the directors. Directors and officers of corporations are agents of the corporation for which they act, and for their unauthorized transactions they may be liable to their principal just as the agent of an individual may be liable for the damage caused to his principal by his unauthorized acts. But . . . when the officers of a corporation engage in an *ultra vires* business for the benefit of a corporation, and the corporation has the actual benefit thereof, and when the business is so carried on with the acquiescence of the stockholders that it actually, though illegally, becomes the business of the corporation, it cannot maintain

fraudulent purpose.[1] But one director is not liable for the others.[2]

A receiver may hold liable a director, where upon the consolidation of two companies large sums are used out of the corporate funds to effect the consolidation, and the company becomes insolvent.[3] Where the officers and directors, in conspiracy, resign their offices and substitute other officers who are irresponsible and untrustworthy, in consideration of unlawful payments made to the former directors, and the assets of the corporation are thereby lost, the first named directors are personally responsible for their action, and a receiver of the corporation may hold them liable.[4]

When a contract is made for the corporation, and this fact appears in the contract, but the officer or agent signs the contract, not in the corporate name, but in his own name, he is generally not liable on such contract; but in some instances he has been held liable.[5] Where an officer or agent of a corporation has been instrumental in causing the corporation to commit trespass or any

an action against such officers for any damages it has suffered in such business. In other words, a corporation engaged in an *ultra vires* business cannot sue, for damages suffered therein, the agents it employs to carry on the business. The agent of the corporation in such a case would be protected just as the agent of a copartnership would be protected who did business with the express or implied consent of the copartners, which was not authorized by the articles of copartnership." Holmes *v.* Willard, 125 N. Y. 75, 79, 81 (1890).

1 See §§ 663, 664, *supra*.

2 Although the directors of a company are the agents of the company, and although, as a member of the company, each of the directors is liable for the acts of its agents on the same ground as other members, still, unless a director has done something to make his co-directors his agents in some other sense than this, he is no more liable for their acts than any other stockholder. In this respect directors are like promoters, each being answerable for his own acts, and for the acts of the others so far as he has made them his agents, but no further. Brown *v.* Byers, 16 M. & W. 252 (1847); Heraud *v.* Leaf, 5 C. B. 157 (1847); Bramah *v.* Roberts, 3 Bing. N. Cas. 963 (1837); Londesborough's Case, 4 De G., M. & G. 411 (1854); Walker's Case, 8 De G., M. & G. 607 (1856). See also Weir *v.* Barnett, L. R. 3 Exch. D. 32 (1877); Weir *v.* Bell, L. R. 3 Exch. 238 (1878); Cargill *v.* Bower, L. R. 10 Ch. D. 502 (1878). As to contribution, see § 749, *infra*.

3 Pierson *v.* Cronk, 13 N. Y. Supp. 845 (1890). Where an insolvent insurance company buys out a solvent company, and certain individuals guarantee that the obligations of the latter company will be fulfilled, and the latter company is "wrecked," the guarantors are liable. Mason *v.* Cronk, 125 N. Y. 496 (1891).

4 Bosworth *v.* Allen, 168 N. Y. 157 (1901). Directors of an insurance company who use its money to procure the resignations of the directors of another insurance company and a substitution of new directors are personally liable for money so expended, and the fact that parties receiving the money had repaid a portion of it by way of compromise is no bar to such suit for the balance. A release by the board of directors is no defense. Gilbert *v.* Finch, 72 N. Y. App. Div. 38 (1902).

5 See ch. XLIII, § 724, *infra*.

other tort, then such director or officer is personally liable therefor.[1] The president of an insurance company which has not complied with the law authorizing its organization is liable to policy-holders for false representations to them by the insurance agents that the company had so complied.[2] The president of a corporation obtaining credit for the corporation by false representations is liable personally therefor, and is liable to arrest.[3] A stockholder who is also general manager of a newspaper corporation is not liable criminally for its criminal advertisement of an illegal lottery, unless he had actual knowledge or notice thereof.[4] An officer is liable who directs a negro to be excluded from the company's omnibus;[5] or who takes part in an assault;[6] or who carries on a malicious prosecution.[7]

Directors are not liable for commencing business before the capital stock is subscribed for.[8] And even though the directors certify that one-half of the capital stock has been paid in in cash, when in fact it has not been, yet the assignee of the corporation for the benefit of its creditors cannot hold them liable for the part not so paid in.[9] A director is not liable for the acts of the corporation in cutting timber on land not owned by the corporation where the director took no part in the same.[10] Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and even though one of them resigns, the liability continues for the benefit of past as well as future creditors.[11] Directors and officers of a national bank are personally liable for the funds of the bank used by them to develop a mining property owned by the bank, even though the bank originally acquired the mining property legally. The statute

[1] This subject belongs more properly to treatises on agency and on torts. An agent is liable for aiding the corporation in perpetrating a breach of trust. Attorney-General *v.* Leicester, 7 Beav. 176 (1844).

[2] Belding *v.* Floyd, 17 Hun, 208 (1879).

[3] Phillips *v.* Wortendyke, 31 Hun, 192 (1883).

[4] People *v.* England, 27 Hun, 139 (1882). See also Green's Brice's Ultra Vires, p. 765.

[5] Peck *v.* Cooper, 112 Ill. 192 (1884); 54 Am. Rep. 231.

[6] Brokaw *v.* New Jersey R. R. & T. Co., 32 N. J. L. 328 (1867); Hewett *v.* Swift, 85 Mass. 420 (1862); Moore *v.* Fitchburg R. R., 70 Mass. 465 (1855).

[7] Hussey *v.* Norfolk Southern R. R., 98 N. C. 34 (1887).

[8] See § 243, *supra.* Where the directors commence business before ten per cent. of the capital is paid in, as required by statute, the directors are personally liable as agents transacting business without authority from the principal. Trust Co. *v.* Floyd, 47 Ohio St. 525 (1890). *Cf.* § 180, *supra.* In Illinois by statute the directors are personally liable for debts incurred before all "stock named in the articles of incorporation shall be subscribed in good faith." Kent *v.* Clark, 181 Ill. 237 (1899).

[9] Hequembourg *v.* Edwards, 155 Mo. 514 (1900).

[10] Davenport *v.* Newton, 71 Vt. 11 (1898).

[11] Nix *v.* Miller, 26 Colo. 203 (1899).

of limitations may, however, be a bar to such a suit.[1] Where a national bank and two of the directors are secretly interested in the profit made by selling property to a corporation for stock, the corporation may hold them liable for such profit. The defense of *ultra vires* on the part of the bank is not good.[2] Where an insolvent person forms a corporation for the purpose of conveying all his property to it for stock, an incorporator and director who takes part in the fraud is personally liable therefor, but not a director who had merely constructive notice of the fraud.[3] A director in a bank is personally liable to persons who deposit their money in the bank after he knows that it is hopelessly insolvent, where he fails to initiate measures to close the business of the bank.[4]

Where the corporation has power to do a certain act, but does not authorize a person or officer to do that act, then the person or officer doing such act is liable personally therefor. He is liable as an unauthorized agent.[5]

If the corporation had no charter power to do the act in question, a more difficult question arises. In England it seems that the officer

[1] Cooper *v.* Hill, 94 Fed. Rep. 582 (1899). *Cf.* 33 S. Rep. 866.

[2] Zinc, etc. Co. *v.* First, etc. Bank, 103 Wis. 125 (1899).

[3] Benton *v.* Minneapolis, etc. Co., 73 Minn. 498 (1898). An unsecured creditor of a solvent corporation that has transferred all its property to another corporation for stock of the latter, and such stock is then sold to pay a mortgage debt, cannot hold the agents of the corporation carrying out the transaction personally liable for misapplication of funds, the transaction having been authorized and directed by the board of directors of the selling corporation. Wing *v.* Charleroi, etc. Co., 112 Fed. Rep. 817 (1902). Even though an insolvent person sells all his property to a corporation and the corporation proceeds with the business, yet the directors are not personally liable on the transfer being set aside, where they acted in good faith. *Re* Ely, 82 L. T. Rep. 501 (1900).

[4] It is his duty to call a meeting of the directors, or report the condition of things to the state authorities, or instruct the cashier to stop taking deposits, or to warn individual depositors, or, if necessary, make public announcement of the condition of things. Cassidy *v.* Uhlmann, 170 N. Y. 505 (1902).

[5] If two directors without authority order a bank to honor the checks of the manager of their corporation and he overdraws, they are personally liable for the overdrafts. Cherry *v.* Colonial Bank, L. R. 3 P. C. 24 (1869). But see Beattie *v.* Ebury, L. R. 7 H. L. 102 (1874), aff'g L. R. 7 Ch. App. 777, and rev'g L. R. 7 Ch. App. 788, n. When the president of the bank, without authority from the directors, sells $6,000 of the bank's paper for $5,500, he is liable to the bank for $500 — the real loss. First Nat. Bank *v.* Lucas, 21 Neb. 280 (1887). But a corporate agent executing a security in the corporate name without authority is not guilty of forgery under the New York statute. Mann *v.* People, 15 Hun, 155 (1878); aff'd, People *v.* Mann, 75 N. Y. 484. He is liable, however, in a civil action. See also Underhill *v.* Gibson, 2 N. H. 352 (1821); Weare *v.* Gove, 44 N. H. 196 (1862). As to the liability of officers for trespass, etc., see Thompson, Liab. Officers, p. 489.

or agent is not liable to the third person.[1] In America he is liable to the company for money so lost.[2] Although the certificate of incorporation fixes the amount of debts which the corporation may incur, yet the directors are not liable for an excess of that amount.[3]

The court may authorize a receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders where such contract is a fair one, even though some of the stockholders dissent.[4] A statute shortening the statute of limitations applicable to the common-law liability of directors is unconstitutional as to existing liabilities, if the shortened period does not give a reasonable time after it takes effect for the commencement of suits on existing causes of action.[5] Stockholders are not personally liable for *ultra vires* acts.[6] Directors who have been obliged to repay money which they and others received for turning over the assets of the company to another company, they having no interest which could legally be the subject of such sale, cannot recover back from such other persons the amount paid by the latter. There can be no contribution among joint tortfeasors.[7]

[1] Eaglesfield *v.* Londonderry, L. R. 4 Ch. D. 693 (1876). But see West, etc. Bank *v.* Kitson, L. R. 13 Q. B. D. 360 (1884), where a note was issued; Nicholls *v.* Diamond, 9 Exch. 154 (1853), where an acceptance was made. The secretary is not liable for a representation as to the power of the company to issue debentures which had been issued. Rashdall *v.* Ford, L. R. 2 Eq. 750 (1866). Directors issuing debentures in excess of the amount allowed by statute are personally liable thereon. Weeks *v.* Propert, L. R. 8 C. P. 427 (1873). As to liability of directors to the company for losses due to their *ultra vires* acts, see *Re* Faure, etc. Co., L. R. 40 Ch. D. 141 (1888). A director is liable for money used, *ultra vires*, to buy land. Grimes *v.* Harrison, 26 Beav. 435 (1859).

[2] Austin *v.* Daniels, 4 Denio, 299 (1847), where stock was purchased by the company. See also Franklin F. Ins. Co. *v.* Jenkins, 3 Wend. 130 (1829), and cases in chs. XXXIX, XL, *supra*, and ch. XLII, *infra*.

[3] Frost Mfg. Co. *v.* Foster, 76 Iowa, 535 (1889). *Cf.* § 760. Where the directors incur debts in excess of the amount allowed by the charter, debts due them are postponed until the other debts are paid, and the directors are legally guilty of fraud as to creditors who did not know of the excessive indebtedness, and hence are personally liable to such creditors. Guenther *v.* Baskett, etc. Co., 52 S. W. Rep. 931 (Ky. 1899).

[4] People *v.* Anglo-American, etc. Assoc., 66 N. Y. App. Div. 9 (1901); s. c., 169 N. Y. 606.

[5] Gilbert *v.* Ackerman, 159 N. Y. 118 (1899).

[6] Tennessee, etc. Co. *v.* Massey, 56 S. W. Rep. 35 (Tenn. 1899). A stockholder is not personally liable for a tort of the corporation in diverting water. Poley *v.* Lacert, 35 Or. 166 (1899). Where a guaranty by a loan and trust company is *ultra vires*, the statutory liability of stockholders cannot be enforced to pay such guaranty, even though the courts of the state where the corporation existed have held that *ultra vires* is no defense where the benefit of the guaranty has been received. Ward *v.* Joslin, 105 Fed. Rep. 224 (1900); aff'd, 186 U. S. 142 (1902). See also § 243, *supra*, as to the liability of stockholders.

[7] Gilbert *v.* Finch, 173 N. Y. 455 (1903).

CHAPTER XLI.

INTRA VIRES ACTS AND CONTRACTS — IN OTHER WORDS, ACTS AND CONTRACTS WHICH ARE WITHIN THE CHARTER POWERS OF THE CORPORATIONS, DIRECTORS, OR STOCKHOLDERS.

§ 683. *Intra vires acts as distinguished from ultra vires acts.*— An *ultra vires* act, as already explained, is an act beyond the express and implied powers of the corporation. An *intra vires* act, on the contrary, is one which is within the express or implied powers either of the board of directors or of the majority of the stockholders in meeting assembled. *Intra vires* acts are frequently spoken of as matters concerning the "internal management" of the corporation. Much confusion has arisen concerning these acts, owing to a failure to recognize clearly the fact that an act is *intra vires* of a corporation if it can be legally carried out *either* by the directors or by the majority of the stockholders. Thus, a stockholder frequently brings suit to enjoin or set aside an act which the majority of the stockholders have power to do, but which the directors have done without power. It is clear that a dissenting stockholder has no right to carry such a matter into the courts unless the majority are also opposed to the act, since, if the majority approve of the directors' acts, this amounts to a ratification of the same.

In short, there are three classes of corporate acts herein. First, the stockholder may bring suit to remedy an act which is *ultra vires*, or beyond the powers of both the majority of the stockholders

and of the directors.[1] Second, as to acts within the power of the majority of the stockholders, but beyond the power of the directors, a stockholder may sue to enjoin or set them aside when the directors have performed them, and the majority of the stockholders refuse to confirm their action.[2] As to such acts the stockholder cannot sue if the majority confirm the directors in their performance. Third, as to acts within the powers of the directors and performed by them, or within the powers of the majority of the stockholders and performed by the majority, the stockholders cannot complain that they are *ultra vires*. The second and third classes of acts are *intra vires* of the corporation. They are matters of internal arrangement or management, and cannot be controlled or objected to by a minority stockholder, except as stated above.[3] The question of what *intra vires* acts are to be performed by the directors, and what ones can be exercised only by the majority of the stockholders in meeting assembled, is considered elsewhere.[4]

§ 684. ***The discretion of the directors or a majority of the stockholders as to acts intra vires cannot be questioned by single stockholders unless fraud is involved.***[5]— This proposition of law is clearly, firmly, and very properly established beyond any question. Were

[1] Chapter XL, *supra*, treats of this subject. See also § 740, *infra*.

[2] Exeter, etc. Ry. *v.* Buller, 11 Jur., Part I, 527, 532 (1847), holding also that where such an action has been instituted it will not be defeated by the fact that subsequently the directors obtain control of a majority of the votes. But there must be clear proof that the majority refuse to confirm. Thus, in Bagshaw *v.* Eastern Union Ry., 7 Hare, 114 (1849), the court says that Foss *v.* Harbottle, 2 Hare, 461 (1843), decides "that if the act, though it be the act of the directors only, be one which a general meeting of the company could sanction, a bill by some of the shareholders, on behalf of themselves and others, to impeach that act, cannot be sustained, because a general meeting of the company might immediately confirm and give validity to the act of which the bill complains." See also MacDougall *v.* Gardiner, L. R. 1 Ch. D. 13 (1875), and § 662, *supra*. Acts *intra vires* may be ratified by a majority of the stockholders and the minority cannot complain. Bassett *v.* Fairchild, 132 Cal. 637 (1901).

[3] See note 5 below.

[4] See ch. XLIII, *infra*.

[5] Quoted and approved in McMullen *v.* Ritchie, 64 Fed. Rep. 253 (1894). "A stockholder cannot enjoin the execution of a contract *intra vires* unless fraud is shown." Burden *v.* Burden, 159 N. Y. 287, 307 (1899). "Questions of policy of management, of expediency of contracts or action, of adequacy of consideration not grossly disproportionate, of lawful appropriation of corporate funds to advance corporate interests, are left solely to the honest decision of the directors, if their powers are without limitation and free from restraint. To hold otherwise would be to substitute the judgment and discretion of others in the place of those determined on by the scheme of incorporation." Ellerman *v.* Chicago Junction, etc. Co., 49 N. J. Eq. 217 (1891). Thus, in Bloxam *v.* Metropolitan Ry., L. R. 3 Ch. App. 337 (1868), the court said: "The matters of internal arrangement

the rule otherwise there would be no safety or possibility of carrying on business through corporations. There would be suits instituted by dissatisfied stockholders on slight provocation, and sometimes for the very purpose of embarrassing the transaction of busi-

which are beyond the province of the court were properly admitted to be such as are within the scope of the company's powers." And in Camblos *v.* Philadelphia, etc. R. R., 4 Brewst. 563. 591 (1873); s. c., 4 Fed. Cas. 1089, the court said: "So long as those who manage the corporation keep within the limits of its charter, and commit or propose to commit no breach of their trust, he has no right to complain." In Becher *v.* Wells, etc. Co., 1 Fed. Rep. 276 (1880), it was said: "A court of equity will not interfere with the internal policy of a corporation unless it is manifest that the proposed act is *ultra vires*." In Bach *v.* Pacific Mail S. S. Co., 12 Abb. Pr. (N. S.) 373 (1872), the court said: "No case can be found where the general management of corporate property has been subject to the restrictions of judicial power, unless, indeed, in the case of a clear violation of express law, or a wide departure from chartered powers." In this case the stockholder objected to the securities in which the corporate funds were being invested. In Walker *v.* Mad River, etc. R. R., 8 Ohio, 38 (1837), it was said by the court: "When acts requiring judgment, science, and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be lightly disturbed." See also Tuscaloosa Mfg. Co. *v.* Cox, 68 Ala. 71 (1880). In Ramsey *v.* Erie Ry., 7 Abb. Pr. (N. S.) 156 (1869), it is said: "When directors are only unwise, or merely extravagant or improvident, or slightly negligent, or merely misjudge in the performance of their duties, the remedy of stockholders is to elect other persons directors in their places." In Bailey *v.* Birkenhead, etc. Ry., 12 Beav. 433 (1850), where a stockholder sought to restrain a call as being unnecessary, the court refused to entertain the suit, and said that it was not for the court "to take upon itself to determine a question which might well and ought to be determined by the shareholders themselves at general meetings." See also Edwards *v.* Shrewsbury, etc. Ry., 2 De G. & Sm. 537 (1849); also § 750, *infra*. A minority stockholder cannot have a receiver appointed on the ground that the corporation, the property of which consists of land, is about to sell a large tract of land at a low price, such price being satisfactory to the majority and no fraud being alleged. Not even the statute in Louisiana authorizing a receiver for gross mismanagement is sufficient. North American, etc. Co. *v.* Watkins, 109 Fed. Rep. 101 (1901). Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown. Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901); Matter of Pierson, 44 N. Y. App. Div. 215 (1899). A mining corporation may lease its property for rental payable in a certain portion of the product of the mine. A stockholder cannot complain, even though the contract be an error of judgment. Hennessy *v.* Muhleman, 40 N. Y. App. Div. 175 (1899); 122 Fed. Rep. 147.

Where a corporation has charter authority to retire its preferred stock and issue mortgage bonds in lieu thereof, on a vote of the directors and stockholders, a minority stockholder cannot enjoin such action on the ground that it would be disastrous in its effect on the corporation. Berger *v.* United States Steel Corp., 53 Atl. Rep. 68 (N. J. 1902). See also Hodge *v.* United States Steel Corp., 54 Atl. Rep. 1 (N. J. 1903). Where by its charter a corporation has a right

ness. A partner in a copartnership may prevent action which he disapproves, but corporations are formed very largely to avoid that very danger and disadvantage. The corporate directors, so long as they act within their powers, may use their own discretion as to what ought to be done. Such also is the rule with the majority of the stockholders in meeting assembled. An act *intra vires* and without fraud is an act of internal management, and a minority of the stockholders are powerless to prevent, control, change, or question that act.[1] Thus, a stockholder has no remedy for the mere inefficiency of a director, except to turn him out at the next election of the corporation. Having once been elected, a director is entitled to retain his position, even though he is grossly inefficient. He cannot be removed from his position.[2] But where there are violent internal dissensions in a corporation, and two sets of officers are attempting to act, and the corporate property is endangered, a court of equity will interfere to the extent of preserving the corporate property by a temporary receiver.[3] A court of equity cannot, however, restrain the corporation from proceeding with business and using its funds for that purpose, even though a minority of the stockholders show that sound business discretion and judgment would dictate a different policy.[4] The question of whether a suit by a corporation shall be brought or not is entirely within the discretion of the directors, in the absence of fraud.[5] Thus, even though a railroad is giving a lower rate to one customer than to another, yet a stockholder cannot maintain a suit of injunction to compel the party to pay what he should have paid. While the act

to purchase stock in other corporations, the corporation may subscribe for stock in another corporation to be formed to carry on a similar business, and the court will not, at the instance of a stockholder, review the discretion of the directors in making such investment. Rubino *v.* Pressed, etc. Co., 53 Atl. Rep. 1050 (N. J. 1903).

[1] Quoted and approved in Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894).

[2] See § 711, *infra.*

[3] Trade Auxiliary Co. *v.* Vickers, L. R. 16 Eq. 303 (1873); Featherstone *v.* Cooke, L. R. 16 Eq. 298, 303 (1873), the court saying: "The court will not interfere with the internal affairs of joint-stock companies unless they are in a condition in which there is no properly constituted governing body, or there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested. In such a case the court will interfere, but only for a limited time, and to as small an extent as possible." See also Lawrence *v.* Greenwich F. Ins. Co., 1 Paige, 587 (1829); and § 746, *infra.*

[4] Fountain Ferry, etc. Co. *v.* Jewell, 8 B. Mon. (Ky.) 140 (1848), the court saying: "The question of expediency, of practicability, of extravagance, or of prudent economy, must be left to be decided by the managers and the corporators." A stockholder may object to corporate acts and contracts which are fraudulent or *ultra vires* or *mala in se.* But all other acts he can correct only by the election of new directors. Leslie *v.* Lorillard, 110 N. Y. 519 (1888).

[5] See § 750, *infra.*

is illegal, it is not *ultra vires*, and as to the illegal act it is for the corporation to decide whether or not it will sue.[1]

§§ 685-689. *Borrowing money, issuing bills, notes, and acceptances, coupon bonds, debentures, and mortgages.*— These subjects are fully considered elsewhere.[2]

§ 690. *Loans by a corporation, and statutes forbidding loans or forbidding the taking of notes or mortgages — Usury.*— A corporation cannot make loans of money unless its regular business ordinarily involves loaning. In most cases the business of a corporation is to invest and use its capital, and not to loan it out. Accordingly, it is well settled that only where the business of the corporation is such as usually involves loaning does the corporation have the right to loan its funds.[3] If not prohibited by statute, a corporation may receive and sell notes or acceptances, if this is naturally connected with its business.[4] But unless specially authorized they

[1] Anderson *v.* Midland Ry., 85 L. T. Rep. 408 (1901).

[2] See chs. XLVI and XLVII, *infra.*

[3] 1 Daniel, Neg. Inst., § 384. It is legal, however, for a loan and trust company to loan money and take a mortgage as security. Farmers' L. & T. Co. *v.* Perry, 3 Sandf. Ch. 339 (1846); Farmers' L. & T. Co. *v.* Clowes, 3 N. Y. 470 (1850). A plank-road company may loan its funds to a contractor who is constructing the road. Dictum in Madison, etc. Co. *v.* Watertown, etc. Co., 5 Wis. 173 (1856). A benevolent association may loan its funds. Western Boatmen's Benev. Assoc. *v.* Kribben, 48 Mo. 37 (1871). A national bank may purchase notes as well as discount them. National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); Attleborough Nat. Bank *v.* Rogers, 125 Mass. 339 (1878). The discounting of a note by a cement corporation contrary to law, done through the president, is presumed to have been his act and not that of the corporation. Lawrenceville Cement Co. *v.* Parker, 10 N. Y. Supp. 831 (1890). The fact that a manufacturing company extended its business so as to include iron pipe as well as brass. and loaned money, which loans. however, the president was willing to take up, and had owned government bonds, is not sufficient to entitle a stockholder who has acquiesced therein to demand that all profits be paid out in dividends. McNab *v.* McNab, etc. Co., 62 Hun, 18 (1891); aff'd, 133 N. Y. 687. A deposit by a bank in a bank renders the latter liable therefor, though the deposit is made to enable the president of the latter to use it. Eastern Townships Bank *v.* Vermont Nat. Bank, 22 Fed. Rep. 186 (1884). A bank may loan money to its cashier with the consent of the board of directors. Barth *v.* Koetting, 99 Wis. 242 (1898).

[4] White's Bank *v.* Toledo F. & M. Ins. Co., 12 Ohio St. 601 (1861); Western Cottage Organ Co. *v.* Reddish, 51 Iowa, 55 (1879); Pratt *v.* Short, 79 N. Y. 437 (1880); Clark *v.* Titcomb, 42 Barb. 122 (1864); Buckley *v.* Briggs, 30 Mo. 452 (1860), where it was held that a corporation, though prohibited from dealing in commercial paper, could receive and sell notes given for the sale of its lands; McIntire *v.* Preston, 10 Ill. 48 (1848). And a note received by a corporation will be presumed to have been taken in the course of business. Lucas *v.* Pitney, 27 N. J. L. 221 (1858); Hardy *v.* Merriweather, 14 Ind. 203 (1860); Frye *v.* Tucker, 24 Ill. 180 (1860); Potter *v.* Bank of Ithaca, 5 Hill, 490, 7 Hill, 530, (1844); Suydam *v.* Morris Canal, etc. Co.,

cannot make a business of discounting,[1] nor engage in a banking business.[2]

A person who borrows money from a corporation cannot defeat an action for the money by alleging that the corporation had no authority to make the loan. He must pay back the money borrowed.[3]

Although a statute or charter forbids a corporation from loaning more than a certain amount of money, and it actually has loaned more than that amount, yet the borrower cannot avoid payment of any part of the loan.[4] Although a statute requires a bank to loan

6 Hill, 217 (1843); Talman *v.* Rochester City Bank, 18 Barb. 123 (1854); Gee *v.* Alabama, etc. Co., 13 Ala. (N. S.) 579 (1848); Bates *v.* Bank of State, 2 Ala. (N. S.) 451 (1841); Smith *v.* Mississippi, etc. R. R., 14 Miss. 179 (1846); Portland Bank *v.* Storer, 7 Mass. 433 (1811); Northampton Bank *v.* Allen, 10 Mass. 284 (1813); Fleckner *v.* Bank of U. S., 8 Wheat. 338 (1823); Rees *v.* Conococheague Bank, 5 Rand. (Va.) 326 (1827); Payne *v.* Baldwin, 11 Miss. 661 (1844); rev'd, Baldwin *v.* Payne, 6 How. 332 (1848); Akin *v.* Blanchard, 32 Barb. 527 (1860). An insurance company cannot purchase a note for purposes of a set-off. Set-off defeated. Straus *v.* Eagle Ins. Co., 5 Ohio St. 59 (1855).

[1] New York F. Ins. Co. *v.* Sturges, 2 Cow. 664 (1824). In Mitchell *v.* Rome R. R., 17 Ga. 574 (1855), it was held that where power is given to "make contracts," a note taken by a corporation is *prima facie* evidence of an authorized contract.

[2] State *v.* Granville, etc. Soc., 11 Ohio, 1 (1841); State *v.* Washington Social Lib. Co., 11 Ohio, 96 (1841); *Re* Ohio Life, etc. Co., 9 Ohio, 291 (1839); Blair *v.* Perpetual Ins. Co., 10 Mo. 559 (1847); Sumner *v.* Marcy, 3 Woodb. & M. 105 (1847); s. c., 23 Fed. Cas. 384. See also Central R. R. *v.* Collins, 40 Ga. 582 (1869), and Duncan *v.* Maryland Sav. Inst., 10 Gill & J. (Md.) 299 (1838).

[3] Quoted and approved in Johnson *v.* Mason Lodge, etc., 106 Ky. 838, 846 (1899); Gorrell *v.* Home Life Ins. Co., 63 Fed. Rep. 371 (1894); Head *v.* Cleburne, etc. Assoc., 25 S. W. Rep. 810 (Tex. 1893); Steam Nav. Co. *v.* Weed, 17 Barb. 378, 382, 384 (1853); Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620 (1863); Mott *v.* U. S. Trust Co., 19 Barb. 568 (1855); Poock *v.* Lafayette Bldg. Assoc., 71 Ind. 357 (1880), the court saying: "The law may have its reproaches, but this is not one of them." A person making a note to a corporation cannot defeat it by the defense that the company had no power to loan money. Bond *v.* Terrell, etc. Co., 82 Tex. 309 (1891). In Alabama the borrower of the money from the corporation may escape payment. Alabama Grand Lodge *v.* Waddill, 36 Ala. 313 (1860); Chambers *v.* Falkner, 65 Ala. 448 (1880), where Masonic lodges had loaned money. See also dictum in Beach *v.* Fulton Bank, 3 Wend. 573 (1829), where an insurance company made a loan; also the decision in Life & F. Ins. Co. *v.* Mechanic F. Ins. Co., 7 Wend. 31 (1831), denying the right of an insurance company to recover an unsecured loan where its charter authorized loans on bond and mortgage. See also New York Firemen Ins. Co. *v.* Ely, 5 Conn. 560 (1825), where, however, the loan was expressly prohibited. In Waddill *v.* Alabama, etc. R. R., 35 Ala. 323 (1859), an unauthorized loan by a railroad was enforced on the ground that the railroad president made the loan without authority from the directors.

[4] Gold Min. Co. *v.* National Bank, 96 U. S. 640 (1877). See also Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820); National Bank *v.* Matthews, 98 U. S. 621

on bond and mortgage, yet it may recover loans made on drafts or notes.[1] Where directors loan money in violation of the statute, they are liable personally therefor.[2]

A statute which prohibits corporations from discounting notes or bills unless expressly authorized so to do prevents the corporation from collecting a note taken in violation thereof;[3] but this does not

(1878); Bly v. Second Nat. Bank, 79 Pa. St. 453 (1875); Allen v. First Nat. Bank, 23 Ohio St. 97 (1872); Stewart v. National Union Bank, 2 Abb. (U. S.) 424 (1869); s. c., 23 Fed. Cas. 68, holding that though the loan may be recovered the franchise of the bank may be forfeited. To same effect, Shoemaker v. National Mechanics' Bank, 2 Abb. (U. S.) 416 (1869); s. c., 21 Fed. Cas. 1331; and Union, etc. Co. v. Rocky Mountain Nat. Bank, 1 Colo. 531 (1872); Elder v. First Nat. Bank, 12 Kan. 238 (1873), holding that a borrower cannot restrain a national bank from negotiating such securities nor compel their return; O'Hare v. Second Nat. Bank, 77 Pa. St. 96 (1874), holding that an accidental excess does not make the loan void. Although the statute forbids loans to directors, yet a loan so made is collectible, and securities pledged by the director are subject to the loan, though they were fraudulently obtained by him from others. Bowditch v. New England, etc. Ins. Co., 141 Mass. 292 (1886). Where the president causes the corporation to loan him money, in direct violation of the statute, he may be sued for the conversion thereof, although his collateral security has been sold and the whole transaction ratified by the directors. Nellis Co. v. Nellis, 62 Hun, 63 (1891). A statute giving a bank a lien on its stock for debts due to the bank from the stockholder is not nullified by another statutory provision prohibiting the bank from loaning money on its stock. Battey v. Eureka Bank, 63 Pac. Rep. 437 (Kan. 1901).

[1] Allen v. Freedman's Sav. etc. Co., 14 Fla. 418 (1874); Mott v. U. S. Trust Co., 19 Barb. 568 (1855); Little v. O'Brien, 9 Mass. 423 (1812); Mutual Life Ins. Co. v. Wilcox, 8 Biss. 203 (1878); s. c., 17 Fed. Cas. 1081; Davis S. M. Co. v. Best, 30 Hun, 638 (1883). A loan for two years, instead of one as allowed by statute, is nevertheless enforceable. Germantown, etc. Ins. Co. v. Dhein, 43 Wis. 420 (1877). A loan is collectible though for a longer time than allowed, and without the required security, and in excess of the amount allowed by statute. Bond v. Central Bank, 2 Ga. 92 (1847).

[2] Thompson v. Greeley, 107 Mo. 577 (1891); Dodd v. Wilkinson, 42 N. J. Eq. 647 (1887); Williams v. McDonald, 42 N. J. Eq. 392 (1886). The treasurer and manager, turning in to the corporation a mortgage not worth double the debt owed by him to the corporation, is liable for any loss. Williams v. Riley, 34 N. J. Eq. 398 (1881). The case of Williams v. McKay, 46 N. J. Eq. 25 (1889), is very full, explicit, and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary, and directors of a savings bank, where those officers, etc., had made instruments contrary to the by-laws, charter, and statutes. See also § 682, *supra*.

[3] New York, etc. Co. v. Helmer, 77 N. Y. 64 (1879), applying the New York act against unauthorized banking; Tracy v. Talmage, 14 N. Y. 162 (1856); Talmage v. Pell, 7 N. Y. 328 (1852); Weed v. Snow, 3 McLean, 265 (1843); s. c., 29 Fed. Cas. 572; Leavitt v. Palmer, 3 N. Y. 19 (1849) (a certificate of deposit), and Hayden v. Davis, 3 McLean, 276 (1843); s. c., 11 Fed. Cas. 898 (an acceptance); Swift v. Beers, 3 Denio, 70 (1846); Tylee v. Yates, 3 Barb. 222 (1848), holding also that an assignment of securities for their payment is also void, and trans-

prevent the corporation from collecting the amount due. It may disregard the note and sue on the loan itself.[1]

fers no title to the assignees; White v. Franklin Bank, 39 Mass. 181 (1839), holding that, while a time deposit is within the prohibition, the money may be recovered in an action brought before the time has expired. See also Slark v. Highgate Archway Co., 5 Taunt. 792 (1814); Wigan v. Fowler, 1 Starkie, 459 (1816); Broughton v. Manchester, etc. Water-works, 3 B. & Ald. 1 (1819); Dockery v. Miller, 9 Humph. (Tenn.) 731 (1849); Ohio Life, etc. Co. v. Merchants', Ins. etc. Co., 11 Humph. (Tenn.) 1 (1850); Root v. Wallace, 4 McLean, 8 (1845); s. c., 20 Fed. Cas. 1167, holding that an indorsee may recover from the indorser of a note void for this illegality the consideration paid for it; State v. Urbana, etc. Co., 14 Ohio, 6 (1846), holding that receiving a deposit of money is not a violation of a charter restriction upon the exercise of banking powers; New York Firemen Ins. Co. v. Ely, 5 Conn. 560 (1825), where a corporation was not allowed to recover upon a note because its charter prohibited it from doing a banking business; Farmers' L. & T. Co. v. Perry, 3 Sandf. Ch. 339 (1846), and Green v. Seymour, 3 Sandf. Ch. 285 (1846), where the same principle was applied to mortgages issued in violation of statutory prohibition; Safford v. Wyckoff, 4 Hill, 442 (1842), holding also that if the form and appearance of the notes indicate that they were intended to be circulated as money, one who takes them, being thereby put upon his inquiry, is not a *bona fide* holder and cannot recover upon them. To same effect, Attorney-General v. Life, etc. Ins. Co., 9 Paige, 470 (1842); Mumford v. American, etc. Co., 4 N. Y. 463 (1851), holding that a certificate of deposit is not included in such a prohibition; Leavitt v. Yates, 4 Edw. Ch. 134 (1843), holding also that a trust deed given to secure such notes was also void; Hazleton Coal Co. v. Megargel, 4 Pa. St. 324 (1846), holding that the statute cannot be avoided by issuing a document which is in effect, though not in form, a note: Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Utica Ins. Co. v. Scott, 19 Johns. 1 (1821); Montgomery Branch Bank v. Crocheron, 5 Ala. (N. S.) 250 (1843), holding that the bills of a corporation which is prohibited from issuing them cannot be rendered legal by being issued by a bank under a contract with the corporation: Sackett's Harbor Bank v. Codd, 18 N. Y. 240 (1858), holding that a statute prohibiting the circulation of foreign bank notes does not prevent their sale and delivery for any other purpose. Payment of a debt by a draft which is prohibited by statute is not payment, the draft not having been paid. Davis v. River Raisin Bank, 4 McLean, 387 (1848); s. c., 7 Fed. Cas. 111. A charter provision that no director or officer should borrow from the bank does not apply to loans to a firm of which the director is a member. Fisher v. Murdock, 13 Hun, 485 (1878). A deposit made with a corporation which is prohibited by statute from doing a banking business is presumed to have been a loan, and in any case is recoverable back in an action for money had and received. Chapman v. Comstock, 58 Hun, 325 (1890); aff'd, 134 N. Y. 509.

[1] Oneida Bank v. Ontario Bank, 21 N. Y. 490 (1860); Pratt v. Short, 79 N. Y. 437 (1880), reviewing New York cases; Davis S. M. Co. v. Best, 30 Hun, 638 (1883); Mills v. Western Bank, 64 Mass. 22 (1852); Webb v. Herne Bay Com'rs, L. R. 5 Q. B. 642 (1870). Compare Faneuil Hall Bank v. Bank of Brighton, 82 Mass. 534 (1860), and Western Bank v. Mills, 61 Mass. 539 (1851); Utica Ins. Co. v. Kip, 8 Cow. 20 (1827); Utica Ins. Co. v. Cadwell, 3 Wend. 296 (1829), and Utica Ins. Co. v. Bloodgood, 4 Wend. 652 (1830); Planters' Bank v. Union

But where the statute prohibits not only the enforcement of the note, but also the enforcement of any contract, express or implied, growing out of the transaction, then the corporation loses the money loaned.[1] Any corporation, unless expressly prohibited, has power to take a mortgage as security for a debt contracted in the course of its business.[2]

Bank, 16 Wall. 483 (1872), holding that, when an illegal contract has been fully executed, the money constituting the price for it may be looked upon as a legal consideration for an express or implied promise. To same effect, Cook *v.* Sherman, 20 Fed. Rep. 167 (1882); Workingmen's Banking Co. *v.* Rautenberg, 103 Ill. 460 (1882), holding that a note given by a director for a loan in excess of the amount limited by charter is void so far as to release a guarantor upon it; Farmington Sav. Bank *v.* Fall, 71 Me. 49 (1880), holding that a prohibition against lending money on the security of names only is merely directory, and a note so secured may be collected. To same effect, National Pemberton Bank *v.* Porter, 125 Mass. 333 (1878); U. S. Trust Co. *v.* Brady, 20 Barb. 119 (1855); Vanatta *v.* State Bank, 9 Ohio St. 27 (1858); Union, etc. Ins. Co. *v.* Keyser, 32 N. H. 313 (1855), where a note given for insurance upon property in one class, when by law it was insurable only in another class, was held valid; McFarlan *v.* Triton Ins. Co., 4 Denio, 392 (1847), where a bond owned by an insurance company was held to have been taken as an investment in default of proof of consideration; Marion Sav. Bank *v.* Dunkin, 54 Ala. 471 (1875), holding that an accommodation drawer of a bill, who did not at the time know it was discounted by a bank in violation of law, may defend by showing that the bank was not properly organized; Brown *v.* Killian, 11 Ind. 449 (1858), holding that notes in similitude of bank-notes are void, even the issuers not being liable upon them, but any consideration paid for them may be recovered back; White *v.* Franklin Bank, 39 Mass. 181 (1839), holding that money deposited in a savings bank in violation of a statute may be recovered; Lester *v.* Howard Bank, 33 Md. 558 (1870), where a director who borrowed money from a bank in violation of its charter was held liable for the money; Philadelphia Loan Co. *v.* Towner, 13 Conn. 249 (1839), where the original debt was validly incurred, but a subsequent note by the corporation was illegal; Pratt *v.* Eaton, 79 N. Y. 449 (1880), where notes secured by a mortgage were held void, but the mortgage valid; People *v.* Brewster, 4 Wend. 498 (1830), holding that prohibiting the carrying on of a banking business does not prevent lending money upon notes, if it is not done as a business; Otis *v.* Harrison, 36 Barb. 210 (1862); Barton *v.* Port Jackson, etc. Co., 17 Barb. 397 (1854).

[1] New Hope, etc. Co. *v.* Poughkeepsie Silk Co., 25 Wend. 648 (1841).

[2] State *v.* Rice, 65 Ala. 83 (1880); National Bank *v.* Insurance Co., 41 Ohio St. 1 (1884); Baird *v.* Bank of Washington, 11 Serg. & R. (Pa.) 411 (1824), holding that a power to take mortgages in the course of business confers the power to commute debts really due for land; Bank of Michigan *v.* Niles, 1 Doug. (Mich.) 401 (1844), holding that power to hold lands and take mortgages for business purposes does not confer the right to deal in lands; National Trust Co. *v.* Murphy, 30 N. J. Eq. 408 (1879), holding that a corporation not authorized to take land as original investment may take a mortgage on land in a foreign state as additional security; Clark *v.* Farrington, 11 Wis. 306 (1860). Sections 5135 and 5137 of the

Although a corporation is prohibited by its charter from taking a real-estate mortgage as security for a debt, nevertheless the mortgage, after it has been taken, may be enforced by the corporation. The penalty is that the state may forfeit the corporate charter for misuser.[1] The laws concerning usury are enforced against corporations as fully as against individuals,[2] and where their charter for-

United States Revised Statutes do not prevent a national bank from enforcing the collection of a note secured by a mortgage of land by a foreclosure of the mortgage. National Bank *v.* Matthews, 98 U. S. 621 (1878); Palmer *v.* Lawrence, 3 Sandf. Super. 161 (1849); Lathrop *v.* Scioto Comm. Bank, 8 Dana (Ky.), 114 (1839); Mapes *v.* Scott, 94 Ill. 379 (1880), holding that national banks may take conveyances of land in payment of pre-existing debts. A national bank may enforce a mortgage securing future indebtedness. National Bank *v.* Whitney, 103 U. S. 99 (1880); Simons *v* First Nat. Bank, 93 N. Y. 269 (1883). The case of U. S. Mortgage Co. *v.* Gross, 93 Ill. 483 (1879), to the effect that foreign corporations for loaning on mortgages could not take mortgages in Illinois, inasmuch as no domestic corporation could be organized for that purpose, was overruled by Stevens *v.* Pratt, 101 Ill. 206 (1882), and Commercial, etc. Co. *v.* Scammon, 102 Ill. 46 (1882). A foreign corporation may foreclose a mortgage. American, etc. Ins. Co. *v.* Owen, 81 Mass. 491 (1860).

[1] National Bank *v.* Whitney, 103 U. S. 99 (1880), reversing Crocker *v.* Whitney, 71 N. Y. 161 (1877), holding that, where a national bank takes a mortgage to secure future advances, it can be objected to only by the government; National Bank *v.* Matthews, 98 U. S. 621 (1878), reversing Matthews *v.* Skinker, 62 Mo. 329 (1876), holding that a bank holding a deed of trust upon real estate as security for a note, contrary to the act, may sell the land in order to collect the note; followed in Winton *v.* Little, 94 Pa. St. 64 (1880); Thornton *v.* National Exch. Bank, 71 Mo. 221 (1879), holding that the only penalty for violations of that act is forfeiture of charter, to be invoked only by the United States. A mortgagor of land to a national bank cannot defend against it on the ground that the bank had no power to take the mortgage. Camp *v.* Land, 122 Cal. 167 (1898). To same effect, Graham *v.* National Bank, 32 N. J. Eq. 804 (1880); Oldham *v.* Bank, 85 N. C. 240 (1881), and Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847). For a contrary decision, see Green *v.* Seymour, 3 Sandf. Ch. 285 (1846); Bard *v.* Chamberlain, 3 Sandf. Ch. 31 (1845).

[2] McLean *v.* Lafayette Bank, 3 McLean, 587 (1846); s. c., 16 Fed. Cas. 264; New York F. Ins. Co. *v.* Sturges, 2 Cow. 664 (1824); Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847); Perkins *v.* Watson, 2 Baxt. (Tenn.) 173 (1872), holding that a bank may discount on the same terms as an individual, and should suffer the same forfeit for usury; Tyng *v.* Commercial Warehouse Co., 58 N. Y. 308 (1874), holding that general usury laws apply to corporations. Charter privileges to a building association to take larger interest than is allowed to others under the usury law are unconstitutional in Kentucky. Gordon *v.* Winchester, etc. Assoc., 12 Bush (Ky.), 110 (1876). A note of a third party given by a debtor to a bank in good faith for an existing debt is not usurious; Dunkle *v.* Renick, 6 Ohio St. 527 (1856); Morse, Banking (3d ed.), § 72, etc. A corporation limited to "legal interest" may take legal interest as allowed by the laws of the state where the money is loaned. It is not confined to the rate prescribed by the laws of the state in which it is incorporated. U. S. Mort-

bid them from exacting more than a specified rate of interest they are bound by the restriction.[1] National banks are limited to the same rate of interest as the banks of the state wherein they are located are allowed to take, and to seven per cent. if there is no restriction in that state;[2] but for any infraction of this statute the bank forfeits the interest, or, if already paid, is liable for twice such interest, but is not subject to the state statutes relative to usury.[3]

§ 691. *Preferences and assignments by insolvent corporations — Assignments by corporations for the benefit of creditors — Preferences in such assignments — Preferences by way of mortgages, etc.* — Corporations, unless restricted by their charters, or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may.

In making the assignment the corporation may make preferences to one or more creditors over others, or to one class of creditors over other classes.[4]

gage Co. *v.* Sperry, 138 U. S. 313 (1891). In some states the excess of interest is forfeited; in other states the whole interest is forfeited; and in still other states the whole debt is forfeited. See Stimson, Am. Stat. Law, § 4832. As to usury as a defense to a suit against a corporation, see § 766*b*, *infra*.

[1] Bank of U. S. *v.* Owens, 2 Pet. 527 (1829), where notes given for more than the rate fixed by the charter of a bank were declared void; Planters' Bank *v.* Sharp, 12 Miss. 75 (1844). But here it was held that taking a greater amount of interest than that allowed by the charter rendered the corporation liable under the general usury laws, and that the contract was not void. On this point see Rock River Bank *v.* Sherwood, 10 Wis. 174 (1860); Commercial Bank *v.* Nolan, 8 Miss. 508 (1843); Grand Gulf Bank *v.* Archer, 16 Miss. 151 (1847); Bank of Chillicothe *v.* Swayne, 8 Ohio, 257 (1838), where a contract for more than the specified rate was held void. To same effect, Creed *v.* Commercial Bank, 11 Ohio, 489 (1842); Spalding *v.* Bank of Muskingum, 12 Ohio, 544 (1841), holding also that taking a commission is only a method of avoiding the statute, and Miami Exporting Co. *v.* Clark, 13 Ohio, 1 (1844), where the same ruling was made in regard to charging for exchange; Morse, Banking (3d ed.), § 52. A national bank cannot take usurious interest under the cover of a "commission," the latter to be paid in case the borrower does not keep a balance in the bank of a specified amount. Although a corporation is forbidden by statute to set up usury, yet a national bank cannot collect usurious interest from a railroad corporation borrowing money of the bank. Union Nat. Bank *v.* Louisville, etc. Ry., 145 Ill. 208 (1893).

[2] U. S. Rev. Stats., § 5197.

[3] U. S. Rev. Stats., § 5198; Barnet *v.* National Bank, 98 U. S. 555 (1878).

[4] *Federal Courts:* That an assignment for the benefit of creditors may be made, see Graham *v.* Railroad Co., 102 U. S. 148 (1880). Compare on this subject the dictum in Consolidated, etc. Co. *v.* Kansas City, etc. Co., 45 Fed. Rep. 7 (1891). That preferences may be given, see Smith, etc. Co. *v.* McGroarty, 136 U. S. 237 (1890); Allis *v.* Jones, 45 Fed. Rep. 148 (1891); Atlanta, etc. R. R. *v.* Western Ry., 50 Fed. Rep. 790 (1892); Consolidated, etc. Co. *v.* Kansas City, etc. Co., 45 Fed. Rep. 7 (1891); Graham *v.* Railroad Co., 102 U. S. 148 (1880); Gould *v.* Little Rock, etc. Ry., 52 Fed. Rep. 680 (1892). Even though a creditor

There have been a few decisions to the contrary. There has also been considerable discussion in legal periodicals, decisions, and

of a corporation arranges with it so that in case of its insolvency he shall obtain a preference, and even though such arrangement is void, yet his claim will not be postponed to other claims, but all claims will share ratably as though the agreement had never been made. United States Rubber Co. *v.* American, etc. Co., 181 U. S. 434 (1901), rev'g 96 Fed. Rep. 891. An insolvent corporation may execute a mortgage to secure an existing debt and further advances. Coler *v.* Allen, 114 Fed. Rep. 609 (1902). When a foreclosure sale is subject to chattel mortgages and the sale is confirmed, the purchaser cannot attack such chattel mortgages on the ground that the mortgagor was insolvent at the time. Richards *v.* Halliday, 112 Fed. Rep. 86 (1901), holding also that an insolvent New Jersey corporation may give a chattel mortgage.

Where a corporation makes an assignment for the benefit of its creditors it commits an act of bankruptcy. Clark *v.* American, etc. Co., 101 Fed. Rep. 962 (1900). Even though the bankruptcy court may have jurisdiction over an insolvent corporation that is being wound up in a state court, yet the bankruptcy court may refuse to take jurisdiction if it is clearly shown that the creditors will be benefited most by the state proceeding. *In re* Harper & Bros., 100 Fed. Rep. 266 (1900). The bankruptcy act does not apply to a water-works company, a quasi-public corporation. *In re* New York, etc. Co., 98 Fed. Rep. 711 (1900). Even though a Connecticut corporation which owns a railroad in Kentucky is being wound up, in accordance with the statutes of Connecticut, and even though the company has assigned to the statutory receiver in Connecticut all its property, yet such an assignment is not an assignment for the benefit of creditors, and hence a creditor of the railroad may attach in Kentucky assets in that state. Huntington *v.* Cheaspeake, etc. Ry., 98 Fed. Rep. 459 (1899). As to what constitutes an act of bankruptcy on the part of a corporation, see *In re* Baker-Ricketson Co., 97 Fed. Rep. 489 (1899). A board of directors has power to make an assignment for the benefit of creditors. *In re* Bates Machine Co., 91 Fed. Rep. 625 (1899). Preferences are legal. National Bank of Commerce *v.* Allen, 90 Fed. Rep. 545 (1898). An insolvent corporation may give a chattel mortgage to secure a part of its debts. Such a mortgage is legal, notwithstanding a statute against assignments with preferences. Brown *v.* Grand Rapids, etc., Co. 58 Fed. Rep. 286 (1893), a case arising in Michigan. A creditor who becomes such after a mortgage is executed cannot object to the mortgage on the ground that it was an unlawful preference. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). A statutory prohibition against preferences by an insolvent corporation does not prevent the giving of collateral for a debt when contracted. Armstrong *v.* Chemical Nat. Bank, 41 Fed. Rep. 234 (1890). A corporate creditor may take a mortgage on the corporate property, although he knows that the corporation is insolvent. Doe *v.* Northwestern, etc. Co., 78 Fed. Rep. 62 (1896). Judgment notes for past and future advances are illegal where the board of directors is at once turned over to the dummies of the holders of the judgment notes, and the company continues to do business as though said judgment notes had not been given, the intent being to insure a preference not only at once, but in the future. Such preferences as to the future must be evidenced by a mortgage or some other instrument upon the public records. American, etc. Co. *v.* Fargo, 77 Fed. Rep. 671 (1896).

A statute prohibiting preferences by any insolvent debtor during ninety

elsewhere to the effect that at common law an insolvent corporation could not prefer one creditor as against another. The almost

days prior to an assignment does not apply to a mortgage given to take the place of a prior mortgage, and of obtaining a larger loan, the creditor having no reasonable cause to suppose the debtor was insolvent. Moore *v.* American L. & T. Co., 80 Fed. Rep. 49 (1896). A remittance to a correspondent by a national bank is legal, although the bank is insolvent at the time. Hayden *v.* Chemical Nat. Bank, 80 Fed. Rep. 587 (1897). Where the controlling directors of two corporations are the same persons, and one company becomes liable on paper for the accommodation of the other, and thereby renders the directors of the former personally liable for breach of trust, a mortgage given by the latter to the former as security for such paper is invalid, because it amounts to a preference to such officers. Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893), a case arising in Indiana. An attaching creditor cannot attack a corporate conveyance which operates as a preference, the corporation itself being insolvent, inasmuch as the reason against preferences by an insolvent corporation applies as much to attaching creditors as to parties taking by conveyance. Walker *v.* Miller, 59 Fed. Rep. 869 (1894). A statutory assignment by a Minnesota corporation to another Minnesota corporation does not prevent a subsequent attachment in Massachusetts by a citizen of New York who is a creditor of the insolvent Minnesota corporation to reach assets of the latter in Massachusetts, even though the New York creditor had notice of the assignment, but had not proven his claim nor filed a release therein. Security T. Co. *v.* Dodd, Mead & Co., 173 U. S. 624 (1899). In this case the court stated that common-law assignments were different and would be respected, except so far as they conflicted with the rights of local creditors or with the laws and policy of a state.

Section 5242 of the Revised Statutes of the United States prohibits a national bank from transferring any notes, bonds, bills of exchange, or other evidences of debt or mortgages or judgments or deposits either after an act of insolvency or in contemplation thereof with a view to a preference. The following decisions are on this statute: National Security Bank *v.* Butler, 129 U. S. 223 (1889), aff'g 22 Fed. Rep. 697, where a bank holding a certificate of deposit of an insolvent bank took assets of the latter on the day of its failure, and gave a certificate of deposit therefor, and then sought to offset the one against the other. The court held that it was immaterial that the creditor of the insolvent bank was not aware of the insolvency. Roberts *v.* Hill, 24 Fed. Rep. 571 (1885), rev'g s. c., 23 Fed. Rep. 311, where a bank transferred to one of its depositors a note which the bank held, the transfer being made when the bank was insolvent. Although the bank kept open for about three months thereafter, and even though the note was given to the depositor as collateral security, and was the only way of preventing him from drawing out his money, the court held that the act was in contemplation of insolvency, inasmuch as the officers could reasonably see that the bank would presently be unable to meet its obligation, and would be obliged to suspend operations. Case *v.* Citizens' Bank, 2 Woods, 23 (1873); s. c., 5 Fed. Cas. 251, in which an insolvent bank transferred various bills and notes to another bank, to which the former bank had, while solvent, transferred bills of exchange which were not thereafter honored. The court held the act to be illegal. Armstrong *v.* Chemical Nat. Bank, 41 Fed. Rep. 234 (1890),

unanimous conclusion, however, is that preferences may be given by an insolvent corporation the same as by an insolvent individual.

wherein it was held that an insolvent bank might transfer assets to secure a loan made contemporaneously with such transfer. Irons *v.* Manufacturers' Nat. Bank, 6 Biss. 301 (1875); s. c., 13 Fed. Cas. 100, where the phrase "act of insolvency" was held to mean any act which would be an act of insolvency by an individual banker. See also National Bank *v.* Colby, 21 Wall. 609 (1874). In Casey *v.* Société de Crédit Mobilier, 2 Woods, 77 (1874); s. c., 5 Fed. Cas. 262, it was held that the preference intended by the act is such as is given to secure or pay a pre-existing debt, and does not prevent the borrowing of money upon security. Venango Nat. Bank *v.* Taylor, 56 Pa. St. 14 (1867), holding that the act relates to legal as well as voluntary transfers of property by banks. See also National, etc. Bank *v.* Mechanics', etc. Bank, 89 N. Y. 467 (1882); Robinson *v.* Newberne Nat. Bank, 81 N.Y. 385 (1880), holding that the act applies only to such banks as are insolvent or are about to become so. A state statute giving savings banks a preference in payment from the assets of an insolvent bank does not apply to national banks which become insolvent. Davis *v.* Elmira Sav. Bank, 161 U. S. 275 (1896), rev'g Elmira Sav. Bank *v.* Davis, 142 N. Y. 590, and 73 Hun, 357. Remittances by an insolvent national bank to its correspondent bank are legal where the former bank has not actually stopped business and the transactions were in good faith. Hayden *v.* Chemical Nat. Bank, 84 Fed. Rep. 874 (1898).

Alabama: That an assigment may be made, see Chamberlain *v.* Bromberg, 83 Ala. 576 (1888); Pope *v.* Brandon, 3 Ala. (O. S.) 401 (1830), holding a'so that it was not necessary that the creditors should sign the assignment; nor was the deed void because the trustee was the president of the assigning bank, who in that capacity executed the deed as grantor; Allen *v.* Montgomery R. R., 11 Ala. 437, 451 (1847). The president cannot make an assignment by the company for the benefit of creditors. A ratification by the directors is not good as against an attachment in the meantime. Norton *v.* Alabama Nat. Bank, 102 Ala. 420 (1894). A bill to compel an assignee for the benefit of creditors of an insolvent corporation to account, and to hold stockholders liable on stock issued for property, and to reach corporate assets in the hands of third parties, is multifarious. The theory that the capital stock is a trust fund is unfounded. O'Bear Jewelry Co. *v.* Volfer, 106 Ala. 205 (1895).

A preference, however, is not allowed in this state. Yet even though under the decisions of Alabama an insolvent corporation cannot give a preference, nevertheless so long as the corporation is a going concern it may pay a party who is not aware of the insolvency. Mary Lee, etc. Ry. *v.* Knox, 110 Ala. 632 (1895). A corporation in financial difficulties cannot execute a mortgage to secure bonds, and deliver these bonds to a bank as security for past and future advances, where two of the directors of the company are also directors of the bank. Such a mortgage delays other creditors. Only *bona fide* holders of such bonds are protected. Age-Herald Co. *v.* Potter, 109 Ala. 675 (1895). A mortgage deed of trust to secure bonds executed by an insolvent corporation is presumed to be a conveyance of corporate property to delay and defraud creditors; but a bill attacking such a mortgage must allege that parties receiving bonds to secure their debts did not advance money at the time of receiving bonds, but were antecedent creditors. Coal City, etc. Co. *v.* Hazard Powder Co., 108 Ala. 218 (1896). Even

And yet it must be conceded that great abuses have arisen therefrom. The directors and stockholders of a corporation are numer-

though a corporation has allowed judgment to be taken against it, yet a general creditor cannot have a receiver appointed on the ground that such judgment constitutes an illegal preference. Builders', etc. Co. *v.* Lucas, 119 Ala. 202 (1898).

Arkansas: Preferences are upheld in this state. Ringo *v.* Bisco, 13 Ark. 563 (1853); *Ex parte* Conway, 4 Ark. 302, 352 (1842). The statutes of Arkansas prohibit preferences among creditors of insolvent corporations. Sand. & H. Digest, secs. 1425, 1427.

California: At common law a preference is legal. Merced Bank *v.* Ivett, 127 Cal. 134 (1899).

Canada: The directors may make an assignment of the corporate assets for the benefit of creditors. Whiting *v.* Hovey, 13 Ont. App. Cas. 7 (1886).

Colorado: An insolvent corporation may give a preference and convey to one creditor all its property. John, etc. Co. *v.* Sweetzer, 10 Colo. App. 421 (1897).

Connecticut: Preferences are upheld. Savings Bank *v.* Bates, 8 Conn. 505 (1831); Smith *v.* Skeary, 47 Conn. 47 (1879). The following case bears upon this principle of law, but does not conflict with it: Catlin *v.* Eagle Bank, 6 Conn. 233 (1826). A deed in trust by a corporation of all its property, made with consent of nearly all its creditors, to trustees to continue the business, is void as to non-consenting creditors. Waterman *v.* Sprague Mfg. Co., 55 Conn. 554 (1888); De Wolf *v.* Sprague Mfg. Co., 49 Conn. 282 (1881). Under the Connecticut statutes an insolvent corporation is placed in a receiver's hands for the benefit of all creditors, and a person holding security must stand on his security or else come in only for the excess of his claim above the value of the security. *Re* Waddell-Entz Co., 67 Conn. 324 (1896). Where a mortgagee at the request of the mortgagor corporation withholds the mortgage from the record to deceive the public until the mortgagor becomes insolvent, the mortgage may be set aside for fraud. Curtis *v.* Lewis, 50 Atl. Rep. 878 (Conn. 1902).

Georgia: An assignment for the benefit of creditors is legal. McCallie *v.* Walton, 37 Ga. 611 (1868). And preferences may be given. The following case bears upon this principle of law, but does not conflict with it: Hightower *v.* Mustian, 8 Ga. 506 (1850).

Illinois: Assignments by insolvent corporations with preferences are legal. Blair *v.* Illinois Steel Co., 159 Ill. 350 (1896), quoting and approving the text above; Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624 (1895); Chicago, etc. Co. *v.* Smith, 158 Ill. 417 (1895). The preference may be by way of mortgage. Reed *v.* Bradley, 17 Ill. 321 (1856). A preference by an insolvent corporation is legal. State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519 (1897). It is legal in Illinois for an insolvent corporation to give judgment notes, even though judgment is immediately entered thereon and all its assets sold out, the creditor not being a director or stockholder. Peterson *v.* Brabrook, etc. Co., 150 Ill. 290 (1894). Although a New York insolvent corporation is prohibited by statute from preferring a creditor, yet where it turns over in Ohio property to a creditor, the Illinois courts will sustain the preference in accordance with Illinois decisions. Warren *v.* First Nat. Bank, 149 Ill. 9 (1893). A corporation that is unable to pay its debts as they become due in the usual course of business is insolvent. Atwater *v.* American, etc. Bank, 152 Ill. 605 (1894).

Indiana: The assignment may be made by a meeting of the board of directors, as in any other corporate business. De Camp *v.* Alward, 52 Ind. 468 (1876). Preferences are legal. First Nat.

ous, and each generally wishes some particular creditor to be preferred. Moreover an insolvent corporation never hopes to resume

Bank *v.* Dovetail, etc. Co., 143 Ind. 550 (1895); Smith *v.* Wells, etc. Co., 148 Ind. 333 (1897). A mortgage given by an insolvent Ohio corporation to certain of its creditors residing in Ohio is valid in Indiana, such mortgage being upon real estate in Indiana, even though the Ohio courts have declared such a mortgage to be invalid. Nathan *v.* Lee, 152 Ind. 232 (1899). A mortgage securing bonds is not fraudulent by reason of the fact that it was agreed that it should not be recorded in order that the credit of the company might not be impaired. Am. Trust & Savings Bank, etc. *v.* McGettigan, 152 Ind. 582 (1899).

Iowa: Preferences are legal. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). The following case bears upon this principle of law, but does not conflict with it: Buell *v.* Buckingham, 16 Iowa, 284 (1864). A director and stockholder who acquiesces in the giving of a mortgage to a certain creditor cannot afterwards complain of the same. Gillette *v.* Meredith, 103 Iowa, 155 (1897). An insolvent corporation may prefer one of its creditors. First Nat. Bank *v.* Garretson, 107 Iowa, 196 (1899). An insolvent individual who owes a bank may convey land to the bank for the benefit of its depositors, and the doctrine that individual assets must be applied to individual debts before being applied to partnership debts does not apply, even though he owns one-half of the stock of the bank. Steinke *v.* Yetzer, 108 Iowa, 512 (1899). The validity of a mortgage given by an insolvent Ohio corporation upon land owned by it in Iowa is determined by the laws of Iowa. Such a mortgage given two months before a general assignment by the corporation is valid, even though the corporation was insolvent during the whole time, the mortgagee not knowing thereof. Manton *v.* Seiberling, 107 Iowa, 534 (1899).

Kansas: An insolvent corporation may give preferences. Grand, etc. Co. *v.* Rude, etc. Co., 60 Kan. 145 (1899).

Kentucky: A creditor of an insolvent corporation may, by attachment, obtain a preference over other creditors, and if an insolvent corporation makes a fraudulent assignment for the benefit of creditors, any creditor may levy such an attachment. A secret unrecorded mortgage, held until the company becomes insolvent, is fraudulent as to other creditors. Louisville, etc. Co. *v.* Etheridge, etc. Co., 43 S. W. Rep. 169 (Ky. 1897).

Louisiana: The Louisiana statute allowing insolvent individuals to apply to the court and obtain an extension of time on their debts does not apply to corporations. Isabella Lumber Co. *v.* Creditors, 48 La. Ann. 269 (1896).

Maine: An insolvent corporation in Maine may be declared an insolvent debtor under the statute, but cannot obtain a discharge in insolvency. A creditor may obtain a judgment at law and levy on property which the insolvent illegally transferred away. Miller *v.* Waldoborough Packing Co., 88 Me. 605 (1896). Although an Illinois corporation has passed through insolvency proceedings in Maine, yet a non-resident creditor who was not a party to such proceedings may thereafter sue such corporation in Maine. Hammond, etc. Co. *v.* Best, 91 Me. 431 (1898).

Maryland: Assignments are legal. State *v.* Bank of Maryland, 6 Gill & J. 205, 219 (1834). A vendor of goods to an insolvent corporation may rescind and replevy the goods if the corporate officers at the time had no reasonable expectation of making payment when the bill becomes due. Edelhoff *v.* Horner, etc. Co., 86 Md. 595 (1898). An assignment for the benefit of creditors, executed by the president and secretary without authority from the board

business again, and is more ruthless and unconscionable in its preferences, because no moral obligation to do equity rests on any one

of directors, may be valid if not promptly repudiated by the board of directors. Miller *v.* Matthews, 87 Md. 464 (1898).

Massachusetts: Assignments are legal. Sargent *v.* Webster, 54 Mass. 497 (1847), holding also that the assignment may be to a stockholder to pay a debt of the corporation to him, and the remainder to go to the corporate treasurer for the benefit of other creditors. As to the Massachusetts statute providing for insolvency proceedings against a corporation which makes an assignment for the benefit of creditors, see Steel, etc. Co. *v.* Manchester Sav. Bank, 163 Mass. 252 (1895). As to the evidence necessary to prove that an insolvent corporation had preferred a creditor in paying a debt in violation of the statute in Massachusetts, see Clarke *v.* Second Nat. Bank, 177 Mass. 257 (1901).

Michigan: An insolvent corporation may make an assignment for the benefit of creditors, and the board of directors may make it without the assent of the stockholders. Boynton *v.* Roe, 114 Mich. 401 (1897). The Michigan statute against preferences in assignments does not prevent the giving of a mortgage to a trustee to secure certain debts due from the insolvent corporation mortgagor. Austin *v.* First Nat. Bank, 100 Mich. 613 (1894). At common law in Michigan an insolvent corporation might assign. Bank of Montreal *v.* Potts, etc. Co., 90 Mich. 345 (1892); Kendall *v.* Bishop, 76 Mich. 634 (1889). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. *Re* George, etc. Co., 86 Mich. 149 (1891); Covert *v.* Rogers, 38 Mich. 363 (1878), holding that the assignee may be one of the stockholders. In this case he was a former treasurer, who had resigned. Stockholders cannot prevent directors making an assignment for the benefit of corporate creditors, though their term of office expires in four days, the corporation being insolvent. A mortgage by an insolvent corporation given in pursuance of a prior agreement is legal where the mortgagee did not know the corporation was insolvent. Franklin, etc. Co. *v.* Amazon, etc. Co., 87 N. W. Rep. 211 (Mich. 1901).

Minnesota: The board of directors of an insolvent corporation may order an assignment for the benefit of creditors. Tripp *v.* Northwestern Nat. Bank, 41 Minn. 400 (1889), 45 Minn. 383 (1891). In Minnesota, by statute, an insolvent corporation cannot give preferences. Yanish *v.* Pioneer Fuel Co., 64 Minn. 175 (1896).

Mississippi: Preferences are legal. Sells *v.* Rosedale, etc. Co., 72 Miss. 590 (1895); Arthur *v.* Commercial, etc. Bank, 17 Miss. 394 (1848); Palmer *v.* George W. Hutchison Grocery Co., 11 S. Rep. 789 (Miss. 1892). The following case bears upon this principle of law, but does not conflict with it: Robins *v.* Embry, 1 Sm. & M. Ch. (Miss.) 207, 258 (1843). An assignment by a railroad assigns its income only. Arthur *v.* Commercial, etc. Bank, 17 Miss. 394, 430 (1848). See also State *v.* Commercial Bank, 21 Miss. 569 (1850). An insolvent corporation may give preferences. Fargason *v.* Oxford, etc. Co., 78 Miss. 65 (1900).

Missouri: Assignments are legal. Hutchinson *v.* Green, 91 Mo. 367 (1886); Shockley *v.* Fisher, 75 Mo. 498 (1882), construing a statute authorizing an assignment "by a debtor to any person in trust for his creditors" to include corporations, and holding that the right exists at common law, citing 2 Kent, Com. 398, and note. Preferences may be given. Meyer *v.* American, etc. Co., 130 Mo. 188 (1895); Slavens *v.* Cook Drug Co., 128 Mo. 341 (1895). A creditor of

director or stockholder. In all this an insolvent corporation differs from an insolvent individual. As a result, the abuses from

an insolvent corporation may obtain a preference by an attachment, and it is legal, even though a director of the corporation advised him to attach. La Grange, etc. Co. *v.* National Bank, 122 Mo. 154 (1894), the court refusing to follow the Tennessee rule. An embarrassed corporation may take title to land in a director's name and have him give a mortgage thereon to raise money for the corporation. Donham *v.* Hahn, 127 Mo. 439 (1895). An insolvent corporation may turn over to a bank book-accounts, merchandise, and fixtures as security for a debt, even though the corporation thereafter, on the same day, assigns for the benefit of creditors. Alberger *v.* National Bank, 123 Mo. 313 (1894), calling attention also to the fact that contrary decisions in Ohio and Texas were based on statutes. A creditor who has not yet reduced his claim to a judgment cannot file a bill to set aside an alleged illegal transfer of property. Atlas Nat. Bank *v.* Moran, etc. Co., 138 Mo. 59 (1897). An assignment for the benefit of creditors, authorized by the directors acting separately and not as a board, is invalid. Calumet Paper Co. *v.* Haskell, etc. Co., 144 Mo. 331 (1897).

Montana: An insolvent corporation may give a preference by a mortgage. Teitig *v.* Boesman, 12 Mont. 404 (1892). Preferences are legal. Ames, etc. Co. *v.* Heslet, 19 Mont. 188 (1897). After foreclosure of a mortgage other creditors cannot attack a mortgage on the ground that the mortgagee had not complied with the state statutes. Miller *v.* Gates, 22 Mont. 305 (1899).

Nebraska: An insolvent corporation may, in the absence of actual fraud, prefer one or more of the creditors, to the exclusion of others. Wallachs *v.* Robinson, etc. Co., 50 Neb. 469 (1897); Shaw *v.* Robinson, etc. Co., 50 Neb. 403 (1897). A mortgage given by way of preference by an insolvent corporation is valid unless it is given to a director or officer. M. A. Seeds, etc. Co. *v.* Heyn, etc. Co., 57 Neb. 214 (1898).

New Hampshire: Assignments may be made. Flint *v.* Clinton Co., 12 N. H. 430, 435 (1841). As to preferences, the following case bears upon this principle of law: Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861). As to proceedings against a corporation under the insolvent debtor's act, see Kennett *v.* Woodworth-M. Co., 68 N. H. 432 (1896).

New Jersey: Section 64 of the Laws of 1896 now forbids any assignment whatsoever of any of the assets of an insolvent corporation. The statute of 1895, prohibiting insolvent corporations from making assignments, did not apply to companies organized before the passage of the statute. Such a statute did not invalidate an assignment for the benefit of creditors given by an insolvent New Jersey corporation in Pennsylvania. Borton *v.* Brines-Chase Co., 175 Pa. St. 209 (1896). A mortgage given by an insolvent corporation to a creditor for a pre-existing debt is invalid under the New Jersey statutes. Frost *v.* Barnert, 56 N. J. Eq. 290 (1897). The proper way to attack a preference given by an insolvent corporation is in the distribution proceedings in a suit to have the company declared insolvent, and a receiver appointed, and its assets distributed. A warrant of attorney to confess judgment given in September and used in February is evidence of an intent to give a preference if existing notes are taken up and new notes given at the time of entry of judgment. Consolidated Coal Co. *v.* National St. Bank, 55 N. J. Eq. 800 (1897). At common law insolvent corporations may assign for the benefit of creditors. Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). And preferences may

allowing an insolvent corporation to make preferences are so great that the various states are enacting prohibitory statutes on this

be given. Vail *v.* Jameson, 41 N. J. Eq. 648 (1886); Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). A chattel mortgage made in contempt of court and in violation of the statutes against preferences by a corporation is void. Bissell *v.* Besson, 47 N. J. Eq. 580 (1890). See also Bergen *v.* Porpoise Fishing Co., 42 N. J. Eq. 397 (1886). Under the old New Jersey statute the directors of a corporation might mortgage the property and issue bonds to themselves as security for previous advancements, even though the company was insolvent. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). It is a disposal of property for the purpose of hindering and delaying creditors, within the meaning of the second section of the statute of frauds, for an insolvent firm to mortgage all their property to a trustee and take the bonds secured by that mortgage, even though they take the bonds to turn over to their creditors. But the act is voidable only as to those creditors who object and contest the matter. National Bank *v.* Sprague, 21 N. J. Eq. 530 (1870). Although New York corporations are forbidden by the statutes of New York to execute mortgages or give preferences in contemplation of insolvency, yet a mortgage given by a New York corporation on chattels and real estate in New Jersey was upheld in New Jersey, although made in contemplation of insolvency. The New Jersey courts did not apply the New York law, but will apply that of New Jersey. The debt secured by the mortgage in this case was payable in New Jersey, however, and most of the creditors resided there. Boehme *v.* Rall, 51 N. J. Eq. 541 (1893). A levy of execution prior to the appointment of a receiver has a prior claim on the assets levied upon. Van Steenberg *v.* Parsil, etc. Co., 34 Atl. Rep. 135 (N. J. 1896). An insolvent New Jersey corporation cannot as against some of its creditors issue mortgage bonds to other creditors. Skirm *v.* Eastern, etc. Co., 57 N. J. Eq. 179 (1898). A mortgage made by the president without authority is not binding on the company and cannot be validated after the company has become insolvent where the statute prohibits assignments after insolvency. Howell *v.* Keen, 43 Atl. Rep. 1070 (N. J. 1899).

New York: In New York, from 1825 to 1892, the statutes prohibited corporations from making any transfers or assignments in contemplation of insolvency, and declared any such transfers and assignments utterly void. (1 R. S. 603, § 4.) By this statute all assignments by New York corporations for the benefit of creditors were held to be void. Sibell *v.* Remsen, 33 N. Y. 95 (1865); National, etc. Bank *v.* Mechanics' Nat. Bank, 89 N. Y. 467 (1882); Harris *v.* Thompson, 15 Barb. 62 (1853); Atkinson *v.* Rochester Printing Co., 114 N. Y. 168 (1889).

The following decisions were as to what was meant by "in contemplation of insolvency:" In Robinson *v.* Bank of Attica, 21 N. Y. 406 (1860), where a state bank, three days before its failure, induced a party to give it accommodation checks, and on the following day turned out securities to secure such checks, the court held that the securities could be recovered back by the receiver. In Marine Bank *v.* Clements, 31 N. Y. 33 (1865), where an insolvent corporation assigned a note to a party, and that party brought suit upon the note, the court held that the maker of the note could not set up the insolvency as a defense, there being no proof that the indorsee did not give value at the time he took the note from the insolvent corporation. In Dutcher *v.* Importers', etc. Nat. Bank, 59 N. Y. 5 (1874), the court held that where the bank paid a check to a depositor who had no knowledge of

subject. Although a state cannot give a preference to its own citizens as against citizens of another state in the distribution of the

the insolvency of the bank, this was not such a preference as was prohibited by the statute. In Paulding *v.* Chrome Steel Co., 94 N. Y. 334 (1884), although a chattel mortgage had been given five years before the company became insolvent, and had not been recorded, and was renewed and recorded at the time when the corporation was insolvent, yet the court held that the mortgage was valid. Under the New York act a director cannot obtain a preference by attachment, nor by a judgment taken by default. Throop *v.* Hatch Lithog. Co., 125 N. Y. 530 (1891). In 1892 the above statute was changed so that assignments by insolvent corporations are now legal, provided no preferences are given. (Stock Corporation Law, § 48.) Preferences given to any creditor, whether a corporate officer, or stockholder, or outsider, are void. A chattel mortgage given by an insolvent Michigan corporation to a trustee for the benefit of all creditors who should accept its terms and extend their debts, the trustee being given power to continue the business, is not valid as to personal property in New York state, even though recorded as a chattel mortgage in New York state. Dearing *v.* McKinnon, etc. Co., 165 N. Y. 78 (1900). An assignment of personal property by an insolvent corporation for the benefit of such of its creditors as accept the same, one of the provisions being that they should extend the time of payment of their claims, is illegal under the statute of frauds in New York, in that it delays and hinders the creditors in obliging them to extend the time of payment and in that the assignee was authorized to sell on credit. The fact that such an instrument was legal in Michigan, where the corporation existed, did not legalize the instrument as to personal property in New York state. Dearing *v.* McKinnon, etc. Co., 33 N. Y. App. Div. 31 (1898). The New York statute does not render invalid a judgment obtained by a corporate creditor by default for failure to answer. Lopez *v.* Campbell, 163 N. Y. 340 (1900). Where an insolvent corporation has illegally transferred its property, a permanent receiver may bring a suit at law for conversion instead of suing in a court of equity. McQueen *v.* New, 45 N. Y. App. Div. 579 (1899). A judgment obtained by collusion with the president may be an illegal preference. Rossman *v.* Seaver, 41 N. Y. App. Div. 603 (1899). Where a corporation is formed to make advances to an insolvent copartnership, taking a lien on the property of the latter, and the latter continues the business in its own name and turns over the proceeds of the sales to the former, the scheme is illegal as giving the firm a false credit and as being inconsistent with the nature of a chattel mortgage. Mathews *v.* Hardt, 37 N. E. Misc. Rep. 653 (1902). In Baker *v.* Emerson, 4 N. Y. App. Div. 348 (1896), where a manufacturing company, being insolvent, paid a note for $3,000, leaving $17,000 of debts unpaid, payment being made May 29, 1893, and the company suspended business June 5, 1893, the court held that the payment was illegal, although the company expected at the time of the payment to raise sufficient money to go on with its business; citing to this effect, Vennard *v.* McConnell, 93 Mass. 555, 562 (1866); also Forbes *v.* Howe, 102 Mass. 427, 436 (1869). A preference to a partnership of which a stockholder is a member is illegal. Jones *v.* Blun, 145 N. Y. 333 (1895). An assignment for the benefit of creditors is authorized by the directors and not the stockholders. A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority;

assets of an insolvent corporation, yet as against corporations of other states such preference may be given.[1]

but he should not select himself as assignee. Rogers v. Pell, 154 N. Y. 518 (1898). In New York an insolvent corporation may make an assignment for the benefit of creditors, but there must not be any preferences. Croll v. Empire, etc. Co., 17 N. Y. App. Div. 282 (1897). Where a private corporation, with the consent of all its stockholders of record, agrees with its creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such relief. Marbury v. Stone, 17 N. Y. App. Div. 352 (1897); aff'd, 160 N. Y. 701. The fact that the company is unable to meet its obligations, and that judgments are being entered against it, shows insolvency. Nealis v. American, etc. Co., 76 Hun, 220 (1894); aff'd, 150 N. Y. 42. Even in New York, where a conveyance in view of insolvency is void, an embarrassed corporation may mortgage all its property to secure bonds which are given to creditors for their debts, where the creditor who refuses to take the bonds waits over three years before attacking the mortgage. New Britain Nat. Bank v. A. B. Cleveland Co., 91 Hun, 447 (1895); aff'd, 158 N. Y. 722 (1899). An insolvent corporation may give a mortgage to secure bonds given at that time, if the issue is a fair business transaction and for the purpose of saving the company and its property. Cochran v. Anglo American, etc. Co., 69 Hun, 168 (1893). In an action by a receiver to set aside a transfer of property made in violation of the statute, it seems that it is no defense that an execution sale by a third party had taken all the equity of the company in the property. Stonebridge v. Perkins, 141 N. Y. 1 (1894). Formerly a foreign corporation might make, in New York, an assignment for the benefit of its creditors, where such assignment would be valid if made in the state where the company was incorporated; in this case in New Jersey. The New York statute against such assignments applied only to a domestic corporation. At common law any corporation might make such an assignment, and the president and secretary, under authority of the board of directors, might execute an assignment for the benefit of creditors made by the corporation. Vanderpoel v. Gorman, 140 N. Y. 563 (1894). An insolvent Massachusetts corporation, having goods in New York, might transfer the same to a creditor, and the transfer takes precedence of an attachment subsequently levied in New York by another creditor. The New York act against assignments by insolvent corporations formerly applied only to domestic corporations. Lane v. Wheelwright, 69 Hun, 180 (1893); aff'd, 143 N. Y. 634. A creditor of a foreign corporation could obtain a preference in New York upon assets in New York. Logan v. McCall Pub. Co., 140 N. Y. 447 (1893); Coats v. Donnell, 94 N. Y. 168 (1883), holding that a statute prohibiting preferences by corporations did not apply to foreign corporations. In the case of Standard, etc. Bank v. Garfield, etc. Bank, 56 N. Y. App. Div. 43 (1900), it is held that the New York statute against assignments by an insolvent corporation does not apply to a foreign corporation, and that a statute of another state against such assignments does not apply in New York state. A foreign cor-

[1] Blake v. McClung, 172 U. S. 239 (1898).

The rights of the creditors of an insolvent corporation or individual who mortgages property to secure bonds and then disposes of the bonds or offers them to the creditors is considered elsewhere.[1]

§ 692. *Preferences and assignments by insolvent corporations to directors, officers, or stockholders — Loans by directors to the corporation — Mortgages by corporations to directors.*— Turning now from preferences given to the ordinary creditor of a corporation to

poration not doing business in New York state is presumed to have power to make an assignment for the benefit of creditors with preferences. Matter of Hulbert Bros. etc., 38 N. Y. App. Div. 323 (1899). As to foreign corporations now in New York, see L. 1897, ch. 384.

North Carolina: Preferences are upheld. Blalock *v.* Kernersville Mfg. Co., 110 N. C. 99 (1892). An insolvent corporation may prefer creditors in North Carolina subject to a sixty-day statutory restriction. Merchants' Nat. Bank *v.* Newton Cotton Mills, 115 N. C. 507 (1894). A corporation is not insolvent so long as its property, at market prices, is equal in value to its debts Silver, etc. Co. *v.* North, etc. Co., 119 N. C. 417 (1896). Cf. s. c., 122 N. C. 542 (1898).

Ohio: Preferences are illegal. Damarin *v.* Huron Iron Co., 47 Ohio St. 581 (1890); Sayler *v.* Simpson, 46 Ohio St. 510 (1890); Rouse *v.* Merchants' Nat. Bank, 46 Ohio St. 493 (1889); followed in Smith, etc. Co. *v.* McGroarty, 136 U. S. 237 (1890), in an Ohio case.

Oregon: A failing corporation may give a mortgage if in good faith. Currie *v.* Bowman, 25 Oreg. 364 (1894); Sabin *v.* Columbia Fuel Co., 25 Oreg. 15 (1894). A judgment creditor who has levied an execution may file a bill to set aside an illegal assignment, but cannot claim a preference on that fund. Kerslake *v.* Brower, etc. Co., 40 Oreg. 44 (1901).

Pennsylvania: Assignments may be made. Ardesco Oil Co. *v.* North American, etc. Co., 66 Pa. St. 375 (1870). A New York corporation may execute a judgment note which is good in Pennsylvania, notwithstanding the New York statute against preferences. East Side Bank *v.* Columbus Tanning Co., 170 Pa. St. 1 (1895). A New Jersey corporation, although forbidden by New Jersey statutes from giving a preference by way of confession of judgment, yet may do so in Pennsylvania, where such a preference is legal, the New Jersey laws allowing preference by any other means than a confessed judgment. Pairpoint Mfg. Co. *v.* Philadelphia, etc. Co., 161 Pa. St. 17 (1894). See also Borton *v.* Brines-Chase Co., 175 Pa. St. 209 (1896). A preference given by a meeting of the board of directors at which a quorum is present, notice of which was not given to the other directors, may be valid if no officer or stockholder thereafter objected to the same. Moller *v.* Keystone, etc. Co., 187 Pa. St. 553 (1898).

Rhode Island: A New York corporation owning property in Rhode Island cannot make in the latter state an assignment which the New York statutes prohibit. Pierce *v.* Crompton, 13 R. I. 312 (1881). Where a corporation conveys away its property in order to enforce a settlement with its creditors it cannot compel a reconveyance of such property. Apponaug, etc. Co. *v.* Rawson, 22 R. I. 123 (1900).

South Dakota: An assignment for the benefit of creditors may be made by a corporation. A foreign corporation may make such an assignment. It is legal, although the foreign corporation has not complied with the law relative to filing a copy of its charter and appointing a resident agent. The assignment is properly made by the di-

[1] See §§ 672, 674, *supra.*

preferences given to a director of the corporation, it is found that entirely different rules prevail. No statute is necessary to prevent

rectors, and not by a meeting of the stockholders. Where the assignment is made to a director and there are indications of fraud, it is for the jury to say whether there was fraud. Wright *v.* Lee, 2 S. D. 596 (1892).

Tennessee: It has been held that preferences are illegal. Tradesman Pub. Co. *v.* Car Wheel Co., 95 Tenn. 634 (1895). *Cf.* Hopkins *v.* Gallatin, etc. Co., 4 Humph. 403 (1843). But a diligent creditor may obtain a preference by a judgment although the corporation is insolvent, it being a going concern. Buchanan *v.* Barnes, 34 S. W. Rep. 425 (Tenn. 1896). An assignment by a corporation for the benefit of creditors does not displace existing attachments. First Nat. Bank *v.* Lumber, etc. Co., 91 Tenn. 12 (1891). An insolvent corporation cannot turn over practically all its assets to one creditor by way of preference. Smith *v.* Bradt Printing Co., 97 Tenn. 351 (1896). After a corporation has been declared insolvent by the board of directors and directions given to file a bill to wind up its affairs, a creditor cannot obtain a preference by levy of execution before the bill is actually filed. Memphis B. etc. Co. *v.* Ward, 99 Tenn. 172 (1897). The Tennessee statute giving its citizens preference as to assets of an insolvent foreign corporation within the state is unconstitutional as to non-resident persons, but is constitutional as to foreign corporations which are creditors of the insolvent corporation. McClung *v.* Embreeville, etc. Ry., 103 Tenn. 399 (1899), following Blake *v.* McClung, 172 U. S. 239, 259 (1898). Where an insolvent corporation has assigned for the benefit of its creditors, and then one of the creditors files a bill to wind up the company and for distribution, his attorneys will not be given an allowance, inasmuch as no new assets were disclosed and no beneficial effect shown. Parkhurst, etc. Co. *v.* Wilkinson Co., 54 S. W. Rep. 58 (Tenn. 1899). A stockholder cannot bring suit against an assignee for the benefit of creditors to hold him liable for maladministration, inasmuch as any surplus, after paying the debts, would belong to the corporation. A request to the directors to bring suit is first necessary. State *v.* Mitchell, 104 Tenn. 336 (1898).

Texas: In Texas the statutes as construed by the courts make the corporate property upon insolvency a trust fund to be distributed equally among all creditors. The corporation may turn the property over to its directors for that purpose. Wright *v.* Euless, 12 Tex. Civ. App. 136 (1896). An insolvent corporation cannot prefer its creditors by giving a mortgage. Judgment creditors may cause it to be set aside and an accounting had. Lyons, etc. Co. *v.* Perry, etc. Co., 88 Tex. 468 (1894). An insolvent corporation cannot prefer certain creditors, and equity will prevent unjust preferences. Lang *v.* Daugherty, 74 Tex. 226 (Tex. 1889). In Texas, however, any creditor may obtain a preference by legal proceedings. Moon, etc. Co. *v.* Waxahachie, etc. Co., 13 Tex. Civ. App. 103 (1896); aff'd, 89 Tex. 511 (1896); Florsheim, etc. Co. *v.* Wettermark, 10 Tex. Civ. App. 102 (1895); Harrigan *v.* Quay, 27 S. W. Rep. 897 (Tex. 1894). But not by assignment. Orr, etc. Co. *v.* Thompson, 36 S. W. Rep. 1129 (Tex. 1896); aff'd, 89 Tex. 501 (1896); Fowler *v.* Bell, 90 Tex. 150 (1896); Specht *v.* Bookhout, 14 Tex. Civ. App. 443 (1896), the court holding also that a debtor of the corporation who pays such preferred creditor, to whom the claim has been assigned, does so at his peril. It has been held that no preference is sustained, even by attachment against an insolvent corporation, in Texas. Farmers', etc. Bank *v.* Waco, etc. Co., 36 S. W. Rep. 131 (Tex. 1896). Attachment lies

preferences to a director of an insolvent corporation. It is undoubtedly true that the law allows a director to loan money to a corporation, and allows the corporation, while it is solvent, to give

against a corporation, although it is insolvent but is still doing business. American Nat. Bank *v.* Dallas, etc. Co., 15 Tex. Civ. App. 631 (1897). The directors of an insolvent corporation may authorize an assignment for the benefit of creditors. Birmingham, etc. Co. *v.* Freeman, 15 Tex. Civ. App. 451 (1897). A purchaser of the assets of an insolvent corporation, under an order of court in a suit instituted by a creditor, may contest the validity of a mortgage given by the insolvent corporation by way of preference, the validity thereof not having been passed upon in such suit, and may also contest the validity of a transfer by the insolvent corporation of its assets by way of preference. Rogers *v.* Southern, etc. Co., 21 Tex. Civ. App. 48 (1899). An attachment against a corporation carrying on its business in the usual way is good, even though the corporation is insolvent. Mallette *v.* Ft. Worth, etc. Co., 21 Tex. Civ. App. 267 (1899).

Utah: Preferences are legal. Weyeth, etc. Co. *v.* James, etc. Co., 15 Utah, 110 (1897). A mortgage by an insolvent corporation may be legal. Singer *v.* Salt Lake City, etc. Co., 17 Utah, 143 (1898). Only the board of directors of a bank may make an assignment for the benefit of creditors. Cupit *v.* Park City Bank, 58 Pac. Rep. 839 (Utah, 1899).

Vermont: Preferences are legal. Warner *v.* Mower, 11 Vt. 385, 390 (1839).

Virginia: Assignments may be made. Lewis *v.* Glenn, 84 Va. 947 (1888). And preferences given. Planters' Bank *v.* Whittle, 78 Va. 737 (1884).

Washington: A corporation may assign for the benefit of creditors. Nyman *v.* Berry, 3 Wash. St. 734 (1892). But preferences are illegal. Conover *v.* Hull, 10 Wash. St. 673 (1895); Thompson *v.* Huron Lumber Co., 4 Wash. St. 600 (1892). An insolvent corporation may sell its property to one of its creditors. Klosterman *v.* Mason, etc. R. R., 8 Wash. 281 (1894); Holbrook *v.* Peters, etc. Co., 8 Wash. 344 (1894). A mortgage by an embarrassed corporation is valid, if in good faith, even though the company soon after fails. Vincent *v.* Snoqualmie Mill Co., 7 Wash. 566 (1894). Even though a corporation has made an assignment for the benefit of creditors, yet a court of equity may appoint a receiver of the assets so assigned under the Washington statutes. Oleson *v.* Bank of Tacoma, 15 Wash. 148 (1896). Preferences are illegal. Compton *v.* Schwabacher, etc. Co., 15 Wash. 306 (1896). An insolvent corporation cannot make a voluntary preference by way of mortgage. Biddle, etc. Co. *v.* Port Townsend, etc. Co., 16 Wash. 681 (1897). A mortgage by an insolvent corporation to one of its creditors as a preference is illegal. Cook *v.* Moody, 18 Wash. 114 (1897). Where a preference by an insolvent corporation is invalid the agreement of all creditors that an insolvent bank may borrow money and pledge its securities as collateral is not valid and such pledge is illegal. Burrell *v.* Bennett, 56 Pac. Rep. 375 (Wash. 1899). But such pledge is legal as against creditors assenting thereto. Bank of California *v.* Puget Sound, etc. Co., 20 Wash. 636 (1899). An attachment by a creditor prior to a receiver being appointed in insolvency proceedings will be set aside on the theory that the assets are a trust fund for creditors. Washington, etc. Co. *v.* Alladio Cafe Co., 68 Pac. Rep. 444 (Wash. 1902).

West Virginia: Assignments formerly were legal. Lamb *v.* Cecil, 25 W. Va. 288 (1884); Lamb *v.* Pannell, 25 W. Va. 298 (1884). And preferences also. Pyles *v.* Furniture Co., 30 W. Va. 123 (1887). A mining company having assets of $25,000 and debts of $20,000 is solvent,

a mortgage to the director to secure the money so loaned. The giving of the mortgage is viewed with suspicion, but it is legal when it is perfectly free from actual fraud.[1]

and may execute a mortgage. Coaldale Min. etc. Co. *v.* Clark, 43 W. Va. 84 (1897). Preferences by insolvent corporations are now prohibited by statute. In West Virginia the board of directors have no power to make an assignment for the benefit of creditors, and in a stockholders' suit to set aside such assignment the corporation is not a necessary party if all stockholders, officers, and directors are made parties to the suit. Kyle *v.* Wagner, 45 W. Va. 349 (1898). Even though an assignment by an insolvent corporation may be only by vote of the stockholders, yet if made on a vote of the directors, and the stockholders acquiesce for a considerable time, it is legal. Young *v.* Improvement, etc. Assoc., 38 S. E. Rep. 670 (W. Va. 1900).

Wisconsin: At common law a corporation may make an assignment for the benefit of creditors. Garden City, etc. Co. *v.* Geilfuss, 86 Wis. 612 (1893). In Wisconsin it is held that a trust deed executed by an insolvent corporation, giving the trustee power to take charge of the business and carry it on, is void, as intended to defeat and delay corporate creditors. First Nat. Bank *v.* McDonald Mfg. Co., 67 Wis. 373 (1886). In Wisconsin an insolvent corporation cannot prefer creditors. Ford *v.* Plankinton Bank, 87 Wis. 363 (1894). The mere insolvency of a corporation does not convert its property into a trust fund, so as to prevent preferences. Ford *v.* Hill, 92 Wis. 188 (1896). A creditor of an insolvent corporation may levy an attachment on its property, and thereby obtain a preference. Ballin *v.* Merchants' Exch. Bank, 89 Wis. 278 (1895). An insolvent corporation may give a preference, and such preference may be to creditors who by contract have named two of the five directors. South Bend, etc. Co. *v.* George, etc. Co., 97 Wis. 230 (1897). A corporation may make an assignment for the benefit of creditors. Goetz *v.* Knie, 103 Wis. 366 (1899). A corporation is not insolvent merely because it has not enough assets to pay its debts and still have its capital stock intact. Hamilton *v.* Menominee, etc. Co., 106 Wis. 352 (1900). A corporation may assign for the benefit of creditors. Binder *v.* McDonald, 106 Wis. 332 (1900).

Wyoming: Preferences are legal. Conway *v.* Smith, etc. Co., 6 Wyo. 468 (1896).

[1] Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587 (1875); Duncomb *v.* N. Y. etc. R. R., 88 N. Y. 1 (1882), 84 N. Y. 190; Hotel Co. *v.* Wade, 97 U. S. 13 (1877). A director in a solvent corporation may take a mortgage from it as security for money advanced. *In re* Estate, etc., 52 Atl. Rep. 58 (Pa. 1902). Directors may execute judgment bonds to themselves at a time when the company is solvent, and may enforce them after it becomes insolvent. Neal's Appeal, 129 Pa. St. 64 (1889). A corporation, at the time of borrowing money from its treasurer personally, who is also a director, may give him a judgment bill to enter judgment. Cowan *v.* Pennsylvania, etc. Co., 184 Pa. St. 1 (1898). A mortgage is not void on the ground that it was to a director, where the director was absent when elected, did not serve, was not eligible, and soon sent in a resignation. Augusta, etc. R. R. *v.* Kittel, 52 Fed. Rep. 63 (1892). A solvent corporation may make a mortgage to one of its officers and stockholders to secure a loan made by him. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 655 (1891). The fairness of a debt alleged to be due from the corporation to directors and audited by them will be closely scrutinized and a note and mortgage therefor set aside if not found entirely in good faith and the whole amount justly due. Graves *v.*

The supreme court of the United States, speaking of loans made by an officer and stockholder to a corporation, said: "Undoubtedly his relation as a director and officer, or as a stockholder of the company, does not preclude him from entering into contracts with it,

Mono Lake, etc. Co., 81 Cal. 303 (1889). A director may loan money to a corporation and take a mortgage to secure the same, and foreclose and buy in the property. Preston *v.* Loughran, 58 Hun, 210 (1890). A mortgage may be given by a corporation to secure directors who at the time of the giving of the mortgage guarantee certain debts of the company. *Re* Pyle Works, [1891] 1 Ch. 173. A mortgage by a company to its directors to secure them as loaners of money to the company is valid, and may be enforced where the transaction was in good faith and beneficial to the company, and sanctioned by the stockholders, and no offer is made to restore the consideration. Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548 (1893); Hope *v.* Valley City Salt Co., 25 W. Va. 789 (1885); Warfield *v.* Marshall, etc. Co., 72 Iowa, 666 (1887). And see the principles and cases in § 653, *supra*. See also Harpending *v.* Munson, 91 N. Y. 650 (1883); Hallam *v.* Indianola Hotel Co., 56 Iowa, 178 (1881), where, however, the purchase of the property by the director at the foreclosure sale for a small price was set aside; Claflin *v.* South Carolina R. R., 8 Fed. Rep. 118 (1880). *Cf.* Wilbur *v.* Lynde, 49 Cal. 290 (1832), invalidating a note given to a director. In the important case of Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862), the court held void a mortgage given by the directors to themselves, where there were other unsecured claims and where the giving of the mortgage was inequitable. In Cumberland, etc. Co. *v.* Parish, 42 Md. 598 (1875), a mortgage to a director was defeated, there being no clear proof that the debt was actually incurred. Directors who guarantee a corporate debt may take a mortgage from the company as security, and may foreclose it. Hopson *v.* Ætna, etc. Co., 50 Conn. 597 (1883). A company indebted to its president may, to secure such debt, give a mortgage to secure a debt due from him to a third party. Bank *v.* Flour Co., 41 Ohio St. 552 (1885). Directors may loan money to the corporation and have it repaid. Ulster Ry. *v.* Banbridge, etc. Ry., Ir. L. R. 2 Eq. 190 (1868); Borland *v.* Haven, 37 Fed. Rep. 394 (1888). A person may enforce a note against a corporation, although he was a promoter thereof, and is a director, stockholder, and manager of the corporation. Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98, 110 (1890). Where two directors borrow money for the corporation and give their own notes therefor, the company, being still solvent, may give them security. First Nat. Bank *v.* Dovetail, etc. Co., 143 Ind. 534 (1896). *Cf.* Cahill *v.* People's, etc. Co., 47 La. Ann. 1483 (1895). A pledgee of bonds from the corporation cannot attack another pledge of bonds to the president to secure a debt due the president, especially where the former took the bonds in pledge with knowledge of the pledge to the president. Hook *v.* Ayers, 63 Fed. Rep. 347 (1894). A corporation may make a mortgage to one of its directors. St. Joe, etc. Co. *v.* First Nat. Bank, 10 Colo. App. 339 (1897). A director may take a mortgage from the company for money loaned at the time of the mortgage, and may buy in the property at the foreclosure sale thereof. Jones *v.* Hale, 32 Oreg. 465 (1898). A mortgage given by a solvent corporation to a director, which, in order to preserve the credit of the corporation, is not recorded, is invalid. Montgomery *v.* Phillips, 53 N. J. Eq. 203 (1895), holding also that a mortgage by an insolvent corporation to a director is illegal. An officer advancing money to a cor-

making loans to it, and taking its bonds as collateral security; but courts of equity regard such personal transactions of a party in either of these positions, not perhaps with distrust, but with a large measure of watchful care; and unless satisfied by the proof that the transaction was entered into in good faith, with a view to the benefit of the company as well as of its creditors, and not solely with a view to his own benefit, they refuse to lend their aid to its enforcement."[1]

But where the corporation is insolvent an entirely different question arises. There has been a difference of opinion in the courts,

poration may repay the money to himself from the treasury when its condition will permit. Stokes *v.* Stokes, 91 Hun, 605 (1895). The president may own receivers' certificates. McKittrick *v.* Arkansas Central Ry., 152 U. S. 473 (1894). A loan by the president of a bank to himself is legal, if the directors acquiesce therein. Reynolds *v.* Bank of Mt. Vernon, 6 N. Y. App. Div. 62 (1896); aff'd, 158 N. Y. 740 (1899). A corporation may pledge treasury stock to a director. Where treasury stock, instead of being given to the corporation, is placed in the hands of trustees under a trust agreement, such agreement may be modified by a new agreement and the stock turned over to the corporation. Kinsman *v.* Fisk, 83 Hun, 494 (1895). It is legal for a solvent corporation to give a mortgage to the president to secure a debt due to him. Strohl *v.* Seattle, etc. Bank, 25 Wash. 28 (1901). Two years' delay on the part of a stockholder in complaining of a mortgage given by the corporation to raise money to pay a debt due to the president is fatal, even though the president had originally agreed to require payment only out of sales of property by the corporation. Wills *v.* Porter, 132 Cal. 516 (1901). A foreclosure is not invalid, even though some of the bonds are held by the directors. Rawlins *v.* New Memphis, etc. Co., 60 S.W. Rep. 206 (Tenn. 1900), holding also that a director who owns bonds may purchase the property at foreclosure sale. Stockholders and directors may loan money to the corporation and participate ratably as creditors upon its insolvency, and in insolvency proceedings the legal existence of the corporation cannot be questioned. Hooven, etc. Co., *v.* Evans, etc. Co., 193 Pa. St. 28 (1899). A bank director may foreclose a mortgage given by the bank for money loaned, even though the bank becomes insolvent after the loan was made. Millsaps *v.* Chapman, 76 Miss. 942 (1899). The Ohio statute prohibiting a director being interested in the purchase of bonds from his corporation at less than par does not apply to an issue of bonds to an outsider who subsequently admits a director as a partner in the transaction. Toledo, etc. R. R. *v.* Continental Trust Co., 95 Fed. Rep. 497 (1899). Where the trustee of a mortgage makes a loan to the mortgagor on the bonds secured by the mortgage and then sells out the collateral and buys it in himself, he can upon foreclosure enforce the bonds only to the extent of the amount loaned and interest. Knickerbocker Trust Co. *v.* Penacook Mfg. Co., 100 Fed. Rep. 814 (1900).

[1] Hence where an officer, for a loan of $100,000 to the company, takes its notes therefor and four hundred bonds as collateral, and twelve hundred and fifty shares of paid-up stock as a "bonus," the court characterized the transaction as a fraud, and held that the pledge of the bonds would be disregarded and declared void. Richardson *v.* Green, 133 U. S. 30 (1890).

but the weight of authority clearly and wisely holds that an insolvent corporation cannot pay or secure a debt due to a director in preference to debts due others, either by transferring property or cash to him or by giving him a mortgage on corporate assets.[1]

[1] Hays *v.* Citizens' Bank, 51 Kan. 535 (1893); Chicago, etc. Bridge Co. *v.* Fowler, 55 Kan. 17 (1895); Ingwerson *v.* Edgecombe, 42 Neb. 740 (1894). In the case of Harding *v.* Hart, 113 Fed. Rep. 304 (1902), where an insolvent insurance company turned over to its president and director as a preference $100,000 worth of securities, the court, after twenty-five years of litigation, compelled him, at the instance of general creditors, to return the amount. In another decision involving the same transaction, Hart *v.* Globe Ins. Co., 113 Fed. Rep. 307 (1882), the court held that a decision in the state court upholding the transaction, but not bringing in all the parties, was not a bar.

A transfer of property by an insolvent corporation to its directors in part payment of their claims is illegal. Hill *v.* Standard, etc. Co., 198 Pa. St. 446 (1901). A director cannot obtain a preference, but the invalidity of his preference does not invalidate preferences to others in the same transaction. Moller *v.* Keystone, etc. Co., 187 Pa. St. 553 (1898). Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and, even though one of them resigns, the liability continues for the benefit of past as well as future creditors. Nix *v.* Miller, 26 Colo. 203 (1899). An insolvent corporation cannot prefer one of its directors. Symonds *v.* Lewis, 94 Me. 501 (1901). A receiver may bring suit to set aside a preference given by an insolvent corporation to the directors. Taylor *v.* Mitchell, 80 Minn. 492 (1900). An insolvent corporation's mortgage to secure debts due to a majority of its directors and debts for which they are sureties is illegal. Nappanee, etc. Co. *v.* Reid, etc. Co., 60 N. E. Rep. 1068 (Ind. 1901). A receiver may recover back property delivered by an insolvent corporation to its directors as a preference; but where the directors in order to relieve corporate property from attachment in another state take an assignment of the claims, their preference in that state out of assets in that state may be allowed. Gray *v.* Taylor, 44 Atl. Rep. 668 (N. J. 1899). A corporate mortgage by an officer to his wife to secure a debt due to himself from the corporation is illegal. Rowe *v.* Leuthold, 101 Wis. 242 (1898). Although a director cannot obtain a preference, yet this does not prevent his estate obtaining a preference. Nebraska Nat. Bank, etc. *v.* Clark, 58 Neb. 183 (1899). In a stockholders' suit to set aside an execution sale of all the property for a debt due to the directors and a purchase at the sale by the directors, it is not necessary for the court to order an accounting, but the court may hear the entire case and decide it. Davis *v.* Hofer, 38 Oreg. 150 (1900). A preference by an insolvent corporation to the treasurer is illegal. King *v.* Wooldridge, 78 Miss. 179 (1900). A preference to a director is illegal, even though such preference was agreed to when the money was loaned. Monroe, etc. Co. *v.* Arnold, 108 Ga. 449 (1899). An insolvent corporation cannot give a preference to a director by offsetting against his subscription a debt due to him. Wyman *v.* Williams, 53 Neb. 670 (1898); Hulings *v.* Hulings Lumber Co., 38 W. Va. 351 (1893). A sale of property by an insolvent company to a director in order to prefer his debt is illegal. Beach *v.* Miller, 130 Ill. 162 (1889). Where a corporation has $15,000 assets, owes $160,000, and confesses judgment for $40,000 to its largest stockholder for an old indebted-

But a corporation acting in good faith and without any purpose of defrauding its creditors, but with the sole object of continuing a business which promises to be successful, may give a mortgage to

ness due him, a court of equity will restrain a sale under that judgment until the rights of all creditors are determined. Krause *v.* Malaga, etc. Co., 18 Atl. Rep. 367 (N. J. 1889). Where the board of directors borrow money on the statement that the loan is from an outsider, and it afterwards transpires that the loan was by the president and another director, a commission of twenty per cent. paid for the loan can be recovered back by the corporation. Bensiek *v.* Thomas, 66 Fed. Rep. 104 (1895). Where a corporate creditor offers to take payment, but is induced to let the debt stand in order that the president personally may use the money, the corporation is no longer liable. Edwards *v.* Carson Water Co., 21 Nev. 469 (1893). Corporate creditors may enjoin the collection of judgments fraudulently confessed by an insolvent corporation to its officers and stockholders. Nimocks *v.* Cape Fear Shingle Co., 110 N. C. 230 (1892). A preference by an insolvent corporation to one of its directors is invalid. It is insolvent when early suspension of business and a failure are inevitable. Corey *v.* Wadsworth, 99 Ala. 68 (1892). A director of an insolvent corporation cannot obtain a preference for his debt. Gibson *v.* Trowbridge Furnace Co., 96 Ala. 357 (1892). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. Farmers' L. & T. Co. *v.* San Diego, etc. Co., 45 Fed. Rep. 518 (1891). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president, who is also a large stockholder, and who signs the mortgage, cannot do so. Perry *v.* Pearson, 135 Ill. 218 (1890). Where a corporation purchases a firm's business, it cannot legally pay a debt due by the firm to a director in the corporation, if such payment is induced by such director and the corporation is insolvent. Rudd *v.* Robinson, 54 Hun, 339 (1889), reversed on another point in 126 N. Y. 113. If a director as a creditor takes all the corporate assets in payment of his debt, he is liable to other creditors for the difference between the actual value of the property and the price at which he took it. Wilkinson *v.* Bauerle, 41 N. J. Eq. 635 (1886). The president of an insolvent corporation cannot provide for the payment of a debt to his wife, thereby giving her a preference. West *v.* West, etc. Co., 9 N. Y. St. Rep. 255 (1887). Directors knowing that the company is insolvent cannot assign its property in trust to pay debts due to themselves. Gaslight Imp. Co. *v.* Terrell, L. R. 10 Eq. 168 (1870); Haywood *v.* Lincoln Lumber Co., 64 Wis. 639 (1885). A preference to a director by an insolvent corporation is unlawful, and the directors who cause the preference are personally liable for property so applied. A director who took no part is not liable. Adams *v.* Kehlor Milling Co., 36 Fed. Rep. 212 (1888). The law "prohibits directors, when a corporation is insolvent and about to go into liquidation, from preferring debts due to themselves from the corporation, or from preferring debts in the payment of which they have a personal interest." So held in a case where a deceased director was preferred by the other directors, his brothers, and agents. Adams *v.* Kehlor Milling Co., 35 Fed. Rep. 433 (1888). A director of an insolvent corporation cannot have his own debt due from the corporation paid to the exclusion of other creditors. Adams *v.* Cross, etc. Co., 5 Ry. & Corp.

directors who have lent their credit to it, in order to induce a continuance of that credit, and in order to obtain renewals of maturing paper at a time when the corporation, although it may not be then

L. J. 18 (Ill. 1888), holding void a mortgage upon which this suit for foreclosure was brought, it having been given by an insolvent corporation to its directors to secure debts due from it to them. A confession of judgment by an insolvent corporation to one of its directors is a fraudulent preference, and the preference will be cut off. The director will be allowed to come in the same as other creditors. Stratton *v.* Allen, 16 N. J. Eq. 229 (1863). A mortgage by an insolvent corporation preferring its president and director was canceled in Lippincott *v.* Shaw Carriage Co., 25 Fed. Rep. 577 (1885).

In Bradley *v.* Farwell, Holmes, 433 (1874); s. c., 3 Fed. Cas. 1146, a transfer by an insolvent corporation of all its assets to a partnership in payment of a debt was set aside, where one member of the partnership was also a director in the corporation. The fact that nine months elapsed before the corporation passed into a receiver's hands was immaterial. A sale of corporate property to a director in payment of debts due him from the insolvent company cannot be objected to in a suit at law by him for the conversion of the property. The objection must be made by bill in equity. Little Rock, etc. Ry. *v.* Page, 35 Ark. 304 (1880). In New Jersey, by statute, a receiver is invested with all the rights of creditors. After his appointment a creditor cannot sue to set aside illegal conveyances to the officers, not even in the federal court. Werner *v.* Murphy, 60 Fed. Rep. 769 (1894). A preference to a president is illegal. Mallory *v.* Kirkpatrick, 54 N. J. Eq. 50 (1895). A stockholder may cause to be set aside a lease of a warehouse and a sale of the wheat therein to two of the directors, and a foreclosure by them of a chattel mortgage on the buildings, which chattel mortgage had been purchased by two of the directors and the property purchased by them at the foreclosure sale. Loftus *v.* Farmers' Shipping Assoc., 8 S. D. 201 (1896). Under the Michigan decisions (prior to the statute) and of the federal court sitting in Michigan, the president of an insolvent corporation could secure a preference for debts due him, even though the corporation was insolvent and the debts were old debts. Childs *v.* Carlstein Co., 76 Fed. Rep. 86 (1896). Where the board of directors of a failing corporation voted all the assets to a few of their number in payment of an antecedent debt, the transaction is fraudulent and will be set aside, even in Michigan, the directors so preferred being three-fourths of the board. Rickerson, etc. Co. *v.* Farrell, etc. Co., 75 Fed. Rep. 554 (1896). Although a director's mortgage is illegal, yet where, after its foreclosure, another prior mortgage is foreclosed, he is not liable to stockholders as having wrecked the corporation. Keeney *v.* Converse, 99 Mich. 316 (1894). In Doyle *v.* Leitelt, 97 Mich. 298 (1893), the court refused to compel a director to refund moneys applied on his claim against the corporation, although he had caused all the corporate property to be sold, it appearing that substantial justice had been done and that complainant had no real grievance. A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority, but he should not select himself as assignee. Rogers *v.* Pell, 154 N. Y. 518 (1898). At common law a mortgage may be made by a corporation to a director as trustee for creditors. Savage *v.* Miller, 56 N. J. Eq. 432 (1898). The corporation itself cannot defend against a suit by a director on a note on the ground that

in fact possessed of assets equal at cash prices to its indebtedness, is in fact a going concern, and is intending and is expecting to continue in business.[1] Even though a corporation is insolvent, yet, if the directors believe it is solvent, although in financial distress, they may loan money to the corporation and take securities as collateral thereto, and they are not bound to know that the corporation is insolvent.[2] But where a director cannot legally obtain a preference directly, he cannot do so indirectly by attachment, or by obtaining judgment and causing execution to be levied.[3] A director can-

the judgment will be an illegal preference. Welling *v.* Ivoroyd Mfg. Co., 15 N. Y. App. Div. 116 (1897); aff'd, 162 N. Y. 599; Bangs *v.* National Macaroni Co., 15 N. Y. App. Div. 522 (1897). The New York statute does not prevent an officer assigning his claim against the corporation to his assignee for the benefit of creditors, and such assignee may obtain judgment and thereby obtain a preference. Jefferson, etc. Bank *v.* Townley, 159 N. Y. 490 (1899). In New York a director may be assignee. Linderman *v.* Hastings, etc. Co., 38 N. Y. App. Div. 488 (1899). For a detailed review of the authorities on this subject, see Lamb *v.* Laughlin, 25 W. Va. 300 (1884). Directors may be compelled to pay back salaries which they pay to themselves when the company is insolvent. Smith *v.* Putnam, 61 N. H. 632 (1882). An insolvent bank cannot legally transfer its real estate to a director in exchange for his stock. Roan *v.* Winn, 93 Mo. 503 (1887). Where the president causes the company illegally to buy its own stock from his wife, a preference to her for the debt will be set aside. Butler Paper Co. *v.* Robbins, 151 Ill. 588 (1894). Preferences to directors are illegal. Noble, etc. Co. *v.* Mt. Pleasant, etc. Inst., 12 Utah, 213 (1895). Where, three months prior to a petition for winding up a company, the directors, who owe on their stock, offset the same by applying the amount on their unpaid salaries, they jointly and severally will be compelled, under the English statute, to refund the money with interest. The transaction is fraudulent. *Re* Washingtôn, etc. Co., [1893] 3 Ch. 95, rev'g the court below. Where an embarrassed corporation had many secured creditors, but only four unsecured creditors, and three of the latter, with full notice to the former, took charge of the company by a change of its directors and advanced funds to keep the company going, and for two and a half years endeavored to extricate it from trouble, they may then legally take a mortgage upon the corporate property for the money so advanced and also for their old unsecured debts, and the fourth creditor cannot complain. American, etc. Bank *v.* Ward, 111 Fed. Rep. 782 (1901). A sale of property by an insolvent corporation to one of its directors is valid as against its creditors where a full consideration was paid therefor. Webb *v.* Rockefeller, 71 Pac. Rep. 283 (Kan. 1903). *Cf.* § 652, *supra*. Even though a mortgage is void as to a part by reason of being an illegal preference, it may be valid as to the remainder. Reed *v.* Helois, etc. Co., 53 Atl. Rep. 1057 (N. J. 1903); 72 S. W. Rep. 669.

[1] Sanford Fork, etc. Co. *v.* Howe, etc. Co., 157 U. S. 312 (1895).

[2] Converse *v.* Sharpe, 161 N. Y. 571 (1900).

[3] Atwater *v.* American, etc. Bank, 152 Ill. 605 (1894). Under the Pennsylvania statute, directors cannot obtain a preference by taking judgment by default and issuing execution. Hopkins's Appeal, 90 Pa. St. 69 (1879). So also in New York. Throop *v.* Hatch Lithog. Co., 125 N. Y. 530 (1891). The remedy in such a case is in equity and not at law.

not legally vote on a renewal of a note to himself.[1] The court will set aside a sale by an insolvent corporation of all its assets to its secretary and treasurer, who was the chief creditor, the sale being in payment of his debt; and the court will hold him liable for such of the assets as he has disposed of.[2] A preference, also, to a large stockholder has been condemned by the courts where, under the facts of the case, the transaction amounted to an actual fraud, as distinguished from an implied fraud.[3] It has been held that a mort-

Braem *v.* Merchants' Nat. Bank, 127 N. Y. 508 (1891). A statute against preference by an insolvent corporation is violated by an offer of judgment by the corporation and the appointment of a receiver under it. National Broadway Bank *v.* Wessell Metal Co., 59 Hun, 470 (1891), holding also that a director cannot obtain a preference by causing a receiver to be appointed on his judgment and then purchasing the property at an inadequate price. A judgment obtained by a director against an insolvent corporation by confession is illegal and may be set aside. Hill *v.* Pioneer Lumber Co., 113 N. C. 173 (1893). Where a director of an insolvent corporation obtains judgment against it and sells out its property, another corporate creditor may compel him to account for a proportionate share of the actual value of the property. Kittel *v.* Augusta, etc. R. R., 84 Fed. Rep. 386 (1898). A judgment lien which is indirectly for the benefit of the directors, the corporation being insolvent, may be set aside at the instance of the receiver. Taylor *v.* Fanning, 91 N. W. Rep. 269 (Minn. 1902); 54 Atl. Rep. 504.

[1] Smith *v.* Los Angeles, etc. Assoc., 78 Cal. 289 (1889).

[2] Brown *v.* Morristown, etc. Co., 42 S. W. Rep. 161 (Tenn. 1897).

[3] A stockholder cannot secure a transfer from the corporation to himself of the property of the corporation so as to deprive a corporate creditor of the payment of his debt. Where he does so through legal proceedings fraudulently and by conspiracy, the property may be reached. Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894). Where a stockholder who is also a creditor of an insolvent corporation obtains for himself, just before the cessation of business, an assignment of practically all the assets of the corporation, it is a question for the jury as to whether such assignment is not fraudulent. Wortendyke *v.* Salladin, 45 Neb. 755 (1895). A corporation may mortgage its property to a stockholder, even though he controls a large majority of the stock. Hanchett *v.* Blair, 100 Fed. Rep. 817 (1900). It is legal for a corporation to pay one of its creditors who is also a stockholder before the debt is due, especially where the stockholder guarantees the loan which the corporation makes in order to make such payment. Wills *v.* Porter, 132 Cal. 516 (1900). Where the chief promoter of a proposed manufacturing corporation obtains donations from property owners to the proposed corporation on his agreement that $75,000 of stock should be subscribed for within a certain time, and then proceeds to organize the company, he himself subscribing for $25,000 of the stock, and the corporation then purchases certain worthless patents and agency contracts and issues therefor $63,250 of full-paid stock, including the $25,000 subscribed for by him, and afterwards the corporation collects $4,000 of such donations and borrows money from such promoter and gives him a mortgage therefor, his mortgage is not good as against the parties who donated the $4,000. Moore *v.* Universal, etc. Co., 122 Mich. 48 (1899). Even though the purchasers of an

gage by an insolvent corporation to a creditor corporation, the two corporations having a majority of their directors in common, is illegal.[1] A purchaser of the equity of redemption from the corporation

equity in land sell it to a corporation which they form, at a price which pays them back their money, and more, and the corporation becomes insolvent and they purchase the land at execution sale, yet a stockholder cannot have the sale set aside unless he repays to them the amounts actually disbursed by them. Fleckenstein *v.* Waters, 61 S. W. Rep. 615 (Mo. 1901). A preference to a director or stockholder is illegal. Reynolds *v.* Smith, 60 Neb. 197 (1900). A mortgage given to repay to preferred stockholders the amount they have invested in their stock as well as to secure regular creditors of the company is invalid altogether. Reagan *v.* First Nat. Bank, 62 N. E. Rep. 701 (Ind. 1902). A stockholder as a creditor has the same standing that other creditors have. Standard, etc. Co. *v.* Excelsior, etc. Co., 32 S. Rep. 221 (La. 1902). A stockholder cannot obtain a preference. Lamb *v.* Russel, 32 S. Rep. 916 (Miss. 1902). A mortgage to secure debts due to stockholders was upheld in Crossette *v.* Jordan, 92 N. W. Rep. 782 (Mich. 1902). In the case of Hodge *v.* United States Steel Corp., 54 Atl. Rep. 1 (N. J. 1903), the court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." In Texas the court held that an insolvent corporation could not, by way of mortgage, prefer creditors who were stockholders. Lyons, etc. Co. *v.* Perry, etc. Co., 86 Tex. 143 (1893). See also Cochran *v.* Ocean Dry Dock, 30 La. Ann. 1365 (1878), holding that stockholders cannot appropriate assets to pay their salaries as officers, or to pay money due them on other accounts, until all creditors who are not stockholders have been paid; Swepson *v.* Exchange, etc. Bank, 9 Lea (Tenn.), 713 (1882), holding that a conveyance of land by the president of a bank to its sole stockholder, after its insolvency, would be set aside at the suit of a judgment creditor of the bank who had levied upon and sold it. Where all the corporate property is pledged to a creditor who owns all the stock, other creditors may object. Stewart *v.* Gould, 8 Wash. 367 (1894). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and chief stockholder. Ragland *v.* McFall, 137 Ill. 81 (1891). See also Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883). In Massachusetts it has been held that a preference given to a large stockholder is legal. Sargent *v.* Webster, 54 Mass. 497 (1847). An insolvent corporation may give a preference to a stockholder. Moreover, a corporate creditor, who became such after such preference, cannot complain. Burchinell *v.* Bennett, 10 Colo. App. 502 (1898). See also Krause *v.* Malaga, etc. Co., 18 Atl. Rep. 367 (N. J. 1889).

[1] Sutton Mfg. Co. *v.* Hutchinson, 63 Fed. Rep. 496 (1894). See also § 658, *supra*. An insolvent corporation whose president is president also of another corporation, the latter corporation being a creditor of the former corporation, cannot cause a preference to be given to such latter corporation, but if the former corporation is not actually insolvent at the time of the preference it is legal. Finch, etc. Co. *v.* Stirling Co., 187 Pa. St. 596 (1898). Where an insolvent savings bank is really controlled by a national bank, although they have not the same directors, yet the former cannot prefer the latter. It is an illegal preference in behalf of

cannot claim that the mortgage was to a director and hence invalid.[1] A creditor who becomes such after a mortgage is executed cannot object to the mortgage on the ground that it was an unlawful preference.[2]

An officer of an insolvent corporation cannot acquire a preference over its unsecured creditors by accepting its bonds on account of his claims against it, even though the officer did not actually know of the insolvency.[3]

If a majority of the directors of an insolvent corporation, knowing it to be insolvent, vote and cause the treasurer to execute to themselves the corporation's judgment note, and then enter judgment on it at once, the judgment is fraudulent as to other creditors, though the debt was legal.[4]

A mortgage by an insolvent corporation to a director may be upheld to the extent that the director, at the time of the mortgage,

the directors. Slack *v.* Northwestern, etc. Bank, 103 Wis. 57 (1899). The fact that an officer of a bank is a director in a manufacturing company does not prevent the latter, though insolvent, giving a preference to the former. Nat. Bank of Commerce *v.* Allen, 90 Fed. Rep. 545 (1898). Mortgage bonds issued by a corporation as security to two banks will be valid, even though the corporation turns out to have been insolvent, but was supposed to be solvent, and even though the directors and stockholders of the corporation are stockholders in the banks. Chick *v.* Fuller, 114 Fed. Rep. 22 (1902). Even though directors are interested in the construction company which takes the bonds, and the property is foreclosed and is bought in by the directors, yet the railroad company cannot set aside the transaction unless it offers to pay to the directors what they have expended, or offers to take the property subject to such mortgage bonds. San Antonio, etc. Ry. *v.* San Antonio, etc. R. R., 60 S. W. Rep. 338 (Tex. 1900). An insolvent corporation may give a preference to a creditor, another corporation, having stockholders and directors in common with it. Sells *v.* Rosedale, etc. Co., 72 Miss. 590 (1895). A preference by an insolvent corporation is legal, although one of the directors is interested in the corporation that is preferred. Colorado, etc. Co. *v.* Western Hardware Co., 16 Utah, 4 (1897). Where the president and a director, without authority from the board of directors of an insolvent corporation, turn over the assets to another corporation in payment of a debt, such president and director being interested in the latter corporation, the transaction is illegal. German Nat. Bank *v.* First Nat. Bank, 55 Neb. 86 (1898).

[1] Greenstreet *v.* Paris, 21 Grant, Ch. (Can.) 229 (1874).

[2] Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). A conveyance to a director in settlement of a claim made two months prior to the insolvency of the corporation is legal so far as subsequent creditors are concerned. Tennant *v.* Appleby, 41 Atl. Rep. 110 (N. J. 1898). A preference by a mortgage to directors is invalid; but where the property is sold by a receiver subject to the mortgage and the purchaser is also a director he cannot attack the mortgage. Richards *v.* Haliday, 92 Fed. Rep. 798 (1899). See also § 46, *supra*.

[3] Sicardi *v.* Keystone Oil Co., 149 Pa. St. 148 (1892).

[4] Roseboom *v.* Whittaker, 132 Ill. 81 (1890).

advanced funds to pay its debts, but not as to antecedent debts due the director.[1]

There are cases which uphold mortgages given by insolvent corporations to their directors, but these cases are wrong in principle and law.[2]

[1] Corbett *v.* Woodward, 5 Sawyer, 403 (1879); s. c., 6 Fed. Cas. 531. See also Williams *v.* Patrons of Husbandry, 23 Mo. App. 132 (1886); White, etc. Co. *v.* Pettes, etc. Co., 30 Fed. Rep. 864 (1887); Lippincott *v.* Shaw Carriage Co., 25 Fed. Rep. 577 (1885); Stout *v.* Yaeger Milling Co., 13 Fed. Rep. 802 (1882).

[2] Planters' Bank *v.* Whittle, 78 Va. 737 (1884), dictum, that directors may make preferences in favor of themselves if they are creditors; but in so doing they must act in perfect good faith. At common law a corporation may give a preference to a director. Wilson *v.* Stevens, 129 Ala. 630 (1901). In the case of Corey *v.* Wadsworth, 118 Ala. 488 (1899), the court held that a preference to a director might be legal, but that under the circumstances of that case it was illegal. In Texas a director in an insolvent corporation may obtain a preference by attachment. Frank Co. *v.* Berwind, 47 S. W. Rep. 681 (Tex. 1898). A mortgage given by an insolvent corporation is valid, although given to secure debts due to the wife of a director, the administrator of another deceased director, and the payee of a note indorsed by still another director. Garrett *v.* Burlington Plow Co., 70 Iowa, 697 (1886). A sale of all the property of an insolvent corporation to a director, who is also present, in payment of his debt, cannot be set aside by other corporate creditors. Buell *v.* Buckingham, 16 Iowa, 284 (1864). A preference is legal, although given by directors who are relatives of the creditor. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). Corporate creditors cannot object to a sale of all the corporate property to one of the creditors in payment of her debt, even though she be the wife of the president and chief stockholder. Ragland *v.* McFall, 137 Ill. 81 (1891). An insolvent corporation, under the Arkansas decisions, may give a mortgage to one of its directors to secure a present or precedent debt, and such mortgage is valid. Gould *v.* Little Rock, etc. Ry., 52 Fed. Rep. 680 (1892), reviewing the authorities. An insolvent corporation may mortgage its property to any one of its creditors. Such a mortgage is not for the benefit of all creditors, even though it is given to secure several. The mortgage may be given to a director or stockholder. Bank of Montreal *v.* Potts, etc. Co., 90 Mich. 345 (1892). The following cases are exceptions to and not contradictory of the general rule: Where a part of the trustees are the only creditors, and the business is a losing one, they may take a mortgage to secure moneys loaned by them to the company, and may foreclose such mortgage. Skinner *v.* Smith, 134 N. Y. 240 (1892); Whitwell *v.* Warner, 20 Vt. 425 (1848), holding that stockholders who avail themselves of their superior advantages to obtain security from the corporation for debts due them, whether by attachment or assignment, are not guilty of fraud so as to render themselves personally liable for corporate debts. Where a corporation owes money to the directors, and to pay the same borrows money and gives a mortgage, and subsequently the property is sold for less than the mortgage, a creditor whose debt was not due when the mortgage was given cannot complain. Holt *v.* Bennett, 146 Mass. 437 (1888). But see St. Louis *v.* Alexander, 23 Mo. 483, 528, 531 (1856), where it was attempted to overturn a deed of trust on the ground that it was executed by a

§ 693. *Preferences in favor of corporate debts upon which the directors are liable as indorsers or otherwise.*—Where a director is merely the indorser, surety, or guarantor of a corporate debt or note, to which a preference is given by an insolvent corporation, a much more difficult question arises than where such debt or note is held by the director himself. The decisions are in conflict on this subject. The great weight of authority undoubtedly is that such a preference is illegal.[1] This is so held because, first, such a prefer-

bare quorum of the directors and one or more of them were legally incapacitated by being directly interested. The language of the court was: "I can see no reason why a member of the board of directors might not sit in the board, and, without fraud, in conjunction with others, consent to an order for securing a debt actually due to him from the corporation." A preference given by an insolvent corporation to directors may be legal. The remedy of corporate creditors against an illegal preference is by creditors' bill and not by an execution sale. Butler *v.* Harrison, etc. Co., 139 Mo. 467 (1897). In Missouri it is held that the directors in an insolvent corporation may prefer their own debts, but a degree of good faith is required which practically nullifies such preference. State *v.* Manhattan, etc. Co., 149 Mo. 181 (1899). Where an insolvent corporation sells property to one of its directors in payment of a debt, he must prove that he did not influence the directors to vote for the transaction. Pitman *v.* Chicago, etc. Co., 67 S. W. Rep. 946 (Mo. 1902). A stockholder cannot have a receiver appointed and mortgages set aside where all the stock is "water," even though the controlling party had made the mortgages to himself and is about to sell the assets of the company to another company controlled by himself, and has levied an assessment on the stock of the old company in order to sell out the stock. Robinson *v.* Dolores, etc. Co., 2 Colo. App. 17 (1892). In Illinois it is held that an insolvent corporation may prefer a creditor who is the father of a majority of the directors. It is also held that a preference may be given to directors for a debt contracted while the company was insolvent. Illinois Steel Co. *v.* O'Donnell, 156 Ill. 624 (1895). In Missouri an insolvent corporation may prefer a director. Schufeldt *v.* Smith, 131 Mo. 280 (1895). *Cf.* National Tube Works Co. *v.* Ring, etc. Co., 118 Mo. 365 (1893). Under the old New Jersey statute the directors of a corporation could mortgage the property and issue bonds to themselves as security for previous advancements, even though the company was insolvent. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). In Connecticut it has been held that a corporation may turn over property to a director in payment of a debt, even though the corporation is insolvent, it being shown that all parties supposed at the time that all debts could be paid. Smith *v.* Skeary, 47 Conn. 47 (1879). A mortgage by a solvent corporation to secure its directors as creditors is legal. Hinz *v.* Van Dusen, 95 Wis. 503 (1897).

[1] The president's transfer of corporate property to himself and wife as security for indorsements on notes is not legal. Hill *v.* Marston, 178 Mass. 285 (1901). A preference by an insolvent corporation to a debt for which the directors are sureties is illegal. National, etc. Co. *v.* Columbia Nat. Bank, 88 N. W. Rep. 481 (Neb. 1901); Merchants' Nat. Bank *v.* McDonald, 88 N. W. Rep. 492 (Neb. 1901); Williams *v.* Turner, 88 N. W. Rep. 668 (Neb. 1902). A mortgage given by an

ence is practically the same as a preference to the director himself, inasmuch as he would have had to take up the debt as indorser if no preference had been given; and second, because to sustain such a preference would tempt a director holding a corporate obligation

insolvent corporation to secure debts on which three directors are liable is not legal where the vote of those three directors was necessary to authorize such mortgage. Swift & Co. *v.* Dyer-Veatch Co., 28 Ind. App. 1 (1901). A mortgage given by an insolvent corporation as security for a debt for which the directors were personally liable as indorsers is not valid as against other creditors, unless the debt was incurred at that time or an agreement to give the mortgage was made when the debt was incurred. Atlas, etc. Co. *v.* Exchange Bank, etc., 111 Ga. 703 (1900). A sale of all the property of an insolvent corporation to one of its directors, payment being by indorsement by credit on notes on which such director is indorser, is illegal, and other creditors are entitled to share *pro rata*. Dozier *v.* Arkadelphia, etc. Co., 67 Ark. 11 (1899).

Where a director is guarantor of a debt, a preference obtained by a judgment creditor's action is illegal. Wisconsin, etc. Bank *v.* Lehigh, etc. Co., 64 Fed. Rep. 497 (1894). A draft drawn by an insolvent corporation to pay a debt for which a director is surety is illegal. Bosworth *v.* Jacksonville Nat. Bank, 64 Fed. Rep. 615 (1894). Where two out of four directors of an insolvent corporation are liable as indorsers on a corporate debt, a mortgage given to secure that debt will be set aside as an illegal preference, even though the mortgage has been foreclosed. Lippincott *v.* Shaw Carriage Co., 34 Fed. Rep. 570 (1888). Where a corporation is practically insolvent, and has assigned its property by deed of trust to pay certain debts for which the directors are sureties, a court of equity in Missouri will enjoin proceeding under the deed of trust, and will appoint a receiver. Consolidated, etc. Co. *v.* Kansas City, etc. Co., 43 Fed. Rep. 204 (1890): s. c., 45 Fed. Rep. 7 (1891). An insolvent corporation may give a preference by confession of judgment, but not to a creditor whose claims was assigned to him by directors. Gottlieb *v.* Miller, 154 Ill. 44 (1895). The directors of an insolvent corporation are trustees for the creditors. They cannot, after it becomes insolvent, take mortgages to themselves on its property to secure advances and indorsements made by them for it. Olney *v.* Conanicut Land Co., 16 R. I. 597 (1889). Directors of an insolvent corporation connot apply corporate funds exclusively to corporate debts for which they are sureties. All debts will be allowed to participate ratably. Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861). An insolvent corporation cannot give a preference to creditors for whose debts the directors are sureties. Tillson *v.* Downing, 45 Neb. 549 (1895). A mortgage to secure a debt upon which one of the directors is liable is illegal. Stough *v.* Ponca Mill Co., 54 Neb. 500 (1898). A corporation supposed to be solvent may give a mortgage to secure a debt guaranteed by its directors. Sabin *v.* Columbia Fuel Co., 25 Oreg. 15 (1893). An insolvent corporation cannot transfer all its property to pay a note of which a director is an indorser, joint maker, or guarantor. Goodyear Rubber Co. *v.* Scott Co., 96 Ala. 439 (1892). A mortgage given by an insolvent corporation to secure debts for which the directors are sureties is illegal. It is not legal, even though it is given for the benefit of co-sureties who are not directors. The directors are bound to know whether the company is solvent or insolvent. Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624 (1893). Where the controlling directors of two corporations are the

to sell the same with his guaranty or indorsement, and then induce the board of directors to prefer that obligation.

Notwithstanding these decisions and reasons, there are circumstances under which such a preference will be sustained. A corporate creditor is not to be punished simply because the directors have guaranteed his claim. The supreme court of the United States has strongly intimated that such is the law;[1] and indeed it

same persons, and one company becomes liable on paper for the accommodation of the other. and thereby renders the directors of the former personally liable for breach of trust, a mortgage given by the latter to the former as security for such paper is invalid, because it amounts to a preference to such officers. Hutchinson *v.* Sutton Mfg. Co., 57 Fed. Rep. 998 (1893). A preference by an insolvent corporation to creditors whose notes are secured by the indorsements of directors cannot be given by the corporation by the vote of such directors. Love Mfg. Co. *v.* Queen City Mfg. Co., 74 Miss. 290 (1896). Even though an insolvent corporation illegally, but in good faith, gives a mortgage by way of preference to its president, this does not sustain an attachment by another creditor on the ground that the corporation is disposing of its property with intent to defraud the creditors. Trebilcock *v.* Big, etc. Co., 9 S. Dak. 206 (1896). An insolvent corporation cannot give a preference to a debt for which its directors are sureties. Gray *v.* Taylor, 38 Atl. Rep. 951 (N. J. 1897). But a corporate creditor who advised the directors to take a mortgage from the corporation to secure them in their indorsement of corporate paper cannot afterwards object to such mortgage. *Re* Bloomfield, etc. Mills, 101 Iowa, 181 (1897). A corporation in financial difficulties cannot execute a mortgage to secure bonds, and deliver these bonds to a bank as security for past and future advances, where two of the directors of the company are also directors of the bank. Such a mortgage delays other creditors. Only *bona fide* holders of such bonds are protected. Age-Herald Co. *v.* Potter, 109 Ala. 675 (1895). A director cannot legally pay from moneys belonging to an insolvent corporation a debt on which he is a surety. Graham *v.* Carr, 41 S. E. Rep. 379 (N. C. 1902). Directors who are guarantors of corporate notes may assume the payment thereof in consideration of property transferred to them by the corporation. Swentzel *v.* Franklin, etc. Co., 67 S. W. Rep. 596 (Mo. 1902). A mortgage given by an insolvent corporation to secure debts on which three directors are liable is not legal where the vote of those three directors was necessary to authorize such mortgage. Swift & Co. *v.* Dyer-Veatch Co., 28 Ind. App. 1 (1901). Even though the president has personally given security for a loan to a corporation, the lender may obtain a judgment against the corporation, and even though by agreement the security is sold and the money deposited as security for the judgment, this does not constitute payment so far as the statutory liability of stockholders is concerned. Lancaster *v.* Knight, 74 App. Div. 255 (1902).

[1] In Sanford, etc. Co. *v.* Howe, etc. Co., 157 U. S. 312, 318 (1895), rev'g Howe, etc. Co. *v.* Sanford, etc. Co., 44 Fed. Rep. 231, Mr. Justice Brewer said, with much force: "Are creditors who are neither stockholders nor directors, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must, as a matter of law, such creditors be content to share equally

is difficult to see how a court of equity can refuse to uphold, in behalf of the corporate creditor himself, a preference which has been given to such creditor, even though a director is surety therefor, where the corporate creditor acquired his claim either from

with the other creditors of the corporation, because. forsooth, they have also the guaranty of some of the directors or stockholders whose guaranty may or may not be worth anything?" A preference may be given by an insolvent corporation on a debt that was incurred before insolvency, even though a director is guarantor of such debt. Rockford, etc. Groc. Co. *v.* Standard, etc. Co., 175 Ill. 89 (1898). An insolvent corporation may give a mortgage to secure notes on which its directors are sureties. Swift & Co. *v.* Dyer-Veatch Co., 60 N. E. Rep. 169 (Ind. 1901). Where a director becomes surety for a bank in receiving city deposits the bank may legally transfer notes held by the bank to such director as security. Klein *v.* Funk, 82 Minn. 3 (1900). A corporation may give security to a director at the same time that he indorses its note. Anglo-American, etc. Co. *v.* Davis, etc. Co., 112 Fed. Rep. 574 (1902). An insolvent corporation in North Carolina may confess judgment to a creditor for whose debt the president is surety. Howard *v.* Central, etc. Co., 123 N. C. 90 (1898). In Georgia it is held that where the directors are guarantors of a note secured by mortgage and the note is not paid, they may take an assignment of the note and mortgage and enforce the mortgage, even though the corporation might possibly pay the debt if time were given. Rylander *v.* Sheffield, 108 Ga. 111 (1899). An insolvent corporation may give a preference to a note which is indorsed by a director where the company received the money for the note and the indorsement was for accommodation. Nat. Bank, etc. *v.* George, etc. Co., 18 Utah. 400 (1898). The payment and securing of a corporate debt are not fraudulent merely because some of the directors had guaranteed the debt. Taylor County Court *v.* Baltimore, etc. R. R., 35 Fed. Rep. 161 (1888). A chattel mortgage securing a part of the creditors of an insolvent corporation may be valid although some of the directors and stockholders who voted for the mortgage are guarantors and indorsers of the debts so secured. Brown *v.* Grand Rapids, etc. Co., 58 Fed. Rep. 286 (1893), following the Michigan decisions, and stating that the supreme court of the United States has not decided that a corporation may not prefer one of its directors. A creditor may be preferred by the giving of security by an insolvent corporation, even though his claim is secured by the directors and stockholders, he not knowing of the insolvency at the time of the giving of the security. Henderson *v.* Indiana Trust Co., 143 Ind. 561 (1895). An insolvent corporation may give a mortgage to a creditor, by way of preference, even though a director is surety on the debt. Waggoner, etc. Co. *v.* Ziegler, etc. Co., 128 Mo. 473 (1895). A mortgage to a creditor on part of the property of an insolvent corporation is legal, although some of the stockholders and directors are indorsers of the debt. Weihl *v.* Atlanta, etc. Co., 89 Ga. 297 (1892). In Arkansas it is held that an insolvent corporation may prefer certain creditors, even though their claim is secured by the indorsements of the directors. Worthen *v.* Griffith, 59 Ark. 562 (1894). In Milledgeville Banking Co. *v.* McIntyre Alliance Store, 98 Ga. 503 (1896), the court very properly held that a mortgage given by an insolvent corporation to an outside creditor was valid, although the directors had given their personal note as additional security for the debt, such note being purely an accommodation note. The court distinguished Lowry, etc. Co. *v.*

the director or from the corporation itself at a time when the corporation was solvent; or where the corporate creditor did not know that the corporation was insolvent when he acquired his claim from the director or from the corporation itself; or where the corporate creditor loaned money to a corporation itself when it was insolvent, and at the same time received a mortgage by way of preference, and also obtained the indorsements of the directors on his paper; or where the directors were merely indorsers for the accommodation of the corporation. It is true that the above rules would enable a corporation to give preference to a corporate creditor in most cases where a director is indorser or guarantor of the claim. But, on the other hand, it is now a general custom in banking circles not to loan to a business corporation unless the directors guarantee the debt. If the law puts such a debt at a disadvantage as compared with other corporate debts, the credit of business corporations will be greatly curtailed, thereby rendering insolvent many corporations which otherwise would be able to extricate themselves from their troubles. In New Jersey the ingenious rule has been sustained that where a preference has been given by an insolvent corporation to debts guaranteed by the directors, the amount realized from such preference, over and above what would have been realized if there had been no preference, may be recovered by the other creditors from the directors.[1]

§ 694. *Land may be purchased by a domestic corporation.*[2]— The English statutes of mortmain are not in force in this country

Empire, etc. Co., 91 Ga. 624. A director who votes for a preference on debts for which other directors are liable cannot complain. Lucas *v.* Friant, 111 Mich. 426 (1897). Although a mortgage is invalid as to the debts in which the directors are interested, it may be valid as to the remaining debts secured by it. Savage *v.* Miller, 56 N. J. Eq. 432 (1898). A preference is legal although some of the directors voting therefor were sureties on the paper to which such preference is given, their votes not being necessary. Levering *v.* Bimel, 146 Ind. 545 (1897). Where a mortgage is given by an insolvent corporation to secure an antecedent debt for which a director is surety, the mortgage is not necessarily illegal; but if the transaction is actually a scheme to give the director a preference, it is illegal. Atlas Tack Co. *v.* Macon Hardware Co., 101 Ga. 391 (1897). Where the debts equal only one-third of the market value of the corporate property, and certain creditors holding notes on which the directors are indorsers demand security or else threaten to sue the corporation, the directors may authorize confession of judgment in their favor. Mueller *v.* Monongahela, etc. Co., 183 Pa. St. 450 (1898). A preference may be given to debts for which the directors are sureties. Nappanee, etc. Co. *v.* Reid, etc. Co., 64 N. E. Rep. 870 (Ind. 1902).

[1] Savage *v.* Miller, 56 N. J. Eq. 432 (1898).

[2] Richardson *v.* Massachusetts, etc. Assoc., 131 Mass. 174 (1881); Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576 (1894); Kelly *v.* People's Transp. Co., 3 Oreg. 189 (1870); Page *v.* Heineberg, 40 Vt. 81 (1868); Central Gold Min. Co. *v.* Platt, 3 Daly, 263 (1870), to the effect

except in Pennsylvania. The only limitation upon the right of corporations to hold real property is that the purchase must be a natural incident of the business specified in the charter.[1] A differ-

that the holding may be upon special trust; Nicoll *v.* New York, etc. R. R., 12 N. Y. 121, 127 (1854); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Sherwood *v.* American Bible Soc., 1 Keyes, 561 (1864); Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13 (1850); Riley *v.* Rochester, 9 N. Y. 64 (1853); Downing *v.* Marshall, 23 N. Y. 366 (1861); State *v.* Mansfield, 23 N. J. L. 510 (1852); State *v.* Newark, 25 N. J. L. 315 (1855); First Parish *v.* Cole, 20 Mass. 232 (1825); Old Colony R. R. *v.* Evans, 72 Mass. 25 (1856), where the company purchased a gravel pit to transport and sell the gravel. And see Smith *v.* Sheeley, 12 Wall. 358 (1870). A corporation is presumed, in the absence of any showing to the contrary, to have the right to purchase and hold land. Stockton Sav. Bank *v.* Staples, 98 Cal. 189 (1893). In a suit by a railroad to quiet title to its land, the defendants cannot question the power of a railroad to hold land. Russell *v.* Texas, etc. Ry., 68 Tex. 646 (1887). In a bill to quiet title, a corporation need not allege that it has power to hold land. Torrent F. Eng. Co. *v.* Mobile, 101 Ala. 559 (1894). A publishing company may take a lease of a building and may sublet such parts of it as it does not use. Oswald *v.* St. Paul, etc. Pub. Co., 60 Minn. 82 (1895). A bank may accept a deed of real estate from a stockholder and director to make good an impairment of the capital stock, it being agreed that compensation therefor should be paid from future profits. Brown *v.* Bradford, 103 Iowa, 378 (1897). Where a bank has legally acquired a part interest in real estate, it may purchase the remaining interest for the purpose of handling the property. Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898). The contract of a religious corporation to purchase land for speculative purposes is not enforcible, and a note given in connection therewith is not valid except in *bona fide* hands. Thompson *v.* West, 59 Neb. 677 (1900). Although a statute prescribes that a corporation shall not hold real estate if more than twenty per cent. of its stock is owned by aliens, it is presumed that not more than twenty per cent. is so held by aliens until the contrary is proved. Northwestern, etc. Co. *v.* Chicago, etc. Ry., 76 Minn. 334 (1899). A statute prohibiting a corporation, a majority of whose stock is held by aliens, from acquiring land, does not prohibit it from acquiring fishing lands. Hastings *v.* Anacortes, etc. Co., 69 Pac. Rep. 776 (Wash. 1902). Where a corporation buys land in the name of its agent as trustee it is liable for the price thereof. Hurst *v.* Am. Assoc., 49 S. W. Rep. 800 (Ky. 1899). Although a deed of a corporation provides that in a certain contingency the land "should revert to the stockholders, their heirs and assigns," yet such reversion is to the corporation and not to the stockholders. Pettit *v.* Stuttgart, etc. Institute, 67 Ark. 430 (1900).

[1] 2 Kent, Com. *282; Moore *v.* Moore, 4 Dana (Ky.), 354 (1836); Lathrop *v.* Scioto Comm. Bank, 8 Dana (Ky.), 114, 121 (1839); Potter *v.* Thornton, 7 R. I. 252 (1862); Perin *v.* Carey, 24 How. 465 (1860); McCartee *v.* Orphan Asylum Soc., 9 Cow. 437, 451 (1827); Page *v.* Heineberg, 40 Vt. 81 (1868). See also Odell *v.* Odell, 92 Mass. 1 (1865); Downing *v.* Marshall, 23 N. Y. 366, 392 (1861); First Parish *v.* Cole, 20 Mass. 232, 239 (1825); Richardson *v.* Massachusetts, etc. Assoc., 131 Mass. 174 (1881). One who agrees to sell land to a corporation is not bound to see that it is required for the purposes of the corporation, and if acting in good faith, and without knowledge of an intention to misapply the corporate funds, he may

ent rule prevails in Pennsylvania.[1] In that state the mortmain laws are held to still exist, and the state itself has enacted a statute restricting the right.

In the other states, however, the rule is firmly established that the right of a domestic corporation to purchase and hold land can be questioned only by a stockholder or by the state in a direct pro-

enforce specific performance of the contract. Eastern Counties Ry. *v.* Hawkes, 5 H. L. Cas. 331 (1855). Frequently the charter places some limitations or grants some privileges herein. A charter power to hold land for business purposes and to secure debts does not authorize the purchase of land for the purpose of selling it again. Bank of Michigan *v.* Niles, Walk. (Mich.) 99 (1842); Pacific R. R. *v.* Seely, 45 Mo. 212 (1870), where a railroad was held to have no power to acquire land for speculation; Land *v.* Coffman, 50 Mo. 243 (1872); Rensselaer, etc. R. R. *v.* Davis, 43 N. Y. 137 (1870). Under such an express power the corporation cannot purchase merely for the convenience of the corporation, nor for purposes foreign to its objects. State *v.* Mansfield, 23 N. J. L. 510 (1852); State *v.* Newark, 25 N. J. L. 315 (1855). But the purchase is presumed to be for purposes mentioned in the charter. Chautauque County Bank *v.* Risley, 19 N. Y. 369 (1859); *Ex parte* Peru Iron Co., 7 Cow. 540 (1827); Moss *v.* Rossie Lead Min. Co., 5 Hill, 137 (1843); Alward *v.* Holmes, 10 Abb. N. Cas. 96 (1880), where a foreign bank had purchased. A railroad, instead of condemning a right of way, may purchase the fee. Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854).

[1] This arose from the fact that the judges of the supreme court, appointed to examine and report to the legislature such of the English statutes as were in force in that state, reported that the statutes of mortmain were "so far in force that all conveyances . . . made to a body corporate, or for the use of a body corporate, are void, unless sanctioned by charter or act of assembly." The report may be found in 3 Binney (Pa.), 595, 626 (1808). See also Methodist Church *v.* Remington, 1 Watts (Pa.), 218 (1832); Miller *v.* Porter, 53 Pa. St. 292 (1866). The statute of April 6, 1833, made all purchases of land by or for corporations, without the license of the commonwealth, subject to forfeiture. Under this act it has been held that a foreign corporation may purchase and hold real estate in Pennsylvania, subject to being divested by the direct action of the state. Runyan *v.* Coster, 14 Pet. 122 (1840). To same effect, Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313 (1821). A similar statute, passed April 26, 1855, was construed to the same effect in Hickory Farm Oil Co. *v.* Buffalo, etc. R. R., 32 Fed. Rep. 22 (1887), after having been declared a mortmain act in American Slate Co. *v.* Phillipsburg, etc. Bank, 8 W. N. Cas. 430 (1880). A person sued in Pennsylvania on a debt to a foreign corporation cannot set up that the corporation is illegally holding land in the state. Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208 (1876). Where a foreign corporation cannot directly own land in a state, it cannot own land indirectly by owning a majority of the stock of a domestic corporation which owns the land. The state may escheat the land. Commonwealth *v.* New York, etc. R. R., 114 Pa. St. 340 (1886). But under the statutes of Pennsylvania it is legal for a railroad company to own all the stock of a mining company which owns land, and such land does not escheat. Commonwealth *v.* New York, etc. R. R., 139 Pa. St. 457 (1891). See also § 695, *infra*.

ceeding for that purpose. The objection cannot be made by others.[1] It is legal for a corporation to hold property in excess of the amount

[1] Only the state can raise the question that the corporation was not entitled to acquire real estate. Cooney *v.* Booth, etc. Co., 169 Ill. 370 (1897): Land *v.* Coffman, 50 Mo. 243 (1872), holding also that a deed voluntarily made to the corporation of real property in excess of the amount allowed by its charter will pass a good title; Natoma Water, etc. Co. *v.* Clarkin, 14 Cal. 544, 552 (1860), Field, C. J., saying: "It would lead to infinite inconveniences and embarrassments if, in suits by corporations to recover the possession of their property, inquiries were permitted as to the necessity of such property for the purposes of their incorporation, and the title made to rest upon the existence of that necessity." Even though a safe deposit company is authorized to possess real estate necessary for the transaction of its business, and it erects a large office building fourteen stories high and rents nearly all of it, yet a tenant cannot avoid payment of rent on the ground that it holds too much real estate. Rector *v.* Hartford Deposit Co., 190 Ill. 380 (1901). A person claiming land by adverse possession as against a corporation cannot set up that the corporation had no power to acquire the land. Only the state can raise this question. Chicago, etc. R. R. *v.* Keegan, 56 N. E. Rep. 1088 (Ill. 1900). The right of a beneficial association to purchase land as an investment cannot be questioned by any one but the state. Hagerstown, etc. Co. *v.* Keedy, 91 Md. 430 (1900). A vendor of land to a corporation cannot afterwards claim that the corporation had no power to purchase. Miller *v.* Flemingsburg, etc. Co., 59 S. W. Rep. 512 (Ky. 1900). A party who has made an executory contract to sell real estate to a corporation cannot refuse to transfer on the ground that the company had no power to buy, the company having made improvements. Coleridge, etc. Co. *v.* Jenkins, 92 N. W. Rep. 123 (Neb. 1902). The power of a private corporation to acquire land cannot be questioned by the grantor of land to the corporation, and moreover, even if the rule were otherwise, an agent who bought for the corporation as agent would not be personally liable. Ray *v.* Foster, 53 S. W. Rep. 54 (Tex. 1899). A grantor of property to a railroad company for picnic purposes cannot avoid his deed and its obligations by claiming that the purchase by the company was *ultra vires*. Shelby *v.* Chicago, etc. R. R., 143 Ill. 385 (1892). The corporation cannot defend against a mortgage on the ground that it had no power to purchase the property. Butterworth, etc. *v.* Kritzer, etc. Co., 115 Mich. 1 (1897). There are many other cases in which it is held that the state alone can raise this objection. National Bank *v.* Matthews, 98 U. S. 621, 628 (1878), and cases cited; Cowell *v.* Springs Co., 100 U. S. 55 (1879); Myers *v.* Croft, 13 Wall. 291 (1871); Southern Pac. R. R. *v.* Orton, 6 Sawy. 157, 181 (1879), and cases cited; s. c., 32 Fed. Rep. 457, 470; Shewalter *v.* Pirner, 55 Mo. 218 (1874); Chambers *v.* St. Louis, 29 Mo. 543, 576 (1860); McIndoe *v.* St. Louis, 10 Mo. 576 (1847); People *v.* Mauran, 5 Denio, 389 (1848); Silver Lake Bank *v.* North, 4 Johns. Ch. 370 (1820); Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313 (1821); Goundie *v.* Northampton Water Co., 7 Pa. St. 233 (1847); Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13 (1850); Kelly *v.* People's Transp. Co., 3 Oreg. 189 (1870); Morgan *v.* Donovan, 58 Ala. 241 (1877). But in this case it was said that in a suit to enforce a contract of purchase which remained executory, or to recover for its breach, the question of *ultra vires* would be material. Banks *v.* Poitiaux, 3 Rand. (Va.) 136, 146 (1825); Barrow *v.* Nashville, etc. Co., 9 Humph. (Tenn.) 304 (1848), holding that the fact that a corporation uses real estate for

of its capital stock.[1] A statute to the effect that a corporation must sell its unnecessary real estate within five years does not give the state title to such real estate if not so sold.[2] A stockholder has

purposes beyond its powers furnishes no ground to the vendor for a rescission of the contract of sale; Runyan *v.* Coster, 14 Pet. 122, 129 (1840); Chicago, etc. R. R. *v.* Lewis, 53 Iowa, 101 (1880); Mapes *v.* Scott, 94 Ill. 379 (1880), in which the rule was applied to national banks; Alexander *v.* Tolleston Club, 110 Ill. 65 (1884); Smith *v.* Sheeley, 12 Wall. 358 (1870); De Camp *v.* Dobbins, 29 N. J. Eq. 36 (1878), which case was affirmed in 31 N. J. Eq. 671 (1879), where it was, however, held that an heir-at-law may object that a corporation cannot hold land in trust in excess of its statutory powers. See this report for a well-considered opinion, citing cases, and notes by the reporter. Bone *v.* Delaware, etc. Co., 5 Atl. Rep. 751 (Pa. 1886); Chicago, etc. R. R. *v.* Lewis, 53 Iowa, 101 (1880); Missouri, etc. Co. *v.* Bushnell, 11 Neb. 192 (1881); Jones *v.* Habersham, 107 U. S. 174 (1882); Barnes *v.* Suddard, 117 Ill. 237 (1886), in which the rule was applied to a foreign corporation; Hickory Farm Oil Co. *v.* Buffalo, etc. R. R., 32 Fed. Rep. 22 (1887), to the same effect; Spear *v.* Crawford, 14 Wend. 20 (1835), where a stockholder was held liable on his statutory liability to a corporate creditor who had sold land to the corporation. 66 N. E. Rep. 850.

If a corporation buys land and then finds it is *ultra vires*, and sells its contract to a third person, it may collect from the latter moneys paid on the purchase. Crutcher *v.* Nashville Bridge Co., 8 Humph. (Tenn.) 403 (1847). A railroad company cannot refuse to complete a purchase of lands which, *prima facie*, it could use for railroad purposes. It cannot claim that the purchase was *ultra vires*. Eastern Counties Ry. *v.* Hawkes, 5 H. L. Cas. 331 (1855). A turnpike company may take a lease of land for storing purposes. Crawford *v.* Longstreet, 43 N. J. L. 325 (1881). An agreement of a company to buy land if a certain bill passes is legal and binding. Taylor *v.* Chichester, etc. Ry., L. R. 4 H. L. 628 (1870), reversing s. c., L. R. 2 Exch. 356 (1867). Coleman *v.* San Rafaël Turnp. Co., 49 Cal. 517 (1875), holds that, in an action to quiet title, a bond to convey to a corporation for purposes beyond its requirements is void. Thweatt *v.* Bank of Hopkinsville, 81 Ky. 1 (1883), where an execution sale to a bank was held to be void at the suit of the execution debtor; Riley *v.* Rochester, 9 N. Y. 64 (1853), holding, in an action of trespass, that a conveyance to a municipal corporation of land beyond its limits for the purposes of a street is void. Although a corporation purchases land in excess of the amount limited by its charter, yet only the state can object, and its remedy is forfeiture of the charter. Fayette Land Co. *v.* Louisville, etc. R. R., 93 Va. 274 (1896). The power of a trust company to buy a tax title cannot be attacked by a mortgagee foreclosing a mortgage on the land. Watts *v.* Gantt, 42 Neb. 869 (1894). In a suit by a corporation to quiet title, a grantee of its grantees cannot set up that the corporation had no power to acquire or hold title. Butte Hardware Co. *v.* Cobban, 13 Mont. 351 (1893). For a careful review of the authorities, and an argument that the corporation or its stockholders are in all cases protected as to real estate purchased *ultra vires*, see 8 Harvard L. Rev. 15 (1894).

[1] Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844). Where a corporation owns property in excess of an amount specified and limited by the charter, an exemption from taxation does not apply to such excess. Seashore House, etc. *v.* City of Atlantic City, 48 Atl. Rep. 242 (N. J. 1900).

[2] People *v.* Stockton, etc. Soc., 133 Cal. 611 (1901).

the same right to object to an *ultra vires* purchase of land as he has to object to any other *ultra vires* act;[1] but he must be prompt in his objection,[2] and must bring suit in behalf of all the stockholders to set the purchase aside.[3] Under a statute authorizing the court to dissolve any corporation on good cause shown, a minority stockholder may file a bill to have the corporation dissolved for purchasing unnecessary real estate.[4] Whenever a corporation may take the legal title to land it may take the beneficial interest in it, but if it cannot hold a legal title it cannot hold as *cestui que trust*.[5] A corporation taking out patents to land in the names of its employees, and then taking a conveyance from them, holds the land subject to forfeiture by the government.[6] The state may by *quo*

[1] *Re* Kent Benefit Bldg. Soc., 1 Dr. & Sm. 417 (1861); Grimes *v.* Harrison, 26 Beav. 435 (1859), where the directors were compelled to make good the funds of the corporation used *ultra vires* to purchase land.

[2] See ch. XLIV, *infra.*

[3] See ch. XLV, *infra.*

[4] Bixler *v.* Summerfield, 62 N. E. Rep. 849 (Ill. 1902).

[5] Coleman *v.* San Rafael Turnp. Co., 49 Cal. 517, 522 (1875). In this case a bond to an individual to convey land in trust for the stockholders of a corporation, with power to sell under direction of its board of trustees, was held to constitute the corporation a *cestuis que trust.* Vidal *v.* Girard, 2 How. 127, 187 (1844), holding also that, if the trust be repugnant to or inconsistent with the purposes of the corporation, a new trustee may be substituted, but no ground is furnished to declare the trust void. See also De Camp *v.* Dobbins, 29 N. J. Eq. 36 (1878): affirmed, 31 N. J. Eq. 671 (1879); Clemens *v.* Clemens, 37 N. Y. 59 (1867); Chamberlain *v.* Chamberlain, 43 N. Y. 424 (1871); Harris *v.* American Bible Soc., 2 Abb. App. Dec. 316 (1867), but here the corporation had express power to hold in trust; Downing *v.* Marshall, 23 N. Y. 366 (1861).

[6] United States *v.* Trinidad Coal, etc. Co., 137 U. S. 160 (1890). Where several persons, in order to evade section 2331 of the United States Revised Statutes, which limits to twenty acres the amount of placer-mining ground that a single person may locate, agree that "dummies" shall be used as locators, and the "dummies" shall transfer the land to one person, who shall hold it for all of the principal parties, and all this is done, the person thus obtaining title cannot be compelled by the others to divide. The contract is illegal and the court will not aid any party. Mitchell *v.* Cline, 84 Cal. 409 (1890). See also Case *v.* Kelly, 133 U. S. 21 (1890). Where land is entered in the names of individuals in order to evade a statute against corporations, and then they deed to the corporations, the state may set aside the grants. Wichita, etc. Co. *v.* State, 80 Tex. 684 (1891). A corporation which engages in the business of buying and selling real estate through a trustee does not forfeit its title to land acquired by such trustee, although contrary to 2 Utah Comp. L. 1888, § 2272, which provides that a corporation "shall not have power to enter into, as a business, the buying and selling of real estate," but affixed no penalty for its violation. Fisk *v.* Patton, 7 Utah, 399 (1891). Even a domestic corporation cannot obtain a patent to a mining claim under the federal statutes, unless all of its stockholders are citizens of the United States, and are severally and individually qualified and competent to make the location. Thomas *v.* Chisholm, 13 Colo. 105 (1889). A foreign corporation not authorized to own and register ships in

warranto proceedings forfeit the charter of a corporation which has acquired land not reasonably needed for the purposes of the business specified in its charter.[1]

Although the officers of a railroad company take in their own names the title to lands which are donated to the railroad, yet the railroad cannot compel them to give up the lands, if the railroad company had no power to acquire such lands.[2] The contract by which a party turns in land in exchange for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.[3]

Quo warranto does not lie to oust a corporation from the possession of land. *Quo warranto* lies only to oust a company from the franchises it claims, and not to divest it of property.[4]

It is well settled that corporations may, without special authority, dispose of land as they may deem expedient,[5] and may mort-

America cannot evade the law by taking title in the names of trustees who are residents of America. Ogden *v.* Murray, 39 N. Y. 202 (1868).— a dictum. Under a constitutional provision that conveyances to a corporation, a majority of the stock of which is held by aliens, shall be void, the attorney-general may commence suit to have certain conveyances declared void, even though a majority of the stock was owned by citizens at the time of the conveyance, such majority having since that time passed into alien hands. State *v.* Hudson Land Co., 19 Wash. 85 (1898).

1 A corporation organized to manufacture railway cars has no power to lay out a town around its works and build twenty-two hundred homes to lease to its employees, to build and run a hotel and saloon, and also a theater, a gas plant, a system of water-works and a brick plant, and to own and run a farm for supplies to sell and for its employees, and to own stock in other corporations manufacturing and selling bar iron and railroad spikes; but may erect an office building containing more space than it requires at the time, and may purchase more real estate than it actually requires at the time, and may supply liquor to passengers on its cars, and may sell surplus steam power. The state may bring *quo warranto* proceedings to forfeit the charter. It is no defense that the usurpations had continued for many years to the knowledge of the state, or that a legislative committee had reported that the real estate was properly taxed. People *v.* Pullman's Palace Car Co., 175 Ill. 125 (1898). A religious corporation has no implied power to use its real estate for business purposes. First M. E. Church, etc. *v.* Dixon, 178 Ill. 260 (1899).

2 Case *v.* Kelly, 133 U. S. 21 (1890).

3 Slide, etc. Mines *v.* Seymour, 153 U. S. 509, 520 (1894).

4 State *v.* Pittsburgh, etc. R. R., 50 Ohio St. 239 (1893).

5 White Water, etc. Co. *v.* Vallette, 21 How. 414, 424 (1858); Barry *v.* Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Dupee *v.* Boston Water Power Co., 114 Mass. 37 (1873); Burton's Appeal, 57 Pa. St. 213 (1868); Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869); Reynolds *v.* Stark County, 5 Ohio, 204 (1831); Newark *v.* Elliott, 5 Ohio St. 113 (1855); De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. 119 (1848); aff'd, 3 N. Y. 238; Buell *v.* Buckingham, 16 Iowa, 284 (1864), holding also that the sale may be by directors having general powers to make contracts. Aurora,

gage lands in the course of legitimate business.[1] A statute authorizing a sale of corporate property in whole or in part upon a vote of the stockholders does not require such vote upon an ordinary sale of real estate.[2]

Under the English statute of wills a devise of land to certain bodies corporate is unlawful. Similar statutes have been enacted quite generally in America.[3]

etc. Soc. *v.* Paddock, 80 Ill. 263 (1875). And see Binney's Case, 2 Bland, Ch. 99, 142 (1829); Railroad Co. *v.* Howard, 7 Wall. 392 (1868), in which a sale by a corporation without authority, but with the consent of all the parties interested in the subject-matter of it, was held valid; Edward *v.* Fairbanks, 27 La. Ann. 449 (1879); Rutland, etc. R. R. *v.* Proctor, 29 Vt. 93 (1856), holding also that a purchaser from a corporation cannot defeat an action for the purchase-money by the defense that the corporation had no power to acquire the property. A corporation may authorize an agent to deed land belonging to the corporation. Barcello *v.* Hapgood, 118 N. C. 712 (1896).

1 See §§ 779, etc., *infra*.

2 Marvin *v.* Anderson, 111 Wis. 387 (1901). A statute requiring leases by corporations to be first approved by the stockholders applies only to leases of property essential to the existence of the corporation for the carrying on of its business, and does not apply to leases of a small portion of a corporate property. Such statute does not apply to purely private corporations at all. Coal, etc. Co. *v.* Tennessee, etc. R. R., 62 S. W. Rep. 162 (Tenn. 1901). The Michigan statute preventing mining companies from selling their land except by vote of the stockholders does not apply to a sale of standing timber. Baggaley *v.* Pittsburg, etc. Co., 90 Fed. Rep. 636 (1898).

3 McCartee *v.* Orphan Asylum Soc., 9 Cow. 437 (1827); Downing *v.* Marshall, 23 N. Y. 366, 384 (1861), but holding that a charter provision enabling a corporation to take land "by direct purchase or otherwise" is an express authority within the meaning of the statute of wills. See also Kerr *v.* Dougherty, 79 N. Y. 327 (1880), overthrowing a bequest by a resident of another state to a New York corporation which was forbidden to take by bequest; State *v.* Bates, 2 Harr. (Del.) 18 (1835), where a devise of money arising from the sale of land was held to be in effect a devise of land; but the contrary view of such a devise was taken in American Bible Soc. *v.* Noble, 11 Rich. Eq. (S. C.) 156 (1859). The statutes of New York against bequests to certain corporations made within a certain time before the testator's death do not apply to a bequest by a foreigner made in a foreign land to a corporation to be organized under the laws of New York, the bequest being valid at the domicile of the testator. Dammert *v.* Osborn, 140 N. Y. 30 (1893). In Massachusetts it has been held that a town or a parish may take and hold a devise for the use of schools. First Parish *v.* Cole, 20 Mass. 232 (1825). As to the rule governing bequests to charitable corporations in New York, see Wetmore *v.* Parker, 52 N. Y. 450 (1873). If the objects of the trust are uncertain or vague a devise to a charitable corporation will be void. Pratt *v.* Trustees, etc., 88 Md. 610 (1898). A foreign charitable corporation cannot take New York land by devise unless the New York statute permits. White *v.* Howard, 46 N. Y. 144 (1871). *Cf.* White *v.* Howard, 38 Conn. 342 (1871). And concerning the common-law restrictions on the power of charitable corporations to sell land, see Madison Ave. Bapt. Ch. *v.* Oliver St. Bapt. Ch.,

An educational corporation authorized to accept property to a certain amount cannot take a devise or bequest of property after it already has property equal to the amount limited by its charter.[1]

A devise or bequest to a corporation to be hereafter created is valid.[2] A deed made before incorporation, to be delivered to the corporation after incorporation, is good.[3] A corporation may take the title to land in fee although the duration of the corporation itself is limited.[4] Where a deed is made by or to a *de facto* corpora-

46 N. Y. 131 (1871). See also § 695, *infra*, as to foreign corporations.

[1] Cornell University *v.* Fiske, 136 U. S. 152 (1890); McGraw *v.* Cornell University, 45 Hun, 354 (1887); *Re* McGraw, 111 N. Y. 66 (1888). Where land is willed to a corporation, the heirs cannot defeat the devise by claiming that the corporation already has all the land that the statutes allow. Only the state can raise that question. Hamsher *v.* Hamsher, 132 Ill. 273 (1890). In Jones *v.* Habersham, 107 U. S. 174 (1882), where the limit was on the income and the gift increased it beyond the limit, the court held that only the state could object. Where the limitation upon the capacity of a corporation to hold land is based upon a yearly value, the yearly value at the time it is acquired is intended, and the title is not affected by a subsequent increase in its value above the amount limited. Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633 (1847); Humbert *v.* Trinity Church, 24 Wend. 587, 629 (1840). And see Harvard College *v.* Boston, 104 Mass. 470 (1870); Church of Redemption *v.* Grace Church, 68 N. Y. 570 (1877); Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633 (1847). *Cf.* Rainey *v.* Laing, 58 Barb. 453 (1871). Although a corporation is limited by its charter as to the amount of property it may take, yet a devise to it of property greater in value than that amount is not void, inasmuch as only the state can complain. Farington *v.* Putnam, 90 Me. 405 (1897).

[2] Russell *v.* Allen, 107 U. S. 163 (1882); Burrill *v.* Boardman, 43 N. Y. 254 (1871); Webster *v.* Wiggin, 19 R. I. 73 (1895). A bequest to a company to be incorporated within the time allowed by statute is valid. People *v.* Simonson, 126 N. Y. 299 (1891). "That a valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is called into being within the time allowed for the vesting of future estates, is not denied." Tilden *v.* Green, 130 N. Y. 29, 47 (1891), the court holding, however, that the devise should be to the corporation to be formed and should not be in trust to the executors to convey to such corporation when formed if the executors think best. See also Burrill *v.* Boardman, 43 N. Y. 254 (1871); Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. 99 (1830); Dammert *v.* Osborn, 140 N. Y. 30 (1893).

[3] Spring, etc. Bank *v.* Hurlings, etc. Co., 32 W. Va. 357 (1889). Where the promoters pay for land and take a deed in the name of the proposed corporation, the vendor cannot claim that the deed was void, even though the corporation was not actually organized until three years after such deed was given. White Oak, etc. *v.* Murray, 145 Mo. 622 (1898). A lease to a corporation not yet organized is void. Utah, etc. Co. *v.* Keith, 18 Utah, 464 (1899). A deed to certain persons "as incorporators" of a company not yet incorporated does not vest title in the company when incorporated. McCandless *v.* Inland, etc. Co., 112 Ga. 291 (1900). See also §§ 504, 637, *supra*.

[4] Nicoll *v.* New York, etc. R. R., 12 N. Y. 121 (1854); Rives *v.* Dudley, 3 Jones, Eq. (N. C.) 126 (1856); Asheville Division *v.* Aston, 92 N. C. 578 (1885); Delhi School Dist. *v.* Everett, 52 Mich. 314 (1883). A deed of property to a rail-

tion, the corporate existence cannot be questioned by any of the parties.[1] A devise of real estate to an unincorporated association does not fail. The title descends to the heir at law, who holds the same as trustee for the use and benefit of the association.[2] The land owned by such an association is generally vested in trustees for its benefit.[3]

§ 695. *Land may be purchased, held, and sold by a foreign as distinguished from an alien corporation, if there is no statute of the state to the contrary.*— A foreign corporation, other than an alien corporation, having power to buy and sell land, may at common law buy and sell land in other states, as well as that in which it was incorporated.[4]

In the exercise of comity between the states, corporations created in one of them may acquire, hold, and transfer land in another, the same as individuals.[5]

road for fifty years, or so long as its charter continued, which by charter is fifty years, passes the land to a corporation which by legislative enactment succeeds to the rights of the first corporation. Davis *v.* Memphis, etc. R. R., 87 Ala. 633 (1888). A dissolution of a corporation after it has conveyed real estate does not impair the title of the grantees. People *v.* Mauran, 5 Denio, 389 (1848). See also § 641, *supra.*

[1] See § 637, *supra.* Where the owner of real estate deeds it to a supposed corporation, and many years afterwards makes another deed to another corporation, the latter cannot claim that the first corporation was illegally organized. It is for the state alone to make such claim. Los Angeles, etc. *v.* Spires, 126 Cal. 541 (1899). A person who has contracted to purchase land from a supposed corporation cannot avoid the contract by the defense that the charter of the company had expired. West Missouri, etc. Co. *v.* Kansas City, etc. Ry., 161 Mo. 595 (1901). Under the Montana statutes, even though no organization meetings of the stockholders and directors are held, yet a deed of property to the corporation may be valid. Morrison *v.* Clark, 24 Mont. 515 (1900).

[2] American Bible Soc. *v.* American Tract Soc., 62 N. J. Eq. 219 (1901), the court refusing to follow the New York decisions to the contrary. See also § 504, *supra.*

[3] See § 504, *supra.*

[4] Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 584 (1894), wherein the court said: "As a corporation *de facto,* possessing some capacity to acquire and convey real property, its conveyance is unimpeachable upon any ground of an excess or of an abuse of powers conferred; and unless in the laws of this state we are able to find a prohibition, expressed herein, or to be implied therefrom, which disabled this corporation from acquiring the land and from conveying it, the plaintiff would obtain a valid title to the premises conveyed."

[5] Cowell *v.* Springs Co., 100 U. S. 55 (1879); Runyan *v.* Coster, 14 Pet. 122, 130 (1840): Christian Union *v.* Yount, 101 U. S. 352 (1879); Barnes *v.* Suddard, 117 Ill. 237 (1886); New Hampshire Land Co. *v.* Tilton, 19 Fed. Rep. 73 (1884); Lathrop *v.* Commercial Bank, 8 Dana (Ky.) 114 (1839); American Bible Soc. *v.* Marshall, 15 Ohio St. 537 (1864); State *v.* Boston, etc. R. R., 25 Vt. 433 (1853); Claremont Bridge *v.* Royce, 42 Vt. 730, 736 (1870); Lumbard *v.* Aldrich, 8 N. H. 31 (1835): Cincinnati, etc. R. R. *v.* Pearce, 28 Ind. 502 (1867); Silver Lake-

This right of foreign corporations to acquire and hold real estate is, however, subject to the statutory laws of the state wherein

Bank v. North, 4 Johns. Ch. 370 (1820), holding that a corporation of another state may file a bill for the foreclosure of a mortgage on land in New York; Columbus Buggy Co. v. Graves, 108 Ill. 459 (1884); Black v. Delaware, etc. Canal Co., 22 N. J. Eq. 130, 422 (1871), the chancellor saying "that a foreign corporation may own property in this state and transact business, and make contracts in it to be performed here, is too well settled to discuss;" Northern Transp. Co. v. Chicago, 7 Biss. 45, 52 (1874); s. c., 18 Fed. Cas. 362, 365; Lebanon Sav. Bank v. Hollenbeck, 29 Minn. 322 (1882); New York Dry Dock v. Hicks, 5 McLean, 111 (1850); s. c., 18 Fed. Cas. 151; Whitman Gold, etc. Co. v. Baker, 3 Nev. 386 (1867); Metropolitan Bank v. Godfrey, 23 Ill. 579 (1860), holding also that foreign corporations can only acquire and hold lands upon the terms and conditions and in the way authorized by the law of their creation. They may loan money on real-estate mortgages. See § 690, *supra*. *Cf.* Northwestern, etc. Ins. Co. v. Overholt, 4 Dill. 287 (1878); s. c., 18 Fed. Cas. 403; Morris Canal, etc. Co. v. Townsend, 24 Barb. 658 (1857), where a statute authorizing a foreign corporation to appropriate land on payment of a just compensation to its owners was held valid (affirmed as to this point, *Re* Townsend, 39 N. Y. 171 — 1868); Stewart v. Lehigh Valley R. R., 38 N. J. L. 505 (1875); National Trust Co. v. Murphy, 30 N. J. Eq. 408 (1879); Sherwood v. American Bible Soc., 1 Keyes, 561 (1864); Elston v. Piggott, 94 Ind. 14 (1883), to the effect that it may hold land purchased at a judicial sale under a decree in its favor. An alien corporation may purchase and hold land in Missouri. Missouri, etc. Co. v. Reinhard, 114 Mo. 218 (1893). The Connecticut Land Company was organized in Connecticut in 1795 and owned the entire Connecticut "Western Reserve." This land was held in the names of trustees for the benefit of the stockholders of the company until 1809, when the company partitioned the land among its stockholders and divided its assets and was dissolved. Holmes v. Cleveland R. R., 93 Fed. Rep. 100 (1861), where the court held that a small parcel of land which accidentally was omitted in making such division of the assets could not be claimed by the heirs of the stockholders fifty years after the division was made. Although an alien cannot own real estate, yet he may own stock in a corporation which owns real estate. Princeton Min. Co. v. First Nat. Bank, 7 Mont. 530 (1888). As to foreign corporations holding land, see 35 Cent. L. J. 166. As to the act of congress prohibiting foreign corporations from owning land in the territories, see Potter v. Rio Arriba, etc. Co., 4 N. M. 322 (1888). Where a Colorado corporation has power, among other things, to deal in real estate, its purchases of land in Texas cannot be questioned by any one except the state, even though Texas does not allow incorporation for that purpose. Galveston, etc. Co. v. Perkins, 26 S. W. Rep. 256 (Tex. 1894). Where a banker sells stock to a lawyer, and informs the latter that the company, the owner of land in Mexico, had a right, though an alien to Mexico, to own land therein, as the banker had been informed by his attorney, a note of the vendee in payment of the stock cannot be defeated on the ground that such corporation could not legally hold the land. Daly v. Brennan, 87 Wis. 36 (1894). A foreign corporation may buy and sell land if authorized so to do by its charter. Barcello v. Hapgood, 118 N. C. 712 (1896). A foreign corporation may own land in Mississippi. Taylor v. Alliance Trust Co., 71 Miss. 694 (1894); 120 Fed. Rep. 893.

the land is situated, and also to its public policy and the general policy of its statutes relating to domestic corporations.[1]

[1] Christian Union *v.* Yount, 101 U. S. 352 (1879); Carroll *v.* East St. Louis, 67 Ill. 568 (1873), where a corporation chartered by Connecticut for the sole purpose of buying and selling land was held not competent to acquire land in Illinois, because such business was contrary to the general policy of the state and tended to create perpetuities; U. S. Trust Co. *v.* Lee, 73 Ill. 142 (1874), in which the court denied the right of a foreign corporation to hold real estate in Illinois beyond what is necessary to the transaction of its business or the collection of its debts, either for its own benefit or in trust for others; U. S. Mortgage Co. *v.* Gross, 7 Cent. L. J. 226 (1878), in which the Illinois rule was explained so as not to exclude foreign corporations empowered to loan money on real-estate securities; Thompson *v.* Waters, 25 Mich. 214 (1872); Holbert *v.* St. Louis, etc. Ry., 45 Iowa, 23 (1876), holding that statutes authorizing railroads to take land for their right of way do not apply to foreign corporations; Farmers' L. & T. Co. *v.* McKinney, 6 McLean, 1 (1853); s. c., 8 Fed. Cas. 1048; Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. 33 (1868); White *v.* Howard, 46 N. Y. 144 (1871); Hollis *v.* Drew Theol. Seminary, 95 N. Y. 166 (1884), holding that foreign corporations are subject to the New York statute which declares invalid a devise or bequest in a will executed less than two months before the death of the testator. In *Re* Prime's Estate, 136 N. Y. 347, 362 (1893), the court said: "A general law of the state prohibiting corporations from exercising particular powers will operate upon foreign corporations, not because the act binds such corporations *ex proprio vigore*, but for the reason that their exercise of such powers here would violate the public policy of the state, indicated by the general restraint imposed upon our own corporations." For the decisions in Pennsylvania on its statutes and policy excluding foreign corporations from holding land, see § 695, *supra*. Where land is claimed by a foreign corporation, the courts of the state in which the land is situated will construe its charter and determine whether it authorizes the corporation to hold the real estate. Boyce *v.* St. Louis, 29 Barb. 650 (1859); White *v.* Howard, 38 Conn. 342 (1871). And in construing such foreign charters the court will consider the decisions of the courts of the state granting them, though it will not be bound thereby. Thompson *v.* Waters, 25 Mich. 214 (1872); Boyce *v.* St. Louis, 29 Barb. 650 (1859). The right of a corporation to hold realty is determined not alone by its charter, but by the statutes of the state where the land is. A corporate deed in a chain of title is presumed good. Tarpey *v.* Deseret Salt Co., 5 Utah, 494 (1888). If a foreign corporation is not authorized to hold real estate, it cannot take land in another state by devise. Boyce *v.* St. Louis, 29 Barb. 650 (1859); Starkweather *v.* American Bible Soc., 72 Ill. 50 (1874).

On the other hand, if by its charter, either expressly or impliedly, a corporation may take lands by devise, an independent provision of law in its own state prohibiting corporations from taking by devise, unless expressly authorized to do so, will not prevent its taking by devise in another state. American Bible Soc. *v.* Marshall, 15 Ohio, St. 537 (1864); Thompson *v.* Swoope, 24 Pa. St. 474 (1855); Chamberlain *v.* Chamberlain, 43 N. Y. 424 (1871), but here the bequest was of personal property. To same effect, Sherwood *v.* American Bible Soc., 4 Abb. App. Dec. 227 (1864). A devise of land to a foreign corporation is void unless authorized by the law of the state where it lies, even though such foreign corporation is

Only the state or a dissenting stockholder can question the power of a foreign corporation to hold land.[1] And only the state can object to a foreign corporation holding more land than the statutes permit.[2] A deed of land to a foreign corporation in Colorado is valid, although the corporation has not filed a copy of its charter as required by the statutes. The grantor cannot complain.[3]

A state may restrict the right of foreign corporations to take and hold real property within its borders.[4]

§§ 696-700. *Foreign corporations — Their right to do business in the various states — Restrictions thereon.*— The corporations of one state may exercise any or all of their powers in another state, unless the latter state, by its statutes, decisions, or policy, forbids.[5] This right of a corporation to act and contract in any state is due to the spirit of comity between the states.[6] It is constitutional,

duly authorized by its charter to take it. White *v.* Howard, 46 N. Y. 144 (1871), followed in United States *v.* Fox, 94 U. S. 315 (1876), declaring void a devise of land in New York to the government of the United States.

[1] Seymour *v.* Slide, etc. Mines, 153 U. S. 523 (1894). The state alone can object to a foreign corporation holding more than five thousand acres of land in the state as prescribed by the statutes. American Mortgage Co. *v.* Tennille, 87 Ga. 28 (1891). Where a Connecticut company owning land in South Dakota sells it to a Minnesota corporation organized to speculate in land, a subsequent deed by the former company to an individual is not good. Only the state can question the power of the Minnesota corporation to take title. The constitutional provision of South Dakota relative to land does not change this rule. Gilbert *v.* Hole, 2 S. D. 164 (1891). Only the state can claim that a foreign corporation has no power to own land in the state. McKinley, etc. Co. *v.* Gordon, 113 Iowa, 481 (1901). Even though a foreign corporation is prohibited by statute from owning land in the state, and it purchases land in the name of an agent, and the agent transfers it without consideration, such foreign corporation may bring suit to recover the title to the land. Only the state can object to its owning the land. Omnium, etc. Co. *v.* North American T. Co., 68 Pac. Rep. 1089 (Kan. 1902).

[2] Reorganized Church, etc. *v.* Church of Christ, 60 Fed. Rep. 937 (1894).

[3] Fritts *v.* Palmer, 132 U. S. 282 (1889).

[4] Runyan *v.* Coster, 14 Pet. 122 (1840); Thompson *v.* Waters, 25 Mich. 214 (1872); United States *v.* Fox, 94 U. S. 315 (1876).

[5] Quoted and approved in Tootle *v.* Singer, 88 N. W. Rep. 446 (Iowa, 1901).

[6] As to the power of a foreign corporation to do business in New York, the court, in Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 591 (1894), said: "It seems to me to be very clear, upon examination of our laws and by reference to such judicial opinions, that there never was a time in the history of the state when a foreign corporation was prevented from entering its boundaries to transact any lawful business which a non-resident natural person might have transacted here." In People *v.* Fidelity, etc. Co., 153 Ill. 25 (1894), it was held that, in the absence of an express prohibitory statute, a corporation legally organized under the laws of another state to do a multiform insurance business may do such business in Illinois, although such a corporation could not be organized under the laws of Illinois.

however, for a state to refuse to allow that privilege,[1] except as against corporations engaged in interstate commerce.

A state may require a foreign corporation to pay a license fee before doing business within its borders.[2] A statute of a state prohibiting a foreign corporation from doing business in the state, if such corporation is connected with a trust, is constitutional.[3]

Foreign corporations must exercise their powers and franchises in accordance with the laws of the state where they do business, and in consonance with the principles of its general policy.[4] In

[1] Bank of Augusta *v.* Earle, 13 Pet. 519 (1839); Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876); Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343 (1875); Paul *v.* Virginia, 8 Wall. 168 (1868); affirmed in Ducat *v.* Chicago, etc., 10 Wall. 410 (1870); Matthews *v.* Theological Seminary, 2 Brewst. (Pa.) 541 (1868); Land Grant, etc. Co. *v.* Coffey County, 6 Kan. 245 (1870); Ducat *v.* Chicago, 48 Ill. 172 (1868); Williams *v.* Creswell, 51 Miss. 817 (1876); Hadley *v.* Freedmen's, etc. Co., 2 Tenn. Ch. 122 (1874); Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566 (1870); s. c. *sub nom.* Oliver *v.* Liverpool, etc. Ins. Co., 100 Mass. 531; Kennebec Co. *v.* Augusta Ins. etc. Co., 72 Mass. 204 (1856); Day *v.* Ogdensburgh, etc. R. R., 107 N. Y. 129 (1887), where a domestic company leased a railroad in another state; Kerchner *v.* Gettys, 18 S. C. 521 (1882); Mutual, etc. Ins. Co. *v.* Davis, 12 N. Y. 569 (1855); Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767 (1856); Doyle *v.* Continental Ins. Co., 94 U. S. 535 (1876); Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); People *v.* Philadelphia Fire Assoc., 92 N. Y. 311 (1883); Atterbury *v.* Knox, 4 B. Mon. (Ky.) 90 (1843), where foreign corporations were forbidden to do banking. See also Cooley, Const. Law, p. 183; Wharton, Conf. L., § 48*a*. In Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883), the court refused to *mandamus* the defendant, a register of deeds, to allow the plaintiff, a foreign corporation, to make abstracts of all the land in the county, there being no evidence of the corporate powers of the plaintiff. A foreign corporation may make a loan in Missouri. Ferguson *v.* Soden, 111 Mo. 208 (1892). An English corporation is of course an alien corporation. Eureka, etc. Co. *v.* Richmond, etc. Co., 2 Fed. Rep. 829 (1880). A state may exclude a foreign corporation from doing business in the state unless engaged in interstate business. Huffman *v.* Western, etc. Co., 13 Tex. Civ. App. 169 (1896).

[2] Walker *v.* Springfield, 94 Ill. 364 (1880); Pembina, etc. Co. *v.* Pennsylvania, 125 U. S. 181 (1888). A stockholder in a corporation cannot maintain a bill to enjoin the payment by the corporation of the tax imposed by act of congress upon such corporation for doing business in Alaska. Corbus *v.* Alaska, etc. Co., 187 U. S. 455 (1903).

[3] Waters-Pierce, etc. Co. *v.* Texas, 177 U. S. 28 (1900). The Tennessee statute prohibiting foreign corporations from doing business in the state where they have combined to lessen competition and influence prices is legal, and the state may file a bill to restrain foreign corporations from doing business in the state where they have violated such statute. State *v.* Schlitz, etc. Co., 59 S. W. Rep. 1033 (Tenn. 1900).

[4] Runyan *v.* Coster, 14 Pet. 122 (1840); *Re* Comstock, 3 Sawyer, 218 (1874); s. c., 6 Fed. Cas. 244; Phœnix Ins. Co. *v.* Commonwealth, 5 Bush (Ky.), 68 (1868); Gill *v.* Kentucky, etc. Co., 7 Bush (Ky.), 635 (1870); Martin *v.* Mobile, etc. R. R., 7 Bush (Ky.), 116 (1870); Milnor *v.* New York, etc. R. R., 53 N. Y. 363 (1873); Frazier *v.* Willcox, 4 Rob. (La.) 517

Missouri it is held that a foreign corporation admitted to do business in the state, either by comity or by express statutory provisions, can transact only the business which a domestic corporation of like character is authorized to transact, and hence that a foreign railroad company having power to build telegraph lines as well as a railroad cannot build a telegraph line in Missouri.[1]

The validity and enforceability of a contract by a foreign corporation are determined, not by its charter, but by the law prevailing where the contract is made.[2]

(1843); Bard *v.* Poole, 12 N. Y. 495 (1855); Diamond Match Co. *v.* Powers, 51 Mich. 145 (1883); Pierce *v.* Crompton, 13 R. I. 312 (1881); Stevens *v.* Pratt, 101 Ill. 206 (1882), holding that the general policy of a state restricting foreign corporations must be expressed in some affirmative way; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 564 (1847); 2 Kent, Com. 284, 285. The general incorporating law of Massachusetts, which does not allow incorporation for manufacturing liquor, does not prevent incorporation for selling liquor, and hence a foreign corporation may sell liquor in that state. Enterprise, etc. Co. *v.* Grimes, 173 Mass. 252 (1899). A foreign corporation may transact business within the state provided a similar domestic corporation may transact such business within the state. Floyd *v.* National, etc. Co., 49 W. Va. 327 (1901). Where the statutes of a state provide that a mortgage shall not be given by a domestic mining corporation on its mines, except by the consent of two-thirds of the capital stock, and the statutes also provide that foreign corporations shall not be allowed to do business within the state on more favorable terms than domestic corporations, a mortgage by a foreign corporation on a mine within the state, without the consent of the stockholders, is void. Williams *v.* Gold Hill, etc. Co., 96 Fed. Rep. 454 (1899); aff'd, 186 U. S. 157 (1902). *Cf.* Saltmarsh *v.* Spaulding, 147 Mass. 224. The legislature may require foreign coal mining corporations to weigh the coal before it is screened. Woodson *v.* State, 65 S. W. Rep. 465 (Ark. 1900).

[1] State *v.* Cook, 71 S. W. Rep. 829 (Mo. 1903).

[2] A charter provision prohibiting the corporation from selling its bonds below par does not invalidate the bonds when sold to a *bona fide* purchaser in another state. Elsworth *v.* St. Louis, etc. R. R., 33 Hun, 7; aff'd, 98 N. Y. 553 (1885). See also Philadelphia Loan Co. *v.* Towner, 13 Conn. 249 (1839); Nichols *v.* Mase, 94 N. Y. 160 (1883), holding that the holder of bonds issued by a foreign corporation, valid upon their face, is not bound to show that the provisions of the statute which authorize their issue have been complied with; Bard *v.* Poole, 12 N. Y. 495 (1855), holding that a corporation prohibited by its charter from contracting for interest over a certain rate may, however, contract for a greater rate in another state under whose laws it is legal. To same effect, Knox *v.* Bank of U. S., 26 Miss. 655 (1854), and Bank of U. S. *v.* Owens, 2 Pet. 527 (1829); American Life Ins. Co. *v.* Dobbin, Hill & D. (Lalor's Supp.) 252 (1843), where, construing the New York restraining act, it was held that a foreign corporation could purchase and sell promissory notes, but not bills of exchange; Bank of Chillicothe *v.* Dodge, 8 Barb. 233 (1850), holding that money paid by a foreign corporation in violation of a local law is recoverable by it. For cases under a statute of Missouri, see Bank of Louisville *v.* Young, 37 Mo. 398 (1866); Connecticut Mut. L. Ins. Co. *v.* Albert, 39 Mo. 181 (1866); Long *v.* Long, 79 Mo. 644 (1883). But corporate creditors and stockholders are subject

A state legislature may impose such terms, conditions, and restrictions upon foreign corporations, other than corporations engaged in interstate commerce, as it may see fit.[1] *Quo warranto* lies against foreign corporations doing business in a state contrary to its statutes.[2]

to provisions and regulations contained in the charter. Canada Southern Ry. *v.* Gebhard, 109 U. S. 527, 536 (1883), where a statutory recapitalization was held to be valid; Hitchcock *v.* U. S. Bank, 7 Ala. (N. S.) 386, 435 (1845), holding that the corporation can exercise only the powers given to it by its charter. A foreign corporation may take any interest allowed by the place of the contract, though such interest is usurious by its charter. Hitchcock *v.* U. S. Bank, 7 Ala. (N. S.) 386 (1845).

[1] Paul *v.* Virginia, 8 Wall. 168 (1868); Ducat *v.* Chicago, 10 Wall. 410 (1870); Doyle *v.* Continental Ins. Co., 94 U. S. 535 (1876); Lafayette Ins. Co. *v.* French, 18 How. 404 (1855), holding that a corporation doing business in such state is presumed to assent to its rules; State *v.* Lathrop, 10 La. Ann. 398 (1855); State *v.* Fosdick, 21 La. Ann. 434 (1869); Indiana *v.* American Exp. Co., 7 Biss. 227 (1876); s. c., 13 Fed. Cas. 24; Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); Smith *v.* Alford, 63 Barb. 415 (1866); Merrick *v.* Van Santvoord, 34 N. Y. 208 (1866); Lamb *v.* Lamb, 13 Bankr. Reg. 17 (1875); s. c., 14 Fed. Cas. 1016; Farmers', etc. Ins. Co. *v.* Harrah, 47 Ind. 236 (1874); Cincinnati Mut. etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870), holding that a charter power to transact business in other states does not exempt them from local restrictions; People *v.* Howard, 50 Mich. 239 (1883); People *v.* Philadelphia Fire Assoc., 92 N. Y. 311 (1883): Goldsmith *v.* Home Ins. Co., 62 Ga. 379 (1879), where a statute imposing upon foreign corporations the same license taxes as their own states impose was held constitutional; Home Ins. Co. *v.* Davis, 29 Mich. 238 (1874); Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767 (1856); American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26 (1880); Matthews *v.* Theological Seminary, 2 Brewst. (Pa.) 541 (1868); Commonwealth *v.* Milton, 12 B. Mon. (Ky.) 212 (1851); Tioga R. R. *v.* Blossburg, etc. R. R., 20 Wall. 137 (1873), prohibiting foreign corporations from setting up the statute of limitations. Foreign corporations doing business in a state which prescribes statutory provisions for that business cannot in contracts do away with the application to it of these provisions. Fletcher *v.* New York Life Ins. Co., 13 Fed. Rep. 526 (1882). The same rule applies to an insurance corporation chartered by congress. It must conform to state restrictions. Daly *v.* National Life Ins. Co., 64 Ind. 1 (1878). A railroad company, by going into another state and having and operating a road there, subjects itself to the legislation of that state. Stone *v.* Illinois Central R. R., 116 U. S. 347 (1885). Foreign corporations may be compelled to pay a license fee before doing business. Pembina, etc. Co. *v.* Pennsylvania, 125 U. S. 181 (1888).

[2] State *v.* Fidelity, etc. Co., 39 Minn. 538 (1888). *Mandamus* does not lie at the instance of the state to compel a foreign corporation to qualify to do business in the state. Secretary of State *v.* National, etc. Co., 86 N. W. Rep. 124 (Mich. 1901). Under the Nebraska statute, in a suit instituted by the state to enjoin a foreign corporation from doing business in the state on the ground that it is violating an anti-trust statute, the court may order the defendant to allow the plaintiff to examine the defendant's books and records for the purpose of obtaining evidence in the case. State *v.* Standard Oil Co., 61 Neb. 28 (1900). Where a foreign corporation has not complied with reasonable regulations by the state as a condition of its doing

Restrictions by a state on foreign corporations must not conflict with provisions of the federal constitution. Thus, the restriction must not interfere with interstate commerce,[1] or with the jurisdiction of the federal courts,[2] or with the removal of causes from state to United States courts.[3] Corporations are not "citizens" entitled

business in the state, *quo warranto* lies to oust it of its claim of right to do business in the state. State *v.* American, etc. Co., 69 Pac. Rep. 563 (Kan. 1902).

[1] Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1 (1877); Telegraph Co. *v.* Texas, 105 U. S. 460 (1881); Rae *v.* Grand Trunk Ry., 14 Fed. Rep. 401 (1882). A foreign corporation engaged in interstate commerce may sue in a state court without showing that it has complied with the laws of the state entitling it to do business there. Zion, etc. Assoc. *v.* Mayo, 22 Mont. 100 (1899). A foreign corporation may sue a railroad company in Texas for breach of a contract in regard to transportation of cattle from Texas to another state, even though such foreign corporation has not filed its charter with the secretary of state, and hence could not maintain any other suit. A state cannot prohibit a foreign corporation from instituting suit on a contract involving interstate commerce. Texas, etc. Ry. *v.* Davis, 93 Tex. 378 (1900); Pasteur, etc. Co. *v.* Burkey, 22 Tex. Civ. App. 232 (1899). Where an Indiana corporation ships goods to Texas, it may sue in Texas for the price thereof, although it has not filed its articles of incorporation in Texas as required by statute. The business is interstate business. A foreign corporation not having an office in the state may sell machinery to persons in Tennessee without filing its papers, etc. Milan, etc. Co. *v.* Gorten, 93 Tenn. 590 (1894). The Arkansas provision requiring foreign corporations to file certificates, etc., and rendering void contracts made by a foreign corporation not complying therewith, does not apply to a sale of a sewing-machine made in Ohio and shipped to Arkansas, this being interstate commerce. Gunn *v.* White S. M. Co., 57 Ark. 24 (1892). As against a milling company that solicits business and sells goods through commercial agents, the statute of Texas prohibiting a foreign corporation from transacting business in the state without filing its articles of incorporation with the secretary of state is void as being an interference with interstate commerce. Bateman *v.* Western, etc. Co., 1 Tex. Civ. App. 90 (1892). See also cases in note, p. 1676, restricting the application of these statutes where sales are made through agents, etc.

[2] Baltimore, etc. R. R. *v.* Cary, 28 Ohio St. 208 (1876); Moore *v.* Chicago, etc. Ry., 21 Fed. Rep. 817 (1884).

[3] Southern Pac. Co. *v.* Denton, 146 U. S. 202 (1892); Barron *v.* Burnside, 121 U. S. 186 (1887); Doyle *v.* Continental Life Ins. Co., 94 U. S. 535 (1876); Insurance Co. *v.* Morse, 20 Wall. 445 (1874); Shelby *v.* Hoffman, 7 Ohio St. 450 (1857); Hartford F. Ins. Co. *v.* Doyle, 6 Biss. 461 (1875): S. C., 11 Fed. Cas. 702. A statute requiring foreign corporations to agree not to remove suits to the federal courts is void. Rece *v.* Newport News, etc. Co., 32 W. Va. 164 (1889); Commonwealth *v.* East Tennessee Coal Co., 97 Ky. 238 (1895). Under the statute of North Carolina requiring foreign telephone companies to file copies of their charter and by-laws and thereby become domestic corporations before doing business in the state, a foreign telephone company that has complied with this cannot remove a case to the federal court on the ground of diverse citizenship. Debnam *v.* Southern, etc. Co., 36 S. E. Rep. 269 (N. C. 1900). A contrary conclusion was reached in South Carolina as to a foreign railroad corporation. Wilson *v.* Southern Ry., 36 S. E. Rep. 701 (S. C. 1900). A statute

to the privileges and immunities of citizens in the several states within the meaning of article 4, section 2, of the constitution of the United States.[1] A state cannot prohibit agents of foreign corporations entering the state and selling goods.[2] A statute requiring corporations, foreign and domestic, to pay their employees once a month and giving the latter a lien prior to all liens, excepting recorded mortgages, is unconstitutional as being a grant of special privileges, and as denying the corporation the equal protection of the laws, and as depriving them of their property without due process of law in that such statute interferes with the freedom to make contracts.[3] Where a foreign railroad company has extended its lines into a state under a statute, the legislature of the latter state cannot afterwards require it to become a domestic corporation. Such a statute impairs the obligation of the contract.[4] Where the statutes provide that no foreign corporation shall transact business which a domestic corporation cannot transact, and domestic corporations are not allowed to act as executors, a foreign corporation cannot act as such in the state.[5]

A statute making void all contracts made in the state by foreign corporations unless a certain fee is paid to the state is unconstitutional as to sales made by traveling salesmen of foreign corporations.[6]

requiring foreign corporations to file a stipulation and obtain a permit, which is forfeited in case the corporation removes any case to the federal courts, is void. And even if valid the corporation cannot be forbidden to litigate past rights or recover property already acquired. Texas, etc. Co. *v.* Worsham, 76 Tex. 556 (1890). See also Allen *v.* Texas, etc. Ry., 25 Fed. Rep. 518 (1885), where a consolidation of a United States corporation with domestic corporations had been made and state statutes prohibited the removal.

[1] Paul *v.* Virginia, 8 Wall. 168 (1868), holding that a statute requiring foreign insurance companies to obtain a license before doing business is not in conflict with that clause; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521 (1876); Tatem *v.* Wright, 23 N. J. L. 429, 444 (1852); Warren Mfg. Co. *v.* Ætna Ins. Co., 2 Paine, 501 (c. 1837); s. c., 29 Fed. Cas. 294; Fire Department *v.* Noble, 3 E. D. Smith, 440 (1854); Ducat *v.* Chicago, 48 Ill. 172 (1868); Cincinnati, etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870); Pierce *v.* Crompton, 13 R. I. 312 (1881). *Cf.* McKinley *v.* Wheeler, 130 U. S. 630 (1889); Thomas *v.* Chisholm, 13 Colo. 105 (1889).

[2] Davis, etc. Co. *v.* Dix, 64 Fed. Rep. 406 (1894).

[3] Johnson *v.* Goodyear, etc. Co., 59 Pac. Rep. 304 (Cal. 1899). To same effect, State *v.* Haun, 59 Pac. Rep. 340 (Kan. 1899).

[4] Commonwealth *v.* Mobile, etc. R. R., 64 S. W. Rep. 451 (Ky. 1901). Under the Kentucky statutes prohibiting foreign corporations from owning or operating railroads in the state until they have become domestic corporations, and prescribing the method of becoming such, they do become domestic corporations if they comply therewith. Davis, Adm'r, *v.* Chesapeake, etc. Ry., 70 S. W. Rep. 857 (Ky. 1902).

[5] Farmers', etc. Co. *v.* Smith, 51 Atl. Rep. 609 (Conn. 1902).

[6] Aultman, etc. Co. *v.* Holder, 68 Fed.

Where a state statute provides that contracts made by foreign corporations shall not be enforced in the courts of the state before compliance with certain requirements of the statute, the prohibition will not be extended to suits brought in the federal courts, the contracts not being void.[1] Even though a foreign corporation is engaged in a state in manufacturing products and sending them beyond the limits of the state, yet a state statute forbidding foreign corporations to transact business in the state until they have filed a copy of their charter with the secretary of state is legal, and the penalty that the contracts of such a corporation in the state are void as regards the corporation, but are enforceable against the corporation, applies, and such statute may apply to a contract made after the statute was enacted but before it went into effect.[2]

A requirement that a foreign corporation shall duly execute a power of attorney appointing an agent upon whom service of process may be made, or obtain a certificate from a state officer, is valid. The corporation is usually forbidden to contract or sue in the state before complying with it. It was formerly held that contracts made before complying with the requirement were void;[3]

Rep. 467 (1895). It has been held that a license fee required of foreign corporations before doing business in the state is unconstitutional as an interference with interstate commerce. Coit *v.* Sutton, 102 Mich. 324 (1894). But see Moline Plow Co. *v.* Wilkinson, 105 Mich. 57 (1895). A statute by which Pennsylvania requires a New York railroad corporation doing business in Pennsylvania to pay to the latter a part of coupons due to residents of Pennsylvania, such coupons being by their terms payable in New York, is void. New York, Lake Erie, etc. R. R. *v.* Pennsylvania, 153 U. S. 628 (1894).

[1] Sullivan *v.* Beck, 79 Fed. Rep. 200 (1897). A statute that no suit shall be brought by a foreign corporation which shall not have filed a statement concerning its business does not prevent the federal courts from exercising jurisdiction. Barling *v.* Bank of British N. A., 50 Fed. Rep. 260 (1892). See 120 id. 893.

[2] Diamond, etc. Co. *v.* United States, etc. Co., 187 U. S. 611 (1903); the court holding also that the corporation is doing business in the state when it takes the management of a factory and helps to operate it and supplies it with a superintendent. The supreme court of the United States will not review a decision of the highest court of a state to the effect that a foreign corporation that has not complied with the statute of the state relative to filing a copy of its charter, etc., cannot have the benefit of the laws of the state. Telluride, etc. Co. *v.* Rio Grande, etc. Co., 187 U. S. 569 (1903); 23 S. C. 630 (1902).

[3] *Re* Comstock, 3 Sawyer, 218 (1874); s. c., 6 Fed. Cas. 244; Bank of British Columbia *v.* Page, 6 Oreg. 431 (1877); Semple *v.* Bank of British Columbia, 5 Sawyer, 88 (1878); s. c., 21 Fed. Cas. 1063; Oregon, etc. Inv. Co. *v.* Rathbun, 5 Sawyer, 32 (1877); s. c., 18 Fed. Cas. 764; but here a note made in Oregon, but payable in Scotland, was treated as if made in Scotland; American Button, etc. Co. *v.* Moore, 2 Dak. 280 (1880), holding under a similar statute that the foreign corporation could sue in the courts of the state, but could not transact business. To same effect, Utley *v.* Clark-Gardner, etc. Co., 4 Colo. 369 (1878); Columbus Ins. Co. *v.* Walsh, 18 Mo. 229 (1853); Union, etc. Co. *v.* Thomas, 46 Ind. 44

but the later doctrine is that they are not void, though not enforceable until compliance,[1] and that the corporation cannot defeat its obligations by such a defense.[2] Some states have gone much farther than this, and have declared void and unenforceable the contracts of foreign corporations which have not complied with the state laws in reference to filing certificates, appointing a local agent, and keeping an office in the state. The courts endeavor to alleviate the harshness of such statutes as much as possible, but do not always

(1874); Farmers', etc. Ins. Co. *v.* Harrah, 47 Ind. 236 (1874); Smith *v.* Little, 67 Ind. 549 (1879), holding that the statute referred only to actions upon contract and not to suits in replevin; Beard *v.* Union, etc. Pub. Co., 71 Ala. 60 (1881), holding that soliciting subscriptions for a foreign newspaper is not "doing business" within the meaning of such a statute; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536 (1865), holding, however, that a contract is not void as to a citizen; Morgan *v.* White, 101 Ind. 413 (1884), holding that requiring an agent to file his authority to act does not apply to a general agent appointing local agents; American Ins. Co. *v.* Butler, 70 Ind. 1 (1880), holding that a failure of the state officer to furnish the proper certificate after the corporation has substantially complied with the statute does not affect its contracts; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394 (1860). A statute to the effect that foreign corporations doing business in the state shall file an appointment of an agent in the state does not prohibit the doing of such business without the appointment of an agent, but merely provides for a convenient means of obtaining jurisdiction. Tolerton, etc. Co. *v.* Barck, 84 Minn. 497 (1901). In Minnesota the statute prohibiting foreign corporations from maintaining suits in the state where they have not complied with the law relative to filing papers with the secretary of the state is construed as prohibiting suit, even though such papers were filed after the commencement of the suit; and the court intimated that even a compliance with the statute after the contract was made would be insufficient. Heilman, etc. Co. *v.* Peimeisl, 85 Minn. 121 (1901).

[1] Walter A. Wood, etc. Co. *v.* Caldwell, 54 Ind. 270 (1876); Singer Mfg. Co. *v.* Brown, 64 Ind. 548 (1878); Elston *v.* Piggott, 94 Ind. 14 (1883), holding that advantage of the failure to comply can only be taken by answer in abatement, and that a foreclosure and title under sale cannot be questioned on that ground; American Ins. Co. *v.* Butler, 70 Ind. 1 (1880); Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347 (1879); National Mut. F. Ins. Co. *v.* Pursell, 92 Mass. 231 (1865); Hagerman *v.* Empire Slate Co., 97 Pa. St. 534 (1881), holding that a foreign corporation cannot take advantage of its own neglect to file the power of attorney; and that service upon an acting agent will suffice in such case; American Ins. Co. *v.* Wellman, 69 Ind. 413 (1879); American, etc. Co. *v.* East, etc. R. R., 37 Fed. Rep. 242 (1889). Stockholders dealing with their corporation cannot defeat their contracts by alleging that it was a foreign corporation and had not complied with the state laws. Kilgore *v.* Smith, 122 Pa. St. 48 (1888); 54 Atl. Rep. 153.

[2] Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37 (1880), holding that a foreign corporation doing business in the state cannot set up its failure to comply with the provisions of the statute relating to such companies to defeat an action on contract. A corporation cannot repudiate its obligations on the ground that it was not authorized to do business in the state. Williams *v.* Bank of Commerce, 71 Miss. 858 (1894).

succeed. Various decisions on different statutes are given in the notes below.[1] The supreme court of the United States has held that, where a contract made by a foreign corporation is not to be valid until approved in its home office in another state, the con-

[1] Under the New York act providing that foreign corporations shall not sue on contracts where they have not taken out a license from the state, a foreign corporation may, subsequently to the breach of contract, take out a license and then sue. Neuchatel, etc. Co. *v.* Mayor, etc., 155 N. Y. 373 (1898). A failure to file the certificate is a question that cannot be raised for the first time in the higher court. Dahl *v.* Montana Copper Co., 132 U. S. 264 (1889); Northwestern, etc. Ins. Co. *v.* Overholt, 4 Dill. 287 (1878); s. c., 18 Fed. Cas. 403, where, the requirement not being made a condition precedent to doing business, a foreign corporation which had not complied with it was held to have power to take a mortgage upon real estate. A statute compelling a foreign corporation to file its charter before doing business in the state may have the effect of making it a domestic corporation. James *v.* St. Louis, etc. Ry., 46 Fed. Rep. 47 (1891). A corporate agent who employs labor and buys goods in the state for a foreign corporation which has not complied with the law prohibiting such corporations to do business in the state until a resident office and agent have been named is personally liable for such labor and goods. Lasher *v.* Stimson, 145 Pa. St. 30 (1892). The objection that the foreign corporation has not filed the statement as required by statute must be clearly raised in order to be available. Campbell, etc. Co. *v.* Hering, 139 Pa. St. 473 (1891). Although the statute requires foreign corporations doing business in the state to file a power of attorney authorizing the commissioner of corporations to accept service for them, yet a corporation not doing so may sue on one of the contracts. Rogers, etc. Co. *v.* Simmons, 155 Mass. 259 (1892). A foreign corporation for mining and *various other purposes* cannot file its certificate under the Michigan statute authorizing foreign corporations for mining purposes to file such certificate and have all the rights of domestic corporations. Isle Royale Land Corp. *v.* Osmun, 76 Mich. 162 (1889). Where the statute requires foreign corporations to file a statement of their condition before doing business, a foreign corporation cannot enforce a contract until it does so. Walter A. Wood, etc. Co. *v.* Caldwell, 54 Ind. 271 (1876). But it may recover from an agent money paid to him for it. U. S. Express Co. *v.* Lucas, 36 Ind. 361 (1871). Although the statutes require a foreign corporation. before doing any business in the state, to file certain papers, and make it a misdemeanor not to do so, yet this does not render contracts void, although such statute is not complied with. Dearborn Foundry Co. *v.* Augustine, 5 Wash. St. 67 (1892).

Parties who have contracted with a foreign corporation and received the benefits of the contract cannot, when sued upon the contract, set up that the company has not complied with the statutory requisites in regard to doing business in the state. Washburn Mill Co. *v.* Bartlett, 3 N. D. 138 (1893). A foreign corporation may sue on contracts made out of the state, although it has not complied with the law as to contracts made in the state. White River Lumber Co. *v.* Southwestern Imp. Assoc., 55 Ark. 625 (1892). A foreign corporation purchasing a piece of machinery in the state may be held liable therefor, although it has not filed the certificate. Colorado Iron Works *v.* Sierra Grande Min. Co., 15 Colo. 499 (1890). A bondsman for a corporate

tract is not made within the former state, within the meaning of the Michigan statute declaring all contracts void when made by foreign corporations in the state without having filed their articles of association in that state,[1] and the tendency of the courts is to restrict these statutes, as regards occasional transactions or sales

agent cannot escape liability by alleging that the corporation has not complied with the law relative to foreign corporations. Singer Mfg. Co. *v.* Hardee, 4 N. M. 175 (1888); American, etc. Co. *v.* Bateman, 22 S. W. Rep. 771 (Tex. 1893). Under the California statute forbidding foreign corporations to maintain suits until a certain statement has been published, the publication may be prior to the time specified in the statute. Bank of British N. A. *v.* Madison, 99 Cal. 125 (1893), passing upon the requisites of the statute, and what constitutes compliance therewith. In Wright *v.* Lee, 4 S. Dak. 237 (1893). the court passed upon the statute which requires foreign corporations to file a copy of their articles of incorporation, etc., with the secretary of state, and prohibiting the doing of business by such corporations until such certificates are filed. The court held that the failure to file such a certificate did not invalidate contracts of the corporation. As to the Mississippi statute relative to foreign corporations doing business in the state, see Hart *v.* Livermore, etc. Co., 72 Miss. 809 (1895). A statute that a foreign corporation, upon filing its charter, shall become a domestic corporation is constitutional as to the right to construct a railroad. State *v.* Southern Ry., 48 S. C. 49 (1896). A foreign corporation is doing business in a state, within the meaning of a statute, where a mortgage deed of trust is made to a resident for the benefit of such foreign corporation. Myers, etc. Co. *v.* Wetzel, 35 S. W. Rep. 896 (Tenn. 1896). The Tennessee statute prohibiting foreign corporations doing business in the state without first complying with certain requisites does not render invalid a note held by a *bona fide* purchaser from a foreign corporation. Lauter *v.* Jarvis, etc. Co., 85 Fed. Rep. 894 (1897). The defense that a corporation has not filed its articles in the county where property is to be foreclosed must be set up by plea in abatement. Ontario State Bank *v.* Tibbits, 80 Cal. 68 (1890). An alien corporation may sue to recover back taxes paid under protest, although it has not filed its charter as required by statute. Powder River Cattle Co. *v.* Custer County, 9 Mont. 145 (1889). A foreign railroad company cannot avoid its contracts in the state by reason of a subsequent statute prohibiting it from doing business in the state unless it first becomes a domestic corporation. Newport, etc. Co. *v.* McDonald, etc., Assignee, 59 S. W. Rep. 332 (Ky. 1900). Under the Utah statute a foreign corporation cannot defend against condemnation if it has not complied with the Utah statute relative to foreign corporations. Rio Grande, etc. Ry. *v.* Telluride, etc. Co., 63 Pac. Rep. 995 (Utah, 1900). The Wisconsin statute that a foreign corporation doing business within the state without complying with the statute cannot enforce a contract, but such contract shall be void, was upheld in City of Ashland *v.* Whitcomb, 89 N. W. Rep. 886 (Wis. 1902). See 53 Atl. Rep. 533.

[1] Holder *v.* Aultman, 169 U. S. 81 (1898). An agreement of a foreign corporation to sell all its property cannot be enforced by the corporation in Michigan, where such corporation has not complied with the Michigan statute relative to doing business within the state. Rough *v.* Breitung, 117 Mich. 48 (1898).

by agents.[1] Moreover such transactions are practically interstate commerce.[2]

In Alabama there has been a large number of decisions on this subject of foreign corporations transacting business in the state.[3]

[1] Where a Maine corporation has no office in New York, but merely receives orders from New York and fills them by shipments to New York, it is not doing business in the latter state within the meaning of the statute requiring foreign corporations to obtain a certificate allowing it to do business in the state. Vaughn, etc. Co. *v.* Lighthouse, 64 N. Y. App. Div. 138 (1901). A foreign corporation that makes a single sale and takes a guarantee of payment in New Jersey is not doing business within that state within the meaning of the statute applicable to such corporations. Delaware, etc. Co. *v.* Mahlenbrock, 63 N. J. L. 281 (1899). A loan by a New York building association in Pennsylvania, secured by mortgage in the latter state, but the debt being payable in New York, is not within the Pennsylvania statute prohibiting foreign corporations doing business within the state without complying with certain requirements. People's, etc. Assoc. *v.* Berlin, 50 Atl. Rep. 308 (Pa. 1901). A foreign corporation which has sold a bill of goods to an Illinois corporation in that state may sue for the price, although it has no office in the state. John Spry, etc. Co. *v.* Chappell, 184 Ill. 539 (1900). A foreign corporation's purchase of property located in the state, the purchase being made out of the state, is not doing business in the state. Lakeview, etc. Co. *v.* San Antonio, etc. Co., 66 S. W. Rep. 766 (Tex. 1902). A foreign corporation is not doing business in the state, within the meaning of the Ohio law, where the corporation merely sells through traveling agents and delivers goods manufactured outside of the state. Toledo, etc. Co. *v.* Glen, etc. Co., 55 Ohio St. 217 (1896). The Montana statute requiring foreign corporations to file their charter in the state before doing business there does not apply to a foreign trust company which purchases bonds of a domestic corporation and takes a mortgage to secure them. Gilchrist *v.* Helena, etc. R. R., 47 Fed. Rep. 593 (1891). The statute relative to foreign corporations doing business in the state is not applicable to loans made out of the state, and the securities delivered and money paid out of the state. Scruggs *v.* Scottish Mortgage Co., 54 Ark. 566 (1891); Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727 (1885), holding that a single act, without the purpose of doing others, in a state does not bring a foreign corporation within the statute of the state forbidding it to transact business there without complying with certain requirements. A single transaction by which a foreign corporation builds a sugar factory in the state and warrants its efficiency is not "carrying on" business in the state within the meaning of the Michigan statute rendering contracts of foreign corporations void unless they have first paid a tax to the state, such statute, however, not being applicable to corporations engaged entirely in interstate commerce. Oakland, etc. Co. *v.* Fred W. Wolf Co., 118 Fed. Rep. 239 (1902). Even though a foreign corporation purchases land in the state, yet if the purchase was made outside of the state, this is not doing business in the state. Goldberry *v.* Carter, 41 S. E. Rep. 858 (Va. 1902).

[2] See note 1, p. 1675, *supra*.

[3] In the case of Dundee, etc. Co. *v.* Nixon, 95 Ala. 318 (1891), an alien corporation failed in its suit on a note because it had no known place of business or authorized agent in Alabama, as required by the constitution and statutes of the state. The note was dated in that state. A purchase of brick in an-

Restrictions upon foreign insurance companies are found in all the states and are strictly enforced.[1]

The Tennessee statute giving its citizens preference as to assets

other state, to be delivered in the state, is an act of interstate commerce, and a foreign corporation making the sale need not comply with the state laws. A foreign corporation may bring suit in the state without complying with the state law in regard to having a place of business and an agent in the state. Cook *v.* Rome Brick Co., 98 Ala. 409 (1893). Where a foreign corporation not complying with the statute sells chattels, the sale is void and the corporation may reclaim its property. Boulden *v.* Estey Organ Co., 92 Ala. 182 (1890). The statute against foreign corporations doing business in the state unless they conform to certain requisites does not apply to interstate traffic, such as selling goods to be shipped in, having been sold out of, the state. Ware *v.* Hamilton, etc. Co., 92 Ala. 145 (1890). The objection as to the failure to file the certificate cannot be raised for the first time on appeal. Ginn *v.* New England, etc. Co., 92 Ala. 135 (1890). A mortgagor to a foreign insurance company cannot demur to a bill for foreclosure on the ground that the taking of the mortgage was *ultra vires* and no certificate was filed. Boulware *v.* Davis, 90 Ala. 207 (1890). A mortgage taken by a foreign corporation in Alabama which has no known place of business or authorized agent in the state, as required by the constitution of the state, is void and not enforceable. Farrior *v.* New England, etc. Co., 88 Ala. 275 (1889). A foreign corporation suing in Alabama to enforce a mortgage made in that state must allege that it has a known place of business and an authorized agent in the state. Christian *v.* American, etc. Co., 89 Ala. 198 (1889). An agent suing a person for a commission on a loan made by the latter with a foreign corporation which has not filed its certificate as required by statute cannot recover. Dudley *v.* Collier, 87 Ala. 431 (1888). For a valuable discussion as to what constitutes the doing of business in the state, see Sullivan *v.* Sullivan Timber Co. 103 Ala. 371 (1894).

[1] If an insurance company does business in the state without complying with the statutory conditions it cannot collect a premium note. Reliance Mut. Ins. Co. *v.* Sawyer, 160 Mass. 413 (1894); Cincinnati Mut. etc. Co. *v.* Rosenthal, 55 Ill. 85 (1870), holding that a premium note given to a foreign company which had not obtained a certificate from the state auditor as required was void in its hands. To same effect, Hoffman *v.* Banks, 41 Ind. 1 (1872), and Roche *v.* Ladd, 83 Mass. 436 (1861); Ætna Ins. Co. *v.* Harvey, 11 Wis. 394 (1860), where filing a statement of the condition with the secretary of state was required; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526 (1883); Charter Oak L. Ins. Co. *v.* Sawyer, 44 Wis. 387 (1878), but holding that they may sue for or secure debts due from residents without complying with such statutes; Williams *v.* Cheney, 69 Mass. 215 (1855), but holding that a premium note void for this reason is valid in the hands of a *bona fide* holder for value without notice; Jones *v.* Smith, 69 Mass. 500 (1855), holding that the payee of a premium note must prove compliance by the insurance company with the statute; Ehrman *v.* Teutonia Ins. Co., 1 Fed. Rep. 471 (1880), holding that if the statute merely imposes penalties for non-compliance with such requirements, the contracts of a foreign corporation not complying are not void. To same effect is King *v.* National M. & E. Co., 4 Mont. 1 (1881); Clark *v.* Middleton, 19 Mo. 53 (1853), holding that the failure of an agency to file a statement was not to make void a promise to pay premium notes given

of an insolvent foreign corporation within the state is unconstitutional as to non-resident persons, but is constitutional as to foreign corporations, which are creditors of the insolvent corporation.[1]

A foreign corporation may sue or be sued in the courts of a state provided jurisdiction is properly obtained.[2]

to the foreign insurance company; Brooklyn Life Ins. Co. *v.* Bledsoe, 52 Ala. 538 (1875), holding that a foreign corporation cannot avail itself of its own failure to comply; Union, etc. Ins. Co. *v.* McMillen, 24 Ohio St. 67 (1873), holding that neglect to comply does not make void a policy issued by a foreign company nor excuse the holder from paying premiums; Eureka Ins. Co. *v.* Parks, 1 Cin. Super. Ct. (Ohio), 574 (1871), holding that a company which issues a policy on property in another state from its home office is not subject to the restricting statute of that state, though it has paid a commission for obtaining the insurance to a resident thereof; Mutual, etc. Ins. Co. *v.* Bales, 92 Pa. St. 352 (1879), holding that it cannot recover from sureties upon an agent's bond unless it has complied with a statute requiring the agents to be commissioned. To same effect, Thorne *v.* Travelers' Ins. Co., 80 Pa. St. 15 (1875); but in U. S. Life Ins. Co. *v.* Adams, 7 Biss. 30 (1873); s. c., 28 Fed. Cas. 816, it was held that compliance with a restraining act is not essential to the validity of an agent's bond; Lamb *v.* Bowser, 7 Biss. 315 (1876); s. c., 14 Fed. Cas. 980, holding that a policy of insurance is not void because the company has not complied with the statute. *Cf.* Isle Royale Land Corp. *v.* Osmun, 76 Mich. 162 (1889). As a defense to a note, see Dudley *v.* Collier, 87 Ala. 431 (1880). See also § 696, notes, *supra;* Charter Oak, etc. Ins. Co. *v.* Sawyer, 44 Wis. 387 (1878), holding that it may sue or take security for a debt without complying with the local act. To same effect, Columbus Ins. Co. *v.* Walsh, 18 Mo. 229 (1853). See also People *v.* Howard, 50 Mich. 239 (1883).

[1] McClung *v.* Embreeville, etc. Ry., 103 Tenn. 399 (1899), following Blake *v.* McClung, 172 U. S. 239, 259 (1898).

[2] This question is fully discussed in §§ 757, 758, *infra;* 54 Atl. Rep. 247.

CHAPTER XLII.

STOCKHOLDER'S ACTIONS TO HOLD THE DIRECTORS LIABLE FOR NEGLIGENCE IN THE DISCHARGE OF THEIR DUTIES.

§ 701. *Remedy of the stockholder herein.*— Where, by reason of the negligence of the directors or other officers, the corporate funds, property, or rights have been lost, the injury is practically and ultimately an injury to the stockholders. But, in the eye of the law, the injury is to the corporation itself. The loss has depleted its treasury. Moreover, the negligent act was in reference to the affairs of the corporation. Accordingly, it is for the corporation to call the directors to an account for their negligence. The action is not one which the stockholder is to bring. The negligence affects him, not directly, but indirectly. Hence, the law is well settled that a stockholder cannot bring the ordinary action at law for damages against the corporate directors for their negligence in the management of the corporate affairs.[1] It is clear also that the stockholder cannot hold the corporation itself liable for the negligence herein of its directors. To allow such an action would be to make part of the stockholders liable to other stockholders for the loss, when all are equally injured, equally innocent, and equally in position to complain.[2] The usual and proper remedy is for the corporation itself to institute a suit at law against the guilty directors.[3] If, however, the corporation is under the control of the guilty parties, or if it refuses to sue when requested by stockholders to do so, then the stockholder himself may bring a suit in equity in his own behalf, and in behalf of all other stockholders who may wish to come in, making the corporation and the guilty parties the defendants, and compel them to make good to the corporation the corporate money or property lost by their negligence.[4] The money or property recovered in such an action be-

[1] See § 734, *infra.*

[2] Oliphant *v.* Woodburn, etc. Co., 63 Iowa, 332 (1884).

[3] Empire State Sav. Bank *v.* Beard, 151 N. Y. 638 (1896), reversing 81 Hun, 184. In Wisconsin it is held that the remedy of the corporation may be in equity. North Hudson, etc. Assoc. *v.* Childs, 82 Wis. 460 (1892). See also Horn, etc. Co. *v.* Ryan, 42 Minn. 196 (1889), and § 734, *infra.*

[4] See §§ 734, 740, *infra.*

longs to the corporation, and not to the stockholder who brings the suit.[1] In a stockholder's suit to hold the directors liable for negligence, the acts of negligence need not be set out with great particularity. The suit is in a court of equity, and the court decides the questions of fact, since the suit is in the nature of an accounting.[2] A general allegation, however, that the board of directors were negligent does not render a particular director liable.[3] It has been held that a suit by the corporation against the directors for negligence may be in equity;[4] but the prevailing rule is that its remedy is at law alone.[5] A receiver may institute the suit.[6] An action by the

[1] Evans *v.* Brandon, 53 Tex. 56 (1880); Dewing *v.* Perdicaries, 96 U. S. 193, 198 (1877); Smith *v.* Poor, 40 Me. 415 (1855); Carter *v.* Ford, etc. Co., 85 Ind. 180 (1882). See also § 734, *infra.*

[2] Halsey *v.* Ackerman, 38 N. J. Eq. 501 (1884), aff'g Ackerman *v.* Halsey, 37 N. J. Eq. 356. This case holds also that the stockholder's action lies even after the corporation has become insolvent. See also Smith *v.* Poor, 3 Ware, 148 (1858); s. c., 22 Fed. Cas. 627; Gardiner *v.* Pollard, 10 Bosw. 674 (1863); and § 734, *infra.* Where a stockholder brings a suit at law against a board of directors for negligence in allowing the cashier to wreck the bank, the directors having been such for different periods of time, there is a misjoinder of causes of action. Sayles *v.* White, 18 N. Y. App. Div. 590 (1897). Where the stock which a person holds in a national bank has been sold for non-payment of an assessment, rendered necessary by negligence of the directors, he may file a bill in equity to hold them personally liable for his loss. Hanna *v.* People's, etc. Bank, 35 N. Y. Misc. Rep. 517 (1901).

[3] Fisher *v.* Graves, 80 Fed. Rep. 590 (1897).

[4] Horn, etc. Co. *v.* Ryan, 42 Minn. 196 (1889). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock, and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. National Bank, etc. *v.* Wade, 84 Fed. Rep. 10 (1897). The remedy of a corporation against its manager for mismanagement, fraud, neglect, and wrongful acts may be in equity on the ground of an accounting, even though an action at law for tort would lie. Empire State Tel. Co. *v.* Bickford, 72 Hun, 580 (1893), reversed on another point in 142 N. Y. 224; 120 Fed. Rep. 440.

[5] Empire State Sav. Bank *v.* Beard, 151 N. Y. 638 (1896), reversing 81 Hun, 184 (1894), holding also that all the guilty parties should be joined as defendants.

[6] Robinson *v.* Hall, 59 Fed. Rep. 648 (1894); O'Brien *v.* Fitzgerald, 143 N. Y. 377 (1894). A suit against directors to hold them liable for negligence and mismanagement may be in equity and may be filed by the receiver. Fisher *v.* Parr, 92 Md. 245 (1901). A receiver of a national bank may sue the directors for negligence and fraud on their part. Cockrill *v.* Abeles, 86 Fed. Rep. 505 (1898). A receiver may sue them for negligence, as the corporation might have done. Movius *v.* Lee, 30 Fed. Rep. 298 (1887). As to the right of corporate creditors to sue for negligence, and an action by a receiver or assignee in behalf of them, see Warner *v.* Hopkins, 111 Pa. St. 328 (1886). Where a receiver sues directors for negligence, stockholders are not proper parties. Kimball *v.* Ives, 30 Hun, 568 (1883). Where a receiver has been appointed it is for him and not for a stockholder to hold the directors responsible for mismanage-

receiver against directors for negligence should be at law, and there must be a separate suit against each director.[1] An action by the receiver to hold a director liable for negligence does not abate by the death of such director.[2] The court may authorize the receiver to compromise claims against directors for negligence.[3] In a stock-

ment of a bank. Howe *v.* Barney, 45 Fed. Rep. 668 (1891). A stockholder or creditor may hold a director liable for negligence where a receiver cannot. Briggs *v.* Spaulding, 141 U. S. 132, 150 (1891). A receiver of a national bank may hold the directors personally liable for losses where they left the entire management in the hands of the officers and made no inquiries. The court held them liable from the time when, dividends having ceased, they were bound to investigate. Gibbons *v.* Anderson, 80 Fed. Rep. 345 (1897). A creditor of an insolvent bank may hold the directors liable for allowing the president to borrow an unreasonably large sum without good security, and for allowing him to purchase stock of the bank with bank funds. Such suit must be for the benefit of all creditors, and the results of the suit will be administered by the court. Gores *v.* Day, 99 Wis. 276 (1898). A receiver of an insolvent bank may sue the directors for damages for their negligence, and it is not necessary to join as defendants all the directors. Coddington *v.* Canaday, 61 N. E. Rep. 567 (Ind. 1901), holding also that even though the stockholders of a bank assent to the notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor. A receiver of an insolvent bank may, in behalf of creditors, hold the directors personally liable for negligence leading to a defalcation by the cashier. Campbell *v.* Watson, 50 Atl. Rep. 120 (N. J. 1901). Under the statutes of Wisconsin the affairs of an insolvent corporation may be wound up and the directors held liable for fraud or negligence and stockholders held liable under statutory liability, all in one suit. Gager *v.* Marsden, 101 Wis. 598 (1899). A stockholder in a national bank who has been subjected to a statutory liability may sue the directors, in behalf of the corporation, to render them liable for their gross negligence, the receiver having neglected to sue. Nelson *v.* Burrows, 9 Abb. N. Cas. 280 (1881), giving the complaint in full. After a receiver has been appointed the remedy of the stockholder to hold the directors liable for negligence is by petition to the receiver to institute a suit. Cunningham *v.* Wechselberg, 105 Wis. 359 (1900). In a stockholder's suit to hold directors in a national bank liable for negligence, a request to the receiver to bring the suit is unnecessary where the receiver was one of the directors. Flynn *v.* Third Nat. Bank, 81 N. W. Rep. 572 (Mich. 1900).

[1] O'Brien *v.* Fitzgerald, 143 N. Y. 377 (1894); s. c., 150 N. Y. 572; Higgins *v.* Tefft, 4 N. Y. App. Div. 62 (1896): Dykman *v.* Keeney, 154 N. Y. 483 (1897). In Stearns *v.* Lawrence, 83 Fed. Rep. 738 (1897), the receiver held the president liable for negligence in the management of a bank by a suit in equity. A court of equity is the proper forum for a receiver to bring suit against directors for negligence and loss. Buist *v.* Melchers, 44 S. C. 46 (1895). If the receiver refuses to sue, a stockholder may sue. See § 740, *infra.* A suit against directors to hold them liable for negligence and mismanagement may be in equity and may be filed by the receiver. Fisher *v.* Parr, 92 Md. 245 (1901); 81 N. Y. App. 10.

[2] O'Brien *v.* Blaut, 17 N. Y. App. Div. 288 (1897).

[3] The court may authorize the receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders where such contract is a fair one, even though some of the stock-

holder's suit against the executive committee of a bank for negligence in managing the business of the company, a settlement with one of the defendants and a release to him releases the others.[1]

§ 702. *Instances of negligence of directors in the performance of their duties.*— It is difficult to lay down any rules as to what acts will constitute negligence on the part of corporate officers. Each case is to be determined largely on its own facts. Thus, where the directors kept no accounts, paid no calls, and collected no subscriptions, they were quite properly held guilty of negligence and were made liable therefor.[2] So also the directors of a national bank are liable when they loan money to irresponsible persons, allow overdrafts, employ dishonest, unfaithful, and incompetent clerks, and neglect to take security from the cashier, president, and other officers for good conduct and the performance of duties.[3] Directors are not personally liable for error of judgment in declaring dividends unless they were culpably or grossly negligent in the matter.[4] Where the president of a corporation sells large quantities of coal to a firm which his sons control, and allows the debt to increase when he could easily have collected it, and ultimately the debt is lost, he is liable for negligence and must make good the loss.[5] The president of a bank may be held personally liable to the bank for negligence in permitting the cashier to loan bank funds on inadequate security and concealing the facts from the board of directors.[6] The

holders dissent. People *v.* Anglo-American, etc. Assoc., 66 N. Y. App. Div. 9 (1901). In the case of Woerz *v.* Schumacher, 37 N. Y. App. Div. 374 (1899), a suit by a receiver of an insolvent bank against the directors was compromised by the directors paying thirty-five per cent. of the liabilities of the bank and taking all the assets and agreeing to pay to the receiver anything realized by them over and above such thirty-five per cent.

[1] Chetwood *v.* California Nat. Bank, 113 Cal. 414, 649 (1896).

[2] Neall *v.* Hill, 16 Cal. 145 (1860).

[3] Brinckerhoff *v.* Bostwick, 88 N. Y. 52 (1882). See also Smith *v.* Rathbun, 22 Hun, 150 (1880). As to the liability of a cashier, see Commercial Bank *v.* Ten Eyck, 48 N. Y. 305 (1872).

[4] Even though a director knew his name was signed to a report to the stockholders after he resigned, yet he is not liable for negligence where he took no part in drawing the report or in recommending the dividends based thereon. *Re* National Bank of Wales (1899), 2 Ch. 629, rev'g 79 L. T. Rep. 667. Directors are not liable to corporate creditors either at common law or under a statute for paying dividends when they supposed, and the books showed, that the company was prosperous and had profits for distribution, but it subsequently turned out that the president had embezzled the funds and substituted fictitious notes of customers and had falsified the books in omitting debts for material, there being no proof that the directors even in the exercise of ordinary diligence would have discovered that the company was insolvent. Chick *v.* Fuller, 114 Fed. Rep. 22 (1902).

[5] Doe *v.* Northwestern, etc. Co., 78 Fed. Rep. 62 (1896).

[6] Commercial Bank *v.* Chatfield, 127 Mich. 407 (1901). The president of a

business usages of the community enter into the question of whether a director was negligent in making loans. The directors may commit the business to the officers, but must give reasonable supervision and not be guilty of gross inattention. Thus, the loan of one-third of the capital stock to one person is not necessarily negligent.[1] Where for three years the directors turn the management over to the cashier, of no responsibility, and know of illegal loans and neglect to record mortgages, they are liable for losses incurred thereby.[2] Directors in a national bank are not liable for the misconduct of the cashier in making excessive loans to a particular corporation where such directors have no reason to suspect such loans; but an examining committee of directors whose duty it is to examine the securities are liable, where such committee knew of such loan.[3] Where the president of a bank cancels a debt of the bank against one of his relatives in exchange for securities which ultimately become worthless, he is liable for the loss.[4] It is negligence for directors to build a hotel before they have provided funds therefor and before they have the title to the land.[5] Directors of a bank are not liable in an action for deceit brought by a purchaser of stock, although they signed the cashier's annual statement which was false, there being proof that they believed it to be true.[6] A director is not liable for a deposit made in a bank after it was insolvent, where there was no fraud on his part inducing the deposit.[7] But a director in a bank is personally liable to persons who deposit their money in the bank after he knows that it is hopelessly insolvent, where he fails to initiate measures to close the business of the bank. It is his duty to call a meeting of the directors, or re-

bank is personally liable to the bank if he permits the cashier to borrow a large sum on inadequate security. He is bound to exercise that degree of care that a careful man would exercise in his own affairs of like importance. A director, however, who takes no part in the transaction is not liable for the negligence of other directors. Commercial Bank *v.* Chatfield, 121 Mich. 641 (1899).

[1] Wheeler *v.* Aiken County, etc. Bank, 75 Fed. Rep. 781 (1896).

[2] Robinson *v.* Hall, 63 Fed. Rep. 222 (1894), rev'g 59 Fed. Rep. 648. Bank directors are liable for defalcations of the cashier where the by-laws requiring them to examine the accounts were not complied with by them, and overdrafts were continued on insufficient security, after the bank examiner had called their attention to them; and it is no defense that the directors did not know that the accounts were incorrect and relied upon the reports of the officers and the examinations of the state officials. Campbell *v.* Watson, 50 Atl. Rep. 120 (N. J. 1901).

[3] Warner *v.* Penoyer, 91 Fed. Rep. 587 (1899).

[4] Lawrence *v.* Stearns, 79 Fed. Rep. 878 (1897).

[5] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

[6] Foster *v.* Gibson, 38 S. W. Rep. 144 (Ky. 1896).

[7] Minton *v.* Stahlman, 96 Tenn. 98 (1896).

port the condition of things to the state authorities, or instruct the cashier to stop taking deposits, or to warn individual depositors, or, if necessary, make public announcement of the condition of things.[1] A depositor in a bank may sue the directors for gross negligence leading to the loss of his money, and may join also a cause of action against them for false statements as to the condition of the bank.[2] The president is negligent and is liable if he does not require the secretary to give a bond for his good conduct, as required by the by-laws of the corporation.[3] But it has been held that the directors are not liable for a failure to have the secretary's bond renewed, they supposing that it did not expire at the end of the year.[4] The law is well established that the corporate officers are not liable on the ground of negligence for *ultra vires* acts which they have done or sanctioned, but in good faith and without knowledge of their *ultra vires* character. The act itself may be impeached and set aside, and property transferred thereunder may be recovered back; but if the directors have made an honest mistake, and it was a mistake which a man of usual intelligence might make, they are not personally liable therefor. The law does not require them to be learned in the law.[5] Bank directors who meet but once or twice during the year, and do not examine the books, and have no knowledge of affairs, are liable for losses resulting from long-continued overdrafts by insolvent parties.[6] A bank has no power to accept notes in payment of a subscription to its stock, and the directors are personally liable for so doing, unless the notes were good or the directors had reasonable cause to believe they were good.[7] Managers of a building-loan corporation are liable for loans made to a firm in excess of the amount allowed by a by-law; but are not liable for a mistaken estimate of value of the security taken, nor for a defect in the acknowledgment of the security — a mortgage.[8] A director has been held not liable for negligence in failing to sue for a debt due to the corporation.[9] Directors are not liable for money lost by an over-

[1] Cassidy *v.* Uhlmann, 170 N. Y. 505 (1902).

[2] Solomon *v.* Bates, 118 N. C. 311 (1896). Such a suit is in tort. Tate *v.* Bates, 118 N. C. 287 (1896).

[3] Pontchartrain R. R. *v.* Paulding, 11 La. 41 (1837).

[4] Vance *v.* Phœnix Ins. Co., 4 Lea (Tenn.), 385 (1880).

[5] Watts's Appeal, 78 Pa. St. 370 (1875); Hodges *v.* New England Screw Co., 1 R. I. 312, 348 (1850); Spering's Appeal, 71 Pa. St. 11, 24 (1872); Williams *v.* McDonald, 37 N. J. Eq. 409 (1883). *Cf.* s. c., 42 N. J. Eq. 392 (1886); Joint Stock Discount Co. *v.* Brown, L. R. 3 Eq. 139; s. c., L. R. 8 Eq. 381 (1869). See also § 682, *supra.*

[6] Marshall *v.* Farmers', etc. Bank, 85 Va. 676 (1889).

[7] Coddington *v.* Canaday, 61 N. E. Rep. 567 (Ind. 1901).

[8] Citizens' Bldg. etc. Assoc. *v.* Coriell, 34 N. J. Eq. 383 (1881).

[9] *Re* Forest, etc. Min. Co., L. R. 10 Ch. D. 450 (1878).

drawn account.[1] A director of a loaning company is not liable for an unsecured loan merely because it appeared on the books and turns out to be uncollectible. Proof is necessary that he knew of the loan.[2] Bank directors are not liable for negligence merely because the cashier has for years been embezzling the funds and making false entries.[3] A treasurer is not liable for depositing funds in his name as treasurer of the corporation, in a private bank, which is reasonably considered solvent, even though it turns out to have been insolvent.[4] The directors, however, are liable for allowing the treasurer to use corporate funds for lobbying purposes;[5] but not for allowing one of their number to manage the business, though he appropriate its property to himself.[6] They are liable for making investments contrary to the charter.[7] But they are not

[1] Turquand *v.* Marshall, L. R. 4 Ch. App. 376 (1869).

[2] Couper *v.* Whitson, 9 Ct. of Sess. Cas. (4th ser.) 1115 (1882).

[3] Louisville Sav. Bank *v.* Caperton, 8 S. W. Rep. 885 (Ky. 1888). The directors of a bank are not bound to know of the cashier's mismanagement and are not liable therefor. Clews *v.* Bardon, 36 Fed. Rep. 617 (1888). For an English case holding the trustees and managers of a savings bank liable for a defalcation of the actuary, see *Re* Cardiff Sav. Bank, L. R. 45 Ch. D. 537 (1890). Where the president of a bank purchases a note which contains a guarantee on the part of the payee, which guarantee subsequently reduces the amount of the note, the president may be guilty of negligence in purchasing the note. Stearns *v.* Lawrence, 83 Fed. Rep. 738 (1897).

[4] Booth *v.* Dexter, etc. Co., 118 Ala. 369 (1898). A treasurer is not liable for loss of funds by the failure of a bank, where he deposited such funds in the bank as treasurer and with the consent of the company, nor is he liable for interest on money which he keeps in the bank by order of the court, unless it is shown that he received a profit therefrom. Laurel Springs Land Co. *v.* Fougeray, 57 N. J. Eq. 318 (1898). The treasurer may be liable for a deficit, even though the cause of the deficit cannot be ascertained. Equitable, etc. Assoc. *v.* Roland, 198 Pa. St. 643 (1901). The treasurer is not liable for losses by deposits made by him, where the corporation acquiesced in the deposits. New York, etc. R. R. *v.* Dixon, 114 N. Y. 80 (1889). A treasurer of an association who receives no compensation is a gratuitous bailee, and is only liable for gross negligence in paying out funds. Hibernia Bldg. Assoc. *v.* McGrath, 154 Pa. St. 296 (1893).

[5] Shea *v.* Mabry, 1 Lea (Tenn.), 319 (1878).

[6] A director is not liable to a creditor of the bank for negligence in allowing the president to gradually embezzle all its assets, where such director received no pay, and once or twice a week he attended to the discounts, saw how much money was on hand, and once a year counted the cash and securities. Swentzel *v.* Penn Bank, 147 Pa. St. 140 (1892), holding also that the plaintiff was not entitled to costs, having failed to prove his case. *Contra* in New Jersey. The corporation should be a party defendant. Creditors also may be made parties defendant. Camp *v.* Taylor, 19 Atl. Rep. 968 (N. J. 1890).

[7] The case of Williams *v.* McKay, 46 N. J. Eq. 25 (1889), is very full, explicit, and clear in its adjudication and distribution of losses on the president, treasurer, manager, officers, finance committee, secretary, and directors of a savings bank, where those officers,

liable for errors of themselves or the cashier in making loans.[1] Inasmuch as directors serve in nearly all cases without pay, the law is not exacting in its requirements of them. But a director may be liable even though he served without pay.[2] Even though a corporation in competing with another concern is selling its product below cost, yet a stockholder cannot enjoin such sales, there being no bad faith or palpably bad judgment shown.[3]

It is not actionable negligence in directors to proceed to business where only a small part of the capital is subscribed.[4] They are not liable for special deposits where there was no negligence on their part.[5]

Directors are not bound to make a thorough examination of the books and papers of a bank.[6]

A director who is absent on leave of absence is not liable for losses occurring during that time,[7] nor for losses occurring shortly after he becomes a director.[8]

The measure of damages for negligence cannot be the entire

etc., had made investments contrary to the by-laws, charter, and statutes.

[1] The directors of a building corporation may not be liable for investing in second mortgages, although it was *ultra vires*. Sheffield, etc. Soc. *v.* Aizlewood, L. R. 44 Ch. D. 412 (1889). Directors are not liable for a negligent or *ultra vires* act in lending the funds without taking proper security, unless it is shown that they failed to really exercise in good faith their discretion and judgment as directors. *Re* New Mashonaland, etc. Co., [1892] 3 Ch. 577. Negligence is not proved by the facts that the bank's capital is gone; that large dividends were declared based on large amounts of assets that turned out to be worthless; that real estate taken for debts depreciated in value; that real estate was bought in on foreclosure sales by the bank; that the directors did not closely watch the cashier, there being no proof of lack of reasonable skill, etc., on his part; that they intrusted the management to the cashier, a man of experience and ability; that overdrafts were allowed to responsible parties; and that there was delay in suing on notes. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891). Various acts of mismanagement were considered in *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890).

[2] Michleson *v.* Pierce, 107 Wis. 85 (1900).

[3] Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901).

[4] *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890).

[5] An officer of a corporation is not liable for the loss of corporate securities without negligence on his part, though intrusted with their care. Mowbray *v.* Antrim, 123 Ind. 24 (1890).

[6] Briggs *v.* Spaulding, 141 U. S. 132 (1891). Although the directors trust the management of the bank entirely to the cashier, and do not examine the books, they are not liable to the creditors of the bank, even though the cashier, by dishonesty and reckless management, wrecks the bank. Warner *v.* Penoyer, 82 Fed. Rep. 181 (1897).

[7] Briggs *v.* Spaulding, 141 U. S. 132 (1891).

[8] A bank director is not liable for negligence where the bank becomes insolvent within a short time after he became a director. Briggs *v.* Spaulding, 141 U. S. 132 (1891).

capital stock which was paid in in cash, and also the debts which the stockholders may have to pay.[1] Various instances relative to the liability of directors are given in the notes below.[2]

§ 703. *Directors must use ordinary care and diligence in the management of the corporation and the transaction of its business.*— The directors of a corporation are not guarantors that no mistakes will be made in the management of the corporate business, nor do they insure the corporation against loss from the frauds or embezzlement of subordinate officers and agents. They are required to exercise reasonable care and sound business judgment, but nothing further than this. They generally serve without pay, and usually by reason of their own interest in the stock of the company are directly interested in the welfare of the corporation. But, though this is the case, they must use ordinary diligence in ascertaining the condition of things, and ordinary intelligence in their action as directors.[3] They are liable for losses if they pay no attention to busi-

[1] Bloom *v.* National, etc. Loan Co., 152 N. Y. 114 (1897).

[2] A director of an insolvent corporation who stands by and allows the treasurer to draw checks payable to the president to be used by him for his personal debts is personally liable to corporate creditors to the amount of such checks. Bird *v.* Magowan, 43 Atl. Rep. 278 (N. J. 1898). Directors are not personally liable because they make a mistake in the price paid for property, even though they knew all about the property, nor are they liable because they pay the purchase price after discovering defects in the property, time being given to the vendors to remedy the defects. Lagunas, etc. Co. Ltd. *v.* Lagunas Syndicate, Ltd., [1899] 2 Ch. 392. A committee to which the board refers, as auditors, the reports of the secretary, are not liable for embezzlement of the secretary not discovered by them, it appearing that such committee were not directors or officers and that the items appearing in the statements corresponded with the items upon the books of the company. Alpena, etc. Assoc. *v.* Denison, 121 Mich. 159 (1899). In the case of San Pedro, etc. Co. *v.* Reynolds, 121 Cal. 74 (1898), a general manager was held liable for negligence leading to embezzlement on the part of the bookkeeper. Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and, even though one of them resigns, the liability continues for the benefit of past as well as future creditors. Nix *v.* Miller, 26 Colo. 203 (1899). Where a lease of a street railway has been made, in accordance with the vote of the stockholders and directors, a stockholder cannot hold the directors personally liable for not informing the stockholders of an offer to purchase the property, it not being shown that the offer was from a responsible party or that it would have made any difference in the stockholders' action. Strunk *v.* Owen, 199 Pa. St. 78 (1901).

[3] The leading case on the liability of directors for negligence is Charitable Corp. *v.* Sutton, 2 Atk. 400 (1742). The most important, recent, and fully considered case, however, is Briggs *v.* Spaulding, 141 U. S. 132 (1891), where the supreme court of the United States laid down rules (pp. 147, 151, 152) which very largely exempt directors in national banks from any liability whatsoever. In North Hudson, etc. Assoc. *v.*

ness at meetings of the directors, or if they regularly fail to attend such meetings. They must exercise a reasonable amount of diligence and care.

The directors are not bound to examine the books of the company, nor to investigate the mode of living of their employees. But

Childs, 82 Wis. 460, 476, 477 (1892), the court said that an officer is "responsible only for a failure to bring to the discharge of his duties such degree of attention, care, skill, and judgment as are ordinarily used and practiced in the discharge of such duties or employments; the degree of care, skill, and judgment depending upon the subject to which it is to be applied, the particular circumstances of the case, and the usages of the business." The court also said: "Where they have not profited personally by their bad management, or appropriated any of the property of the corporation to their own use, courts of equity treat them with indulgence. Were a more rigid rule to be applied, it would be difficult to get men of character and pecuniary responsibility to fill such positions." In Percy *v.* Millaudon, 8 Mart (La.) 68 (1829), the court said: "If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible." This case also holds that directors are not liable for errors of judgment unless they are grossly wrong. United Society, etc. *v.* Underwood, 9 Bush (Ky.), 609 (1873), holding that the director must use ordinary diligence; Williams *v.* Gregg, 2 Strobh. Eq. (S. C.) 297 (1848). In Richards *v.* New Hampshire Ins. Co., 43 N. H. 263 (1861), the court said: "The rule is a just one that an agent is bound to apply the same diligence to obtain payment of debts in his care that he does to recover his own." In Land Credit Co. *v.* Fermoy, L. R. 5 Ch. App. 763 (1870), an attempt was made to hold liable, for negligence, directors who innocently approved of a loan which in reality had not been made, but the money had been used by other directors for speculative purposes. See also *Re* Railway Imp. Co., 42 L. T. Rep. 206 (1880); Scholefield's Case, 17 W. N. 22 (1882); British, etc. Ass. Co., L. R. 14 Ch. D. 335 (1880). In Dunn *v.* Kyle, 14 Bush (Ky.), 134 (1878), where a cashier had embezzled the funds of the bank, the court said: "Bad faith or gross negligence is certainly necessary to render the director liable to a stockholder in a case like this." The court also approved of the rule given in Morse on Banking, p. 117, to the effect that, "for excusable mistakes concerning the law, and for many errors strictly of discretion, they are not liable. Though in cases in which their action has been so grossly ill-advised as to warrant the imputation of fraud, or to show a want of the knowledge absolutely necessary for the performance of their duties, so great that they were not justified in assuming the office, they may be held responsible." The mere fact that loans by a bank turn out to have been unwise and hazardous does not render the director liable therefor. Witters *v.* Sowles, 31 Fed. Rep. 1 (1887). Bank directors cannot be held liable for negligence in loans, etc., at the suit of a stockholder, where they have used ordinary care and acted in good faith. Jones *v.* Johnson, 86 Ky. 531 (1888). In order to render bank directors liable, in an action of deceit, for a false statement as to the condition of the bank,

they are required to attend the directors' meetings with reasonable regularity; to have statements of the business made to them; to object to the transaction of important business without the knowledge and consent of the board of directors; to examine with rea-

thereby inducing deposits, it must be shown that they knew the statement to be false and not merely that they should have known it. Pieratt *v.* Young, 49 S. W. Rep. 964 (Ky. 1899). In a suit by a receiver to hold officers liable for negligence it is no defense that the directors knew of the mode in which the business was transacted. New Haven T. Co. *v.* Doherty, 50 Atl. Rep. 887 (Conn. 1902). Under the Indiana statute directors in a bank are liable for gross inattention to business. Coddington *v.* Canaday, 157 Ind. 243 (1901). The fact that a by-law of a bank requiring the directors to examine the bank every three months has been long disregarded does not raise a presumption of repeal and does not release the directors from liability for negligence leading to a defalcation. Campbell *v.* Watson, 50 Atl. Rep. 120 (N. J. 1901). For the mere failure of bank directors to exercise ordinary diligence in the management of the bank they cannot be held liable by general creditors. Union Nat. Bank, etc. *v.* Hill, 148 Mo. 380 (1899). Directors in a bank are liable for losses due to the carelessness and mismanagement of the executive officers to whom the directors turned over the management, without exercising ordinary care and prudence in supervising their action. Warren *v.* Robison, 19 Utah, 289 (1899). The case of *Re* Cardiff Sav. Bank, [1892] 2 Ch. 100, is an example of one mode of doing business. The Marquis of Bute was made president of a savings bank at the age of six months. He continued to be president from 1848 until 1886. During this time he attended one meeting in 1869. His name, however, always appeared in the pass-books, annual reports, and circulars. He paid no attention whatsoever to the bank. It transpired in 1886 that the deceased actuary of the bank had defrauded it of a great deal of money. The court held that the marquis was not liable. The duty of an auditor is to examine the books, ascertain their correctness, and prepare a balance sheet showing the company's financial position at the time he is appointed, but he is bound to use only a reasonable amount of care and skill, varying according to the case. *Re* Kingston Cotton Mill Co., [1896] 2 Ch. 279. A director who is habitually absent from meetings of the board may be liable for the acts of the board. Schout *v.* Conkey, etc. Assoc., 87 Hun, 568 (1895); aff'd, 156 N. Y. 668.

The law on this subject is ably and clearly set forth by Mr. Justice Earl, in Hun *v.* Cary, 82 N. Y. 65 (1880). *Cf.* Van Dyck *v.* McQuade, 86 N. Y. 38 (1881). See also Scott *v.* Depeyster, 1 Edw. Ch. 513 (1832); Litchfield *v.* White, 3 Sandf. Super. 545 (1850); Liquidators, etc. *v.* Douglas, 32 Scot. Jur. 212 (1860); Spering's Appeal, 71 Pa. St. 11 (1872), an important case, and one which is frequently spoken of as the leading case herein. A director who trusts everything to the other directors, or who performs all acts as a mere man of straw, is liable. Joint-Stock Discount Co. *v.* Brown, L. R. 8 Eq. 404, 405 (1869). See also Williams *v.* McKay, 40 N. J. Eq. 189 (1885); Ackerman *v.* Halsey, 37 N. J. Eq. 356 (1883); aff'd, Halsey *v.* Ackerman, 38 N. J. Eq. 501; Mutual, etc. Bank *v.* Bosseiux, 3 Fed. Rep. 817 (1880). That directors are not liable for the fraud or misconduct of co-directors, see Movius *v.* Lee, 30 Fed. Rep. 298 (1887). Directors are not liable for gross negligence in buying out a business where the corporation was organized for the express purpose of buying out that business. Overend, etc. Co. *v.*

sonable care the reports and matters of business brought before them; and not to shut their eyes to obvious objections to the business transactions and general condition of the corporation, or to the character and well-known reputation of the employees. Moreover, when a director has knowledge that an unauthorized act is being done, he cannot escape liability, however innocent he may be, unless he prevents the act by his protest, or files a bill in equity to remedy the wrong.[1]

Gibb, L. R. 5 H. L. 480 (1872). Where loans without securities are improperly made, and the guilty directors are liable therefor, a director who did not participate is nevertheless liable, if he does not take steps to remedy the matter as soon as he learns of it. Jackson *v.* Munster Bank, 15 L. R. Ir. 356 (1885). After a director sends in a letter of resignation he is not liable for the wrongful acts of the directors, even though no attention is paid to his letter. Perry's Case, 34 L. T. Rep. 716 (1876). In the case of Movius *v.* Lee, 30 Fed. Rep. 298, 307 (1887), the court held, reviewing the cases, that "there is no case which has been cited or observed in which it has been decided that a director of a corporation was liable to make good a loss occasioned by the fraud or misconduct of a co-director, in which he had no part, and which was perpetrated without his connivance or knowledge. . . . It is nowhere adjudged that all must always act, or that they must not trust one another to act, or that they are liable for the mere omission to watch and restrain the others, without wrong intention on their own part, or actual knowledge of the wrong on the part of the others." Directors are required to use such care and diligence as a prudent man exercises in his own affairs. If he utterly neglects his duties he is liable. Horn, etc. Co. *v.* Ryan, 42 Minn. 196 (1889). Misfeasance is such non-feasance as is negligence amounting to a breach of trust. Liability for negligence cannot be imputed to directors unless it is gross negligence resulting in loss. To constitute gross negligence there must be, first, a plain duty to do or abstain from a particular thing; secondly, such abstention or such action as the court would be justified in holding to be mischievous or reckless. When a duty incumbent on the directors has not been performed, the burden of proving gross negligence is on those who allege that conclusion; but where the facts establish gross negligence, but at the same time show that it is possible or likely that a satisfactory explanation ought to be forthcoming, the burden of proof is shifted. *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890).

[1] Cassidy *v.* Uhlmann, 170 N. Y. 505 (1902); Joint-Stock Discount Co. *v.* Brown, L. R. 8 Eq. 381, 402 (1869); Ashhurst *v.* Mason, L. R. 20 Eq. 225 (1875). That a director is not in general liable for misdeeds of subordinate corporate agents, see Bath *v.* Caton, 37 Mich. 199 (1877); Bacheller *v.* Pinkham, 68 Me. 253 (1878); Nicholson *v.* Mounsey, 15 East, 384 (1812); Stone *v.* Cartwright, 6 T. R. 411 (1795); Hewett *v.* Swift, 85 Mass. 420 (1862). *Cf.* Weir *v.* Barnett, L. R. 3 Exch. D. 32, 238 (1878). But knowledge obtained by the director previous to becoming such does not compel him to act. *Re* Forest, etc. Co., L. R. 10 Ch. D. 450 (1878).

CHAPTER XLIII.

THE POWER OF VARIOUS OFFICERS AND AGENTS TO CONTRACT FOR A CORPORATION, AND THE MODE OF DRAWING AND EXECUTING CORPORATE CONTRACTS — ADMISSIONS AND NOTICE.

§ 704. *Under what circumstances is a corporation bound by a contract made in its name — The three tests for determining whether a contract may be enforced against a corporation.*— In determining whether a contract may be enforced against a corporation, three things are to be considered. First, did the corporation have the power to enter into such a contract? Second, was the contract entered into by a duly-authorized agent of the corporation? Third, was the contract drawn, signed, and sealed in a form which binds the corporation?

The first of these questions has been already treated in the preceding chapters of this book.[1]

[1] See particularly chs. XL and XLI, *supra*.

There is an infinite variety of contracts which the corporation may enter into, and the great mass of law on this subject is constantly being increased by new decisions. A corporation may enter into any contract which is within its express or implied powers. And even a contract which is not within the express or implied powers of the corporation is sometimes enforced against it or in its behalf when one party to the contract has already performed, or when the parties cannot be restored to their original positions.[1]

The second and third tests of whether a contract is enforceable against a corporation are considered in this chapter.

A. POWER OF PROMOTERS, STOCKHOLDERS, DIRECTORS, EXECUTIVE COMMITTEE, PRESIDENT, SECRETARY, TREASURER, CASHIER, GENERAL MANAGER, AND MISCELLANEOUS AGENTS TO CONTRACT FOR A CORPORATION, AND CONTRACTS BINDING ON THE CORPORATION BY RATIFICATION.

§ 705. *Promoters — Liability to strangers, to the corporation, and to subscribers for stock — Liability to subscribers herein — Contribution — Liability of the corporation herein to strangers and to promoters.*— A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself.[2] The "flotation" of a property means a sale thereof at a profit to a substantial company.[3]

[1] See ch. XL, *supra.*

[2] Quoted and approved in Dickerman *v.* Northern T. Co., 176 U. S. 181, 203 (1900). An interesting description of the "promoter" is given by Judge Lurton, in McMullen *v.* Ritchie, 64 Fed. Rep. 253, 260 (1894), as follows: "He was a man of great ability, enormous energy, and a towering ambition for great enterprises. As a promoter or 'boomer' he seems to be unrivaled; a man of large general information and robust constitution, extraordinarily sanguine, desperately pugnacious, generous as a prince, and possessing no degree of caution whatever. His ambition was to make millions." Promoters are "the persons who undertake to form and set going a company with reference to a given project." First, etc. Co. *v.* Hildebrand, 103 Wis. 530 (1899). A trust company receiving subscriptions to the stock of a corporation and issuing receipts therefor, to the effect that upon payment the party should receive from the trust company a certificate for the stock in the proposed corporation, may be liable for misstatements in the prospectus which had been issued by the promoters. McClure *v.* Central Trust Co., 165 N. Y. 108 (1900). In England the word "promoters" is often used in special acts of incorporation in place of the word "incorporators." Marshall *v.* South Staffordshire Tramways Co., [1895] 2 Ch. 36. For definitions of a promoter, in reference to his liability to the corporation itself, see § 651, *supra.* It has recently been well said: "The business

[3] Torva, etc. Syndicate *v.* Kelly, [1900] A. C. 612.

There has been great difficulty in determining who is to be considered a promoter and who is not. As regards the liability to strangers, however, it seems that every one is liable herein as a promoter who induces such stranger to act in expectation of payment from the prospective corporation. Having induced the party to act, the promoter must see that he is paid.

In America the question of the liability of promoters to persons who have performed services or entered into contracts relative to a prospective corporation has rarely arisen. But in England this question has frequently been passed upon. In general the promoter of a prospective corporation is liable for services rendered by others who are employed as clerks, engineers, or in a similar capacity in the work of promoting the enterprise.[1]

promoter seems temporarily to have fallen into disrepute. He is regarded with the same sufferance and suspicion as was the financier in the fifteenth century. There may be some ground for this suspicion. In itself, however, the task of a promoter is not only essential for industrial progress, but it demands for its successful exercise a high grade of intelligence and judgment. It is he who seeks out new opportunities for investment, who formulates plans for working those opportunities, and who so organizes the conditions and forces at his disposal as to give market value to an enterprise which first existed as an idea in his mind."

[1] The promoters may be liable for royalties according to contract, even though they organized a corporation which did all the business. American Paper Bag Co. *v.* Van Nortwick, 52 Fed. Rep. 752 (1892). Promoters are liable for goods ordered and delivered for a corporation that is never organized. Hub Pub. Co. *v.* Richardson, 13 N. Y. Supp. 665 (1891). Where the individuals who intend to incorporate a company employ an attorney and authorize him to contract for printing, they are personally liable for the printing bill. Hersey *v.* Tully, 8 Colo. App. 110 (1896). Promoters may be liable on a contract to pay a commission to a person obtaining subscriptions to the stock of the company. Pratt *v.* Finkle, 99 Ga. 616 (1896). A promoter is liable for preliminary debts incurred. Sandusky Coal Co. *v.* Walker, 27 Ont. (Can.) 677 (1896). Where the promoters after incurring debts abandoned the enterprise, each one of them is liable for at least his proportionate part of such debts. Roberts Mfg. Co. *v.* Wright, 62 Minn. 337 (1895). The secretary of a prospective company ordering advertisements is liable for the same, though he orders as "secretary *pro tem.*" Hopcroft *v.* Parker, 16 L. T. Rep. 561 (1867). An architect employed by one of the promoters may hold the promoters liable, the scheme having been abandoned, and he may file a *lis pendens* on land which the promoter intended to turn into the corporation for stock. Friedman *v.* Janssen, 66 S. W. Rep. 752 (Ky. 1902). A committee appointed at a public meeting of mechanics to carry out certain things are personally liable for the wages of workmen employed by them. McCartee *v.* Chambers, 6 Wend. 649 (1831). The chairman of the promoters who signs the prospectus may by the jury be held to have authorized the expense of printing, and is liable personally. Riley *v.* Packington, L. R. 2 C. P. 536 (1867). In Collingwood *v.* Berkeley, 15 C. B. (N. S.) 145 (1863), a director who allowed his name to be used as such for a proposed company was held liable for a passage ticket which was purchased on a representa-

Where, however, the owner of land, with knowledge that several parties contemplate forming a corporation, makes a lease to one of such promoters, the intent being that the lease shall be assumed by

tion of the secretary that the company would be organized. That the interested parties may be liable to the attorney of the provisional committee of a company which is abandoned before incorporation, see Parsons *v.* Spooner, 5 Hare, 102 (1846). A promoter who employs a person in behalf of a proposed company is liable. Bell *v.* Francis, 9 Car. & P. 66 (1839). A local committee to form a company are liable to their secretary. They are not allowed to say that he must look to the corporation for pay. Kerridge *v.* Hesse, 9 Car. & P. 200 (1839). A promoter is liable personally on contracts made by him in behalf of the company with third persons, and his liability is not released by the subsequent adoption of the contract by the company. Kilner *v.* Baxter, L. R. 2 C. P. 174 (1866); Scott *v.* Embury, L. R. 2 C. P. 255 (1867). The question of whether a surveyor employed by promoters can look to them for compensation, the company not having been formed, is for the jury, considering all the facts of the employment. Higgins *v.* Hopkins, 3 Exch. 163 (1848). If he was present when the promoters resolved that they should not be liable he cannot recover from them. Laudman *v.* Entwistle, 7 Exch. 632 (1852). In Lake *v.* Argyle, 6 Q. B. 477 (1844), it was left to the jury to decide whether the president of a proposed corporation thereby held himself out as liable on a contract made by an agent of the proposed company. It is a question for the jury whether the president of a proposed corporation is liable. Wood *v.* Argyle, 6 M. & Gr. 928 (1844). Allowing one's name to be used as a director and suggesting that advertising be done does not render a person liable for the advertising. Burbridge *v.* Morris, 3 H. & C. 664 (1865). A promoter is not liable on a contract made before he joined in the enterprise, though the contract is performed afterwards. Newton *v.* Belcher, 12 Q. B. 921 (1848). A promoter is not liable on contracts made in writing before he became such. Beale *v.* Mouls, 5 Ry. & Can. Cas. 105 (1847).

A person contracting with a partnership may hold the partners liable, although he knew that their articles provided for incorporation and they afterwards did incorporate. Witmer *v.* Schlatter, 2 Rawle (Pa.), 359 (1830). But the rule is otherwise where the party allows the account to be transferred to the corporation and then carries on a long running account. Whitwell *v.* Warner, 20 Vt. 425 (1848). Or where the party knew that he was contracting with the other as an agent of an unincorporated association. Abbott *v.* Cobb, 17 Vt. 593 (1845). As to this subject of liability, see also §§ 245, 503c, *supra*, on the liability of trustees; § 508, *supra*, on the liability of officers of unincorporated associations; § 888, *infra*, on the liability of committee-men, and § 724, *infra*, on the liability of persons who sign their names and add an official title. In England a provisional committee is generally appointed by the subscribers. This committee is generally held not liable. But a committee of management is usually appointed subsequently, and this committee is generally held liable. That a provisional committee is not liable, see Nevins *v.* Henderson, 5 Railw. & Can. Cas. 684 (1848); Dawson *v.* Morrison, 5 Railw. & Can. Cas. 62 (1847); *Ex parte* Roberts, 2 Macn. & G. 192 (1850); Carmichael's Case, 17 Sim. 163 (1850); *Ex parte* Clarke, 20 L. J. (Ch.) 14 (1851); Maitland's Case, 3 Giff. 28 (1861); Hall's Case, 3 De G. & S. 214 (1850); *Ex parte* Stocks, 22 L. J. (Ch.) 218 (1853); Tanner's Case, 5 De G. & S. 182 (1852); Forrester *v.* Bill, 10 Ir. L. Rep. 555 (1847); *Ex parte* Osborne, 15

the corporation, he cannot hold the individual taking the lease personally liable, the lease having been assigned by such individual

Jur. 72 (1851); Burnside *v.* Dayrell, 3 Exch. 224 (1849); McEwan *v.* Campbell, 2 Macq. 499 (1857). *Contra*, Lefroy *v.* Gore, 1 Jo. & Lat. 571 (1844). It is for the jury to say whether a provisional director is liable for advertisements which he authorized the secretary to publish at the secretary's expense. Maddick *v.* Marshall, 17 C. B. 829 (1864), affirming 16 C. B. 387. As to a provisional committee-man, see also Williams *v.* Pigott, 2 Exch. 201 (1848). Merely allowing one's name to be used as a member of a provisional committee does not render a person liable on contracts made. Barker *v.* Stead, 3 C. B. 946 (1847); Patrick *v.* Reynolds, 1 C. B. (N. S.) 727 (1857). Nor is he liable to an engineer, although the former took part in meetings. Rennie *v.* Wynn, 4 Exch. 691 (1849). Moreover, the person sued may show that no personal liability was to be incurred and that the plaintiff knew it. Rennie *v.* Clarke, 5 Exch. 292 (1850). It is a question for the jury whether the provisional committee authorized and became liable on contracts made by the managing committee. Williams *v.* Pigott, 5 Ry. & Can. Cas. 544 (1848). For a case where the provisional committee were held not to have so authorized, see Dawson *v.* Morrison, 5 Ry. & Can. Cas. 62 (1847). But Barrett *v.* Blunt, 2 Car. & K. 271 (1846), made it a question for the jury. Barker *v.* Lyndon, 2 Car. & K. 651 (1847), held the committee not liable. So also Giles *v.* Cornfoot, 2 Car. & K. 653 (1847); Griffin *v.* Beverley, 2 Car. & K. 648 (1847). In Bailey *v.* McCauley, 13 Q. B. 815 (1849), the court said that it was a question for the jury whether a committee-man, *i. e.*, a promoter, allowed himself to be held out as liable, and that if the debt incurred was a necessary and usual one he is liable. In *Ex parte* Cottle, 2 Macn. & G. 185 (1850), affirmed *sub nom.* Norris *v.* Cottle, 2 H. L. Cas. 647 (1850), it was held that the mere fact of allowing one's name to appear as a member of the provisional committee does not render a person liable at law for the debts. To same effect, *Ex parte* Roberts, 2 Macn. & G. 192 (1850).

A person who consents to the use of his name as a provisional committee to promote and organize a company is liable, as a partner, for the debt of the committee for stationery. Barnett *v.* Lambert, 15 M. & W. 489 (1846). But not where a board of managers afterwards takes charge and incurs the expense. Bright *v.* Hutton, 3 H. L. Cas. 341 (1852), rev'g 1 Sim. (N. S.) 602, and substantially overruling Hutton *v.* Upfill, 2 H. L. Cas. 674 (1850). To same effect. Reynell *v.* Lewis, 15 M. & W. 517 (1846). As to the matters to be proved in rendering a promoter liable, see Carrick's Case, 1 Sim. (N. S.) 505 (1851). Lindley, Partn. (see Thompson, Liability of Officers, p. 202), says of Bright *v.* Hutton, 3 H. L. Cas. 341 (1852), that it overruled directly or indirectly the following cases: "Upfill's Case, 2 H. L. Cas. 674 (1850); *Ex parte* Besley, 2 Macn. & G. 176 (1850). This case occurs three times in the books. It was first decided by Vice-Chancellor Knight-Bruce (3 De G. & S. 224), who held that Besley was not a contributory. This decision was appealed against and reversed by Lord Cottenham (2 Macn. & G. 176). But the appeal was reheard by Lord Truro, who affirmed the decision of the vice-chancellor (3 Macn. & G. 287). The case as reported in 3 De G. & S. 224, and 3 Macn. & G. 287, is still law. Bright's Case, 1 Sim. (N. S.) 602 (1851). This was reversed on appeal (3 H. L. Cas. 341). *Ex parte* Brittain, 1 Sim. (N. S.) 281 (1851), decided reluctantly on the authority of Upfill's Case. Hole's Case, 3 De G. & S. 241 (1850), decided on the authority of *Ex parte* Besley, 2 Macn. & G. 176 (1850).

to such corporation after it was formed.[1] But a promoter, who makes a contract to purchase, and gives a mortgage in his own name, is personally liable thereon, even though he was acting as agent for a corporation, the stockholders of the vendor and mortgagee not knowing that he was acting as agent.[2] Even though a national bank transacts business before it is authorized to do so by the comptroller, the officers and stockholders are not liable therefor as partners, but the officers may be liable on an implied warranty of their authority to act for the corporation.[3]

Markwell's Case, 5 De G. & S. 528 (1852), decided on the authority of Upfill's Case, but after the decision of Bright *v.* Hutton. It cannot, however, be considered law. See *Ex parte* Capper, 1 Sim. (N. S.) 178 (1851), and Carrick's Case, 1 Sim. (N. S.) 505 (1851). *Ex parte* Morrison, 15 Jur. 346, and 20 L. J. (Ch.) 296 (1851), decided on the authority of Upfill's Case, and in effect overruled by Sharp and James's Case, 1 De G., M. & G. 565 (1852). Nicholay's Case, 15 Jur. 420 (1851), decided on the authority of Upfill's Case. *Ex parte* Sichell, 1 Sim. (N. S.) 187 (1851), decided reluctantly on the authority of Upfill's Case. *Ex parte* Studley, 14 Jur. 539 (1850). This case is very briefly reported, but it seems inconsistent with such cases as Hall's (3 De G. & S. 214 — 1850), Stocks's (22 L. J. (Ch.) 218 — 1852), and Carrick's (1 Sim. (N. S.) 505 — 1851)."

A member of the managing committee is liable where he attended a meeting and knew of the employment. Norbury's Case, 5 De G. & S. 423 (1852); Pearson's Case, 3 De G., M. & G. 241 (1852). *Cf.* Sharp & James's Case, 1 De G., M. & G. 565 (1852). But not if he is unaware of his being on the committee. *Ex parte* Haight, 1 Drew. 484 (1853). For a case where promoters were held liable on a contract that the company would pay certain damages to a land-owner, see Bland *v.* Crowley, 6 Exch. 522 (1851). In Webb *v.* London, etc. Ry., 1 De G., M. & G. 521 (1852), reversing 9 Hare, 129, the company was held not liable on such a contract. A promoter who promises that an existing railway company will pay the parliamentary expense of a contemplated new railway is not liable on such promise, the same being illegal and contrary to public policy. MacGregor *v.* Dover, etc. Ry., 18 Q. B. 618 (1852). Where no stock is subscribed for, but an organization meeting is held and officers elected and debts incurred, the officers are liable for such debts. Whetstone *v.* Crane, etc. Co., 1 Kan. App. 320 (1895), the ground of the decision being that such officers are merely promoters. In Nova Scotia, where a subscriber sues a promoter for damages for fraud in obtaining for himself stock and bonds illegally, the suit must be by the corporation, or by the stockholder if the corporation refuses to sue. Weatherbe *v.* Whitney, 30 Nova Scotia Rep. 49 (1897). Such claim cannot be joined with a personal claim for services rendered, etc. Weatherbe *v.* Whitney, 30 Nova Scotia Rep. 104 (1897).

[1] *Re* Heckman's Estate, 172 Pa. St. 185 (1896). An agreement of subscribers with promoters cannot be enforced by the promoters after the promoters have accepted a substitute agreement from the corporation. Mildenberg *v.* James, 31 N. Y. Misc. Rep. 607 (1900). The promoters of and subscribers to a corporation are not personally liable on a land contract made before incorporation by an agent, but the corporation itself is liable if it has taken an assignment of the contract. Esper *v.* Miller, 91 N. W. Rep. 613 (Mich. 1902).

[2] Lewis *v.* Weidenfeld, 114 Mich. 581 (1897).

[3] Seeberger *v.* McCormick, 178 Ill. 404 (1899). See 94 N. W. Rep. 1045.

The subject of the liability of persons who sell a business to a corporation for stocks, bonds, or cash is considered elsewhere.[1]

Where a promoter has been held liable to strangers he may have contribution from his fellow-promoters.[2] Where the secretary was the original promoter and persuaded the others to go in, he cannot recover from them for his services.[3] They are not liable to each other for services.[4] A person may collect on a surveying contract from co-promoters, though he was also a promoter.[5] But not for services as secretary.[6]

Another difficult question connected with this subject is the liability of one promoter to another for breach of the contract of promotion. The general rule is that where the contract is definite and the obligations are clear, an action at law will lie by one promoter against another for a breach thereof.[7] Where the owner

[1] See chs. III and XLVI.

[2] Boulter *v.* Peplow, 9 C. B. 493 (1850); Batard *v.* Hawes, 2 El. & B. 287 (1853); Edgar *v.* Knapp, 7 Jur. 583 (1843); Spottiswoode's Case, 6 De G., M. & G., 345 (1855); Lefroy *v.* Gore, 1 Jo. & Lat. 571 (1844). A promoter who has advanced money may have contribution. Hamilton *v.* Smith, 5 Jur. (N. S.) 32 (1859). An action at law lies for contribution between promoters. Batard *v.* Hawes, 2 El. & B. 287 (1853).

[3] Parkin *v.* Fry, 2 Car. & P. 311 (1826). The promoters are not partners. Lindley, Companies, p. 143.

[4] Holmes *v.* Higgins, 1 B. & C. 74 (1822).

[5] Lucas *v.* Beach, 1 Man. & Gr. 417 (1840).

[6] Wilson *v.* Curzon, 15 M. & W. 532 (1847).

[7] Where parties intending to incorporate a company contract in behalf of that company to purchase certain property, and the parties selling refuse to fulfill, the parties purchasing may sue in their own names for breach of contract. They may recover damages, not as members of the company, but "which they suffered, if any, by reason of the defendants preventing them from successfully establishing and fitting out a business to be conducted by them as a" company. Abbott *v.* Hapgood, 150 Mass. 248 (1889). Where a person owning certain property agrees with others that a corporation shall be formed and he shall receive pay for the property in cash and stock on a certain basis, and he turns over his property to the others for that purpose and they fail to form the corporation, he may hold them liable in damages. Mosier *v.* Parry, 60 Ohio St. 388 (1899). Where several owners of riparian rights and lands agree to organize a company and transfer their property to it for stock, and a few of them make such transfer and the others refuse to do so, the former may have the transfers made by them canceled. Mack *v.* Consolidated, etc. Co., 101 Fed. Rep. 869 (1900). A party who has invested $15,000 in obtaining a bridge franchise and for plans and specifications, and transfers the same to another party on the agreement of the latter to organize a corporation to build the bridge and to give to the former $15,000 out of $80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue $95,000 in bonds, $80,000 in preferred stock, and $60,000 in common stock for building the bridge at a cost of $71,000; but if the former takes his $15,000 preferred stock and keeps it for six years, he cannot then complain.

of a patent and another person agree that the patent shall be assigned to the latter to hold in trust, and that the latter shall assign it to a corporation to be organized whenever the parties deem it advisable, the latter person agreeing also to furnish the capital

Jutte *v.* Hutchinson, 189 Pa. St. 218 (1899). A contract between the owner of property and a promoter by which the former agrees to sell his property to a corporation to be formed by the latter, with a specified capital stock, cannot, a year after the transaction has been carried out, be made the basis of a suit in equity to compel the promoter to cancel excessive stock which was issued to the promoter, there being no allegation that the promoter still had the stock. The remedy of the vendor is at law. Even though several vendors to the corporation had a similar claim, yet one of them cannot file such a bill in equity in behalf of himself and others. Brehm *v.* Sperry, 92 Md. 378 (1901). An agreement between promoters that one of them should buy certain real estate and turn it over to the corporation must be in writing to satisfy the statute of frauds. McLennan *v.* Boutell, 117 Mich. 544 (1898). An agreement of several parties to sell their property to a corporation in exchange for stock of the latter, the amount of stock going to each to be determined by arbitrators, will not be specifically enforced where the arbitrators have fixed the value in an illegal way. Any party may withdraw from such a contract prior to the time when it has been signed by all. Consolidated, etc. Co. *v.* Nash, 109 Wis. 490 (1901). Where a promoter contracts with the owners of patent rights to form a corporation and issue a certain part of its stock for the patents, and to sell the remainder at a certain price, the money to be divided in a certain way, and they refuse to proceed, and he sues for damages, he must prove complete performance on his part, or that he was ready and able to perform and did not do so on account of the acts of the other parties. If he alleges full performance he must prove it, and a charter with $500 capital, with the right to increase to $300,000, may not be such performance. Stern *v.* McKee, 70 N. Y. App. Div. 142 (1902). The statement of certain parties to a promoter that in case they organized a company proposed by him he would be made general agent, does not sustain a suit by him on a *quantum meruit.* Flaherty *v.* Murray, 60 N. Y. App. Div. 92 (1901). A contract between promoters, by which one of them is to be employed by a proposed insurance company on a salary and a percentage of premiums, is too indefinite to be enforced, even though some of the promoters proceeded to form the company. It seems also that such a contract is contrary to public policy. Flaherty *v.* Cary, 62 N. Y. App. Div. 116 (1901). Where a person has turned in securities under a plan of consolidation, which states the aggregate capacity of properties which it is proposed to acquire, or so many of them as the organizers may deem best, the party cannot withdraw, where the plan has been carried out, even though less than half of the properties have been actually acquired. And even though the preliminary contract provided for the acquisition of a certain company, yet, if the consolidated company acquires practically all the stock and bonds of that company, the party turning in securities cannot withdraw, and especially cannot reclaim the securities as against a transferee in good faith who had no notice of personal representations. Jewell *v.* McIntyre, 62 N. Y. App. Div. 396 (1901). Where the purchaser of a plant and stock is sued for the price and judgment is recovered, he may afterwards bring suit for the stock and for dividends paid

needed, and for all this he was to have a half interest in the enterprise, the patentee, after making the assignment, cannot revoke it, unless the other party has delayed an unreasonable time in proceeding after being requested so to do.[1] A suit by a promoter to compel the delivery of stock to him on the ground that without his consent and knowledge an incorporation made in accordance with his contract had been abandoned and a new one adopted from which he had been excluded, is not for fraud, and hence the statute of limitations applicable to the latter is not a bar.[2]

after the time when he would have been entitled to the stock, if he had fully complied with his contract. Beaty *v.* Johnson, 66 Ark. 529 (1899). Where promoters agree to construct a railroad and to give a part of the stock to parties who furnish valuable privileges, right of way, grants, etc., but instead of doing so sell out the affair to a competing railroad company, which buys with notice and does not go on with the enterprise, the parties who are injured may sue the purchasing railroad company for an accounting, etc. The promoters are not necessary parties defendant. Hamilton *v.* Savannah, etc. Ry., 49 Fed. Rep. 412 (1892). A promoter who has brought about the sale of a large plant to new parties, who have agreed to organize a new corporation and give the promoter a certain amount of stock therein, cannot, upon the ground that he is being defrauded of his commissions, enjoin the parties from closing the transaction irrespective of the promoter, nor can he get specific performance of the contract to incorporate a company and deliver the stock. There is no fiduciary relation between the parties. The value of the stock can be estimated in damages. There was no allegation of defendant's insolvency. The promoter has ample remedy at law for damages. Avery *v.* Ryan, 74 Wis. 591 (1889). Specific performance of a contract to form a corporation will not be granted. Avery *v.* Ryan, 74 Wis. 591 (1889). As to the remedy at law, see Crow *v.* Green, 111 Pa. St. 637 (1886); Hudson *v.* Spaulding, 6 N. Y. Supp. 877 (1889). For the measure of damages for the breach of a contract of defendants to organize a company and pay to plaintiff for his patents certain stock and cash, see Kirschmann *v.* Lediard, 61 Barb. 573 (1872). As to the measure of damages in a suit by a vendor of property to the corporation for damages against it and its promoters for breach of the contract to employ him as manager, see Marston *v.* Singapore Rattan Co., 163 Mass. 296 (1895). Although two partners desire to incorporate, and each to have the same interest, and a third party to have a smaller interest, thereby holding the balance of power, and such arrangement is carried out, and the third party is really a dummy of one of the partners, and thereby gives the control of the corporation to that partner, yet the other partner has no legal cause of complaint, notwithstanding the general understanding as to the division of control. Baumgarten *v.* Nichols, 69 Hun, 216 (1893).

[1] Niles *v.* Graham, 62 N. E. Rep. 986 (Mass. 1902). Where a vendor contracts with a person to transfer his patents to a corporation for stock and cash, and such person agrees to furnish the money to carry on the business, but fails to do so, in a suit by the vendor, if he asks for rescission and also for damages, he should separately state these two causes of action. De Lery *v.* Rogers, 71 N. Y. App. Div. 99 (1902).

[2] Farris *v.* Wirt, 63 Pac. Rep. 946 (Colo. 1901). Where a broker has a contract with the owner of a mine for the sale

Where a promoter agrees to pay a certain compensation to a person for services to be performed by the latter in connection with a reorganization, the promoter must pay such compensation, even though he changes his reorganization agreement and carries out the reorganization with other parties than those originally contemplated.[1] But an agreement of various stockholders in several street railway companies to form a new corporation and transfer their interest thereto and divide the new stock in a certain proportion does not constitute such a partnership as to entitle one to sue the others for an accounting of profits where the others had formed such a corporation with other parties, leaving out the first-named party.[2]

thereof or the organization of a company, and the broker introduces a party with whom the promoter subsequently organizes the company, it may be a question for the jury as to whether such organization was substantially within the meaning of the contract. West *v.* Demme, 128 Mich. 11 (1901). Where two promoters agree to purchase certain property and organize a corporation to take it over, and one of them purchases it himself and organizes the company and takes all the stock, the other promoter may hold both him and the corporation liable for that portion of the stock which he was to have, it being shown that the corporation knew of the contract. Sun, etc. Co. *v.* Frost, 64 Pac. Rep. 435 (Ariz. 1901).

[1] Babbitt *v.* Gibbs, 150 N. Y. 281 (1896).

[2] Schantz *v.* Oakman, 163 N. Y. 148 (1900). A contract between a stockholder and a third person by which the third person is to be made a director, and agrees to devote his time and attention to the business, and develop the property, and procure the construction of a railroad, and cause various lots of land owned by the corporation to be sold, will not sustain an action at law for damages by the stockholder for breach of the contract. An action in such a case may be maintained only by the corporation or by the stockholder in its behalf. So far as the contract intended to control the action of the board of directors, it was illegal. Kountze *v.* Flanagan, 19 N. Y. Supp. 33 (1892). Where a promoter buys property for the corporation before it is formed, and the seller supposes he is selling to a corporation, but the latter is never formed, the seller may recover back the property, even from one who bought the property from the promoter in good faith. Wyckoff *v.* Vicary, 75 Hun, 409 (1894). In Angle *v.* Chicago, etc. Ry., 151 U. S. 1 (1894), a contractor was harassed and prevented from completing his contract by the company which had passed under the control of another company that was seeking to get a land grant that had been given conditionally to the former company. The contractor was ruined, the road not completed, and the second company got the land grant by a subsequent legislative act. The contractor got judgment against the first company, and then filed a bill against the second company to reach the land, charging conspiracy, bribery, and fraud. The court, overruling the decision below, held that a demurrer to the bill was not good. Where the vendor of a majority of the stock of a corporation agrees that the company owes no debts except certain specific ones, the vendee may recover back any excess of debts over those specified. Where the debts of one class were not to exceed a certain sum, but did exceed that sum, the vendee may recover the difference, even though the debts of another class were less than a sum speci-

Where a party agrees with a promoter and constructer of water-works that he, the former, will take a certain amount of water from the corporation for ten years, and he fails to do so, the former may hold him liable. It is immaterial that no formal contract was made with the company. The contractor, owning practically all the stock of the company, may sue and collect for himself the price of the water less the cost.[1] A promise and contract of promoters to subscribers to certain bonds may give the latter an equitable lien on the bonds enforceable in equity.[2]

On the other hand, even though an inventor is persuaded to turn in his inventions to a corporation for stock on an oral assurance that plenty of money would be forthcoming to take the stock of the company and make the business successful, and even though the parties making such representations do not advance the money, but allow the company to become insolvent, and buy in the assets, including the patents, yet the inventor cannot maintain an action for fraud in failing to furnish money according to promise.[3] A promoter who has taken a contract to purchase a property at a certain price, based upon reports and representations that the business had not decreased since the reports, may, upon discovering that the business has largely decreased, refuse to carry out the contract, and

fied in the contract of sale. Chicago, etc. Ry. *v.* Hoyt, 89 Wis. 314 (1895). A promoter who does not complete the transaction or consummate an enforceable contract cannot recover commissions. Hammond *v.* Crawford, 66 Fed. Rep. 425 (1895). Where one of the promoters agrees with others that he will purchase property and turn it in to the company, the price to apply on his subscription for stock, and he does purchase, and the company takes possession of the property and builds thereon, he will be compelled to transfer title to the company. Nester *v.* Gross, 66 Minn. 371 (1896). Sometimes, where the corporation cannot enforce the contract, the promoters may. Carmody *v.* Powers, 60 Mich. 26 (1886). Where one promoter sues another for failure to form the corporation, and obtains a verdict for the par value of the stock which plaintiff was to receive, there being no proof as to what the value would have been if issued, nor whether the company would be successful, the verdict will be set aside as excessive. Pitt *v.* Kellogg, 11 N. Y. Supp. 526 (1890). A contract between promoters by which one agrees to assist in the building of a road is too definite to sustain an action for breach thereof. Porter *v.* Blair, 83 Fed. Rep. 104 (1897). Where competing applicants for a street-railway franchise agree to act together, whereby one is to withdraw and the other is to obtain the grant, and the benefits are to be divided equally, which is done with the full knowledge of the municipal authorities, and then the one who secured the grant refuses to divide with the other, the remedy of the latter is at law, and not in equity, even if the agreement should be held to be valid. Hyer *v.* Richmond Traction Co., 168 U. S. 471 (1897), modifying 80 Fed. Rep. 839.

[1] Drummond *v.* Crane, 159 Mass. 577 (1893).

[2] Badgerow *v.* Manhattan Trust Co., 64 Fed. Rep. 931 (1894).

[3] Smith *v.* Parker, 148 Ind. 127 (1897).

may hold the party liable for his disbursements, but not for profits which he would have made if his plans had been carried out.[1]

Another class of cases arises where the enterprise is carried to a successful conclusion, but one promoter refuses to divide the profits in accordance with the contract. In such cases the courts may compel an accounting and distribution according to the contract.[2]

A court may grant specific performance of a promoter's contract by which some of them were to pay to the corporation a certain sum of money and were to receive certain stock of the corporation therefor, the stock not having been issued and the money not hav-

[1] Loewer *v.* Harris, 57 Fed. Rep. 368 (1893).

[2] Where a party to a contract relative to an incorporation and division of the stock sues to recover his interest according to the contract, the court will decree a proper division of the stock, all parties being allowed the amounts invested by them in forwarding the enterprise. Bates *v.* Wilson, 14 Colo. 140 (1890). One of the promoters suing for his interest according to the contract cannot hold any of them liable where he has released some. Burgess *v.* Sherman, 147 Pa. St. 254 (1892). Several persons defrauded as to their contract, whereby they were to receive stock, cannot sue jointly. Each must sue separately. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890). As to promoters' suits to enforce their right to stock, see also § 334, *supra.* For an agreement to take effect when a certain corporation should be formed, see Childs *v.* Smith, 46 N. Y. 34 (1871). Where for $1,300 a person was to have a ten per cent. commission on the price for which a mine is sold, and is to have all stock received over and above the sum of $225,000 net to the vendor, and the mine is sold by the vendor, a complaint by the holder of the contract is subject to demurrer where the negotiations and agreements are not fully set forth. Sipes *v.* Seymour, 44 Fed. Rep. 326 (1890). Where a promoter conveys property to a different corporation from the one agreed upon by him with a co-promoter, the latter may make the promoter account for the consideration on the basis of the contract. Sims *v.* Tyrer, 26 S. E. Rep. 508 (Va. 1897). A promoter's contract that he should receive a certain percentage of all stock received by the interested parties was enforced in the case of Hix *v.* Edison, etc. Co., 10 N. Y. App. Div. 75 (1896), and 27 N. Y. App. Div. 248; aff'd, 163 N. Y. 573. Where two persons, each being interested in different street railways, make a contract to form a new corporation to which such street railways are to be transferred, and one of the parties afterwards turns his street railways over to a different corporation, the other party cannot hold him liable in an action for an accounting for profits. A breach of contract must be set up. Schantz *v.* Oakman, 10 N. Y. App. Div. 151 (1896). Where the statute authorizes incorporation for producing and selling electricity, and the certificate of incorporation includes this as well as manufacturing and selling electrical appliances, apparatus, and supplies, the corporation is not a *de jure* corporation, and hence insufficient to support an action by one promoter against another on a contract of the latter to convey land to a corporation to be formed and to take stock in payment, especially where the full capital stock of such corporation had not been subscribed for. Burk *v.* Mead, 64 N. E. Rep. 880 (Ind. 1902). A person who pays for stock by transferring worthless mining stock is not a *bona fide* purchaser. Sewell *v.* Nelson, 67 S. W. Rep. 985 (Ky. 1902).

ing been paid in full.[1] An agreement between a promoter and patentee by which the promoter is to have one-third of cash, stock, or other profits obtained from the patent rights may create a trust relationship entitling the promoter to file a bill in equity to obtain his one-third.[2] Where a person contracts to give to another person a fourth interest in any mines which the former may buy, the former must give the latter a fourth of stock which the former purchases in a mining company.[3] And where the promoters, who are also stockholders, agree that the profits are to be divided in a certain way under a construction contract, and a part of them make a secret profit, the others may compel a complete division.[4]

The liability of promoters to persons who have been induced by fraudulent prospectuses to subscribe for stock,[5] and the liability of promoters to the corporation itself to account for fraudulent profits which the promoter has secretly made out of contracts which he caused the corporation to enter into,[6] have already been considered.

§ 706. The question sometimes arises whether a subscriber for stock in a projected corporation is liable to its creditors in case the enterprise is abandoned before incorporation; and also whether the promoters of the abortive corporation are liable to the subscribers for deposits made by the latter. The former question is decided in the negative. "The subscribers to the stock or articles of association are not partners with those who assume the risk of acting for

[1] Macklem v. Fales, 89 N. W. Rep. 581 (Mich. 1902). Where a promoter's contract is personally carried out by the parties and the corporation becomes insolvent, the court has power to compel complete performance in a suit by one promoter against the other. Hunt v. Davis, 135 Cal. 31 (1901).

[2] Harvey v. Sellers, 115 Fed. Rep. 757 (1902). A bill in equity for an accounting does not lie, at the instance of a party, who claims that in consideration of newspaper work the defendants agreed to carry five hundred shares of stock for him in connection with a pool which had been formed. Black v. Vanderbilt, 70 N. Y. App. Div. 16 (1902). A promoter cannot maintain a suit in equity to collect from an inventor one-half of what the latter received in stock and cash, even though the contract between the two gave the former such one-half. His remedy is at law. Everett v. De Fontaine, 78 N. Y. App. Div. 219 (1903). A contract whereby a party who is about to sell his business to a corporation to be organized agrees secretly to give $5,000 of stock to a party who agrees to subscribe openly for $5,000 of the stock is not enforcible, it appearing that the party who was thus to get the extra stock objected to the amount of stock to be issued to the vendor, and withdrew his objection only upon this agreement, and it appearing also that he afterwards became a director and voted to purchase the property at the price demanded by the vendor. Koster v. Pain, 41 N. Y. App. Div. 443 (1899).

[3] Dennison v. Chapman, 105 Cal. 447 (1895).

[4] Krohn v. Williamson, 62 Fed. Rep. 869 (1894); affirmed in Williamson v. Krohn, 66 Fed. Rep. 655 (1895).

[5] See chs. IX and XX, *supra*.

[6] See § 651, *supra*.

a corporation not yet legally established."[1] As to the latter question the rule has become well established in England that a subscriber for stock in a corporation that never comes into existence, who has paid a part of his subscription, may recover back from the promoters of the enterprise the amount so paid, and is not liable even for the preliminary expenses.[2] His remedy may be by bill

[1] Ward *v.* Brigham, 127 Mass. 24 (1879), the court saying also: "Those who acted as agents for the inchoate corporation acted without a principal behind them, because there was no body corporate capable of appointing agents, and so became principals in the transaction." See also Duke *v.* Andrews, 2 Exch. 290 (1848); Hutton *v.* Thompson, 3 H. L. Cas. 161 (1857); Duke *v.* Diver, 1 Exch. 36 (1847), where the stockholder had promised to pay on a certain day, and was held to his promise. To same effect. Duke *v.* Forbes, 1 Exch. 356 (1847); Aldham *v.* Brown, 7 El. & Bl. 164 (1857); 2 El. & El. 398, on appeal; Woolmer *v.* Toby, 10 Q. B. 691 (1847). However, in the case of Lake *v.* Duke of Argyle, 6 Q. B. 477 (1844), the court held that attendance at a meeting, announcement of intention of being president and of taking stock, and concurrence in measures for incorporation, may be strong evidence that defendant "held himself out as a paymaster to all who executed the orders." The question, then, is for the jury. Where a proposed corporation, never incorporated, contracts to purchase certain property of a subscriber, he cannot bring suit *at law* against other subscribers for damage caused by non-fulfillment of contract. Crow *v.* Green, 111 Pa. St. 637 (1886). Subscribers are not liable. Bourne *v.* Freeth, 9 B. & C. 632 (1829). Unless they allow themselves to be held out as partners in the enterprise. Fox *v.* Clifton, 9 Bing. 115 (1832), rev'g 6 Bing. 776. *Cf.* Heraud *v.* Leaf, 5 C. & B. 157 (1847); Dickinson *v.* Valpy, 10 B. & C. 128 (1829). *Ex parte* Hirschel, 15 Jur. 924 (1851), held that a subscriber for stock in an abortive company was not liable for debts incurred. The vice-chancellor said: "Where courts have been contradicting each other for years, this court can do no otherwise than follow the last decision." A note given to pay for stock in a corporation to be organized cannot be enforced by the payee where the corporation has not been formed. Northwestern, etc. Co. *v.* Lanning, 83 Minn. 19 (1901).

[2] Ashpitel *v.* Sercombe, 5 Exch. 147 (1850), where the court said: "There seems to be no doubt that the plaintiff, having paid his money for shares in the concern which never came into existence, or a scheme which was abandoned before it was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to its use, unless he can be shown to have consented to or acquiesced in the application of the money which the directors have made." See also Thompson, Liabilities of Officers, 210; Nockels *v.* Crosby, 3 B. & C. 814 (1825), the leading case; 1 Lindley, Companies, p. 31, citing Walstab *v.* Spottiswoode, 15 M. & W. 501 (1846); Moore *v.* Garwood, 4 Exch. 681 (1849); Coupland *v.* Challis, 2 Exch. 682 (1848); Owen *v.* Challis, 5 C. B. 115 (1848); Ward *v.* Londesborough, 12 C. B. 252 (1852); Mowatt *v.* Londesborough, 3 El. & Bl. 307 (1854), and 4 El. & Bl. 1. See also Vollans *v.* Fletcher, 1 Exch. 20 (1847); Chaplin *v.* Clarke, 4 Exch. 402 (1849). Where a contract is made in the corporate name after the articles have been filed, but before any subscriptions have been obtained, and before an organization meeting has been held or officers elected, the incorporators are liable on the contract as partners. McVicker *v.* Cone, 21 Oreg.

in equity.[1] If, however, the subscriber expressly or by implication authorizes expenditures, he cannot recover back his deposit.[2] The subscriber need not submit to the deduction of any part of his subscriptions to be applied to the payment of the expenses incurred by the promoters in attempting the incorporation.[3] An agreement to deliver stock in a company to be formed, nothing being said as to any preferred stock, is not fulfilled by delivering common stock, where there is preferred stock issued also.[4]

§ 707. Great difficulty has arisen in determining whether a corporation is liable on contracts made in its behalf by its promoters before the incorporation took place. The decided weight of authority holds that the corporation is not bound thereby.[5]

353 (1891). A subscription agreement prior to incorporation, in which the parties state the number of shares taken, and in which they agree to pay the contractors, who are parties to the contract, a specified sum, is a joint undertaking on the subscribers' part. The contractors may hold them liable as partners, the agreement not limiting their liability to the number of shares taken by each. An immaterial alteration after a part have signed does not release any one. The agreement of the contractors to hold each subscriber liable only on his subscription, if he would pay that, is without consideration and void. Any subscriber could expressly limit his liability to his subscription. Davis *v.* Shafer, 50 Fed. Rep. 764 (1892). See also § 76, *supra.*

[1] 2 Lindley, Companies, p. 568. "A bill in equity lies to recover back money paid in a bubble." Colt *v.* Woollaston, 2 P. Wms. 154 (1723), where there was fraud; Green *v.* Barrett, 1 Sim. 45 (1826); Blain *v.* Agar, 1 Sim. 37 (1826); s. c., 2 Sim. 289 (1828); Cridland *v.* De Mauley, 1 De G. & S. 459 (1847), before the Judicature Acts; and Cooper *v.* Webb, 15 Sim. 454 (1846); Wilson *v.* Stanhope, 2 Coll. 627 (1846); Apperly *v.* Page, 1 Phillips, 775 (1847); Clements *v.* Bowes, 17 Sim. 167 (1852); Sheppard *v.* Oxenford, 1 K. & J. 491 (1855); Butt *v.* Monteaux, 1 K. & J. 98 (1854), since such acts. In these latter cases the demurrers were overruled. See also Williams *v.* Page, 24 Beav. 654 (1857), and "The Bubble Act," 9 Geo. I, ch. 18.

[2] 1 Lindley, Companies, p. 33, citing Baird *v.* Ross, 2 Macq. 61, 68 (1856); Garwood *v.* Ede, 1 Exch. 264 (1847); Watts *v.* Salter, 10 C. B. 477 (1850); Vane *v.* Cobbold, 1 Exch. 798 (1848); Atkinson *v.* Pocock, 1 Exch. 796 (1848); Willey *v.* Parratt, 3 Exch. 211 (1848); Clements *v.* Todd, 1 Exch. 268 (1847); Jones *v.* Harrison, 2 Exch. 52 (1848); Aldham *v.* Brown, 7 El. & B. 164 (1857); s. c., 2 El. & El. 398 (1859); Burnside *v.* Dayrell, 3 Exch. 224 (1849).

[3] Nockels *v.* Crosby, 3 B. & C. 814 (1825). *Contra,* Williams *v.* Salmond, 2 Kay & J. 463 (1856).

[4] McIlquham *v.* Taylor, [1895] 1 Ch. 53.

[5] Munson *v.* Syracuse, etc. R. R., 103 N. Y. 58, 75 (1886). The agreement of the promoters of a bank that a person will be paid for obtaining subscriptions to its stock does not bind the bank itself. Tift *v.* Quaker City Nat. Bank, 141 Pa. St. 550 (1891). The contract of the directors of a mutual life insurance association that it will locate the chief office in a certain city, if the city will pay certain expenses, is not binding on the society after incorporation unless ratified by it. Park *v.* Modern, etc. of America, 181 Ill. 214 (1899). A corporation is not liable on a contract of its promoters to pay for drawings, plans, etc. Hence, although by statute stockholders are personally liable on corporate contracts, if the corporation commences

Any other rule would be dangerous in the extreme, inasmuch as promoters are proverbially profuse in their promises, and, if the corporation were to be bound by them, it would be subject to

business before one-half of its capital is subscribed and twenty per cent. paid in, they are not liable on such a contract made before incorporation. Buffington *v.* Bardon, 80 Wis. 635 (1891). The company is not bound to issue stock in payment for services of a claim which the promoters agreed should be paid for by the company. Carey *v.* Des Moines, etc. Co., 81 Iowa, 674 (1891). The corporation is not liable for the breach of an agreement among its organizers as to the distribution of stock. Summerlin *v.* Fronteriza, etc. Co., 41 Fed. Rep. 249 (1890). A corporation is not bound by the contracts of its promoters, where it has not ratified the same nor accepted the benefit of the same. Moore, etc. Co. *v.* Towers Hardware Co., 87 Ala. 206 (1889). The correspondence of one who afterwards becomes president of a corporation which is afterwards incorporated does not bind such corporation. First Nat. Bank *v.* Armstrong, 42 Fed. Rep. 193 (1890). A promoter's contract is not binding on the company, even though it obtains the benefits thereof. Wilbur *v.* New York, etc. Co., 58 N. Y. Super. Ct. 539 (1891). The parliamentary agent was held bound to look to the promoters for his pay, and not to the company, in *Re* Skegness, etc. Co., L. R. 41 Ch. D. 215 (1888). Promoters have no power to bind the corporation, even though they afterwards become trustees. Berridge *v.* Abernethy, 24 N. Y. Week. Dig. 513 (1886). An agreement among the officers to reduce their salaries cannot be insisted upon by the corporation. It was not a party to the agreement. Thompson Co. *v.* Brook, 14 N. Y. Supp. 370 (1891). A contract of promoters to sell to a corporation to be formed cannot be enforced by a stockholder suing in behalf of himself and other stockholders, when the company has not performed or endeavored to perform its part of the agreement. Negley *v.* McWood, N. Y. L. J., May 2, 1890. An assignment of patents by one of several parties to a corporation formed to unite various patents in a certain business is absolute and cannot be revoked, even though the party was by agreement to have a salary of $6,000 per year, and this salary has not been paid. Bracher *v.* Hat Sweat Mfg. Co., 49 Fed. Rep. 921 (1892). The company is not liable for goods ordered and received before it was incorporated, even though it used them. Bradley Fertilizer Co. *v.* South Pub. Co., 17 N. Y. Supp. 587 (1892). An agreement of promoters that a corporation should be formed to pay $5,000 to a factory does not bind such corporation. Davis, etc. Co. *v.* Hillsboro Creamery Co., 10 Ind. App. 42 (1894). A corporation is not bound by a contract made in its name before it was organized. Winters *v.* Hub Min. Co., 57 Fed. Rep. 287 (1893). An agreement by promoters that certain stock need not be paid for is not binding on the corporation, and it may collect. York, etc. Assoc. *v.* Barnes, 39 Neb. 834 (1894). The corporation is not liable for moneys expended by its promoters in developing or purchasing property, nor is it liable on their contracts. Bash *v.* Culver Gold Min. Co., 7 Wash. 122 (1893). A corporation may be liable on a contract made before incorporation by a party who afterwards becomes a director and president, even though the contract was to perform services after incorporation. Oaks *v.* Cattaraugus Water Co., 143 N. Y. 430 (1894). The corporation is not liable for the services and expenses of its promoters. Security Co. *v.* Bennington, etc. Assoc., 70 Vt. 201 (1897). The agreement of the promoters of a corporation that a certain claim of a person would be paid, provided he gave to the corpo-

many unknown, unjust, and heavy obligations. The only protection of the stockholders and of subsequent corporate creditors

ration certain business, may be binding upon the corporation. Durgin *v.* Smith, 115 Mich. 239 (1897). An insurance company may refuse to pay a loss incurred after its incorporation, but growing out of a policy taken by its promoters before incorporation. Gent *v.* Manufacturers', etc. Ins. Co., 107 Ill. 652 (1883); s. c., 106 Ill. 252. The corporation is not liable for the debts of an old partnership, and not even the parol promise of its president makes it liable. Georgia Co. *v.* Castleberry, 43 Ga. 187 (1871). An agreement among the donors to an academy that the money should be repaid does not bind the academy after incorporation. Bluehill Academy *v.* Witham, 13 Me. 403 (1836). An agreement of promoters to pay a person for obtaining subscriptions is not binding on the corporation. New York, etc. R. R. *v.* Ketchum, 27 Conn. 169 (1858), the court saying: "Can a few persons combine for their own interest to get up a railroad — agree with one of their number to give him a large commission or bonus for every stockholder he can allure into the company — and privately make this commission or bonus a charge on the corporation when formed? This would be a breach of faith towards the honest and unsuspecting stockholders who pay the charter price for their stock, and expect to take it clear of all incumbrance." In Illinois the rule is favored that the corporation is never liable on contracts made by its promoters, unless it expressly agreed to perform. So held as regards preliminary surveys. Rockford, etc. R. R. *v.* Sage, 65 Ill. 328 (1872); and book-keeping for one of the promoters, Safety, etc. Co. *v.* Smith, 65 Ill. 309 (1872); and the liability of a new company for the services of the superintendent of an abortive company by the same parties, Western, etc. Co. *v.* Cousley, 72 Ill. 531 (1874).

An agreement of promoters that a certain person shall have a certain part of the stock upon incorporation, upon his paying therefor, does not bind the corporation. Morrison *v.* Gold, etc. Co., 52 Cal. 306 (1877). An agreement with a vendor before formation of the company provided that he should not be removed from the directorate until a certain date. The memorandum and articles provided that this agreement should be adopted, and the articles "confirmed" and incorporated it. The agreement was acted on, but no contract was made between the vendor and the company. *Held*, the articles did not form a contract between them, and the vendor could be removed. Eley *v.* Positive, etc. Co., L. R. 1 Exch. D. 88 (1876), followed; Browne *v.* La Trinidad, L. R. 37 Ch. D. 1 (1886). See Lindley, Companies, p. 146, etc.; Chadwyck, Healey, 36. Where the bondholders, in order to procure a government land grant, contracted with plaintiff to complete the road, and subsequently the bondholders foreclosed and reorganized, the court held that the new company was not liable on such contract merely from having accepted the complete road. The court said: "From all the authorities it seems clear that, in order to recover in an action at law, the plaintiff must show either an express promise of the new company, or that the contract was made with persons then engaged in its formation and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of the plaintiff and with the assurance on the part of the projectors that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it." Little Rock, etc. R. R. *v.* Perry, 37 Ark. 164, 191

against such a result lies in the rule that the corporation is not bound by the contracts of its promoters. The rule is just and

(1881); aff'd in Perry *v.* Little Rock, etc. R. R., 44 Ark. 383 (1884). See also *Re* Empress, etc. Co., L. R. 16 Ch. D. 125 (1881), where the agreement of the promoters on behalf of the company, that it would pay the costs and charges of the solicitors, for services and disbursements in perfecting the organization thereof, was dismissed, but without prejudice to any equitable claim on a *quantum meruit;* Sully's Case, L. R. 33 Ch. D. 16 (1886), holding that, in the absence of a new contract made by a company after its incorporation, a contract made before its incorporation by a person purporting to contract as trustee for the company is not binding on the company, though the parties afterwards carry out some of the terms of the contract and act on the supposition that it is binding on the company. A provision in the by-laws, which in England are filed, that a certain person shall be the attorney for the company, is not binding on the company. Eley *v.* Positive, etc. Co., L. R. 1 Exch. D. 20, 88 (1876). See also *Re* Skegness, etc. Co., L. R. 41 Ch. D. 215 (1888), holding that a parliamentary agent or lobbyist could not hold the company liable. An agreement of promoters with a turnpike company that the proposed railway company will make a certain grade crossing with the former is not binding on the railway company. Aldred *v.* North Midland Ry., 1 Ry. Cas. 404 (1839). An attorney cannot collect his fees from the corporation for services previous to incorporation, even though the by-laws provided for payment, and the directors in meeting assembled said that he would be paid. *Re* Rotherham, etc. Co., L. R. 25 Ch. D. 103 (1883). The corporation is not liable for services in obtaining street permits and franchises prior to its incorporation. Hutchinson *v.* Surrey, etc. Assoc., 11 C. B. 689 (1851). A railway company is not bound by the agreement of its promoters that it will purchase the canal of a canal company if the latter will not oppose the grant of its charter. Leominster, etc. Co. *v.* Shrewsbury, etc. Ry., 3 K. & J. 654 (1857). A railway company is not bound by the contract of its promoters for it with a town that the company would build certain wharves, etc. "If such secret or unexpected terms are to be held binding on those who take shares, the result may be ruinous to those who act on the faith of what appears on the face of the legislative incorporation." Caledonian, etc. Ry. *v.* Magistrates, etc., 2 Macq. 391 (1855), questioning Edwards *v.* Grand Junction Ry., 1 Myl. & C. 650 (1836); Stanley *v.* Chester, etc. Ry., 1 Ry. Cas. 58; s. c., 9 Sim. 264; aff'd in 3 Myl. & C. 773 (1838), and Petre *v.* Eastern, etc. Ry., 1 Ry. Cas. 462 (1838). Where, by the articles of incorporation, the subscribers are not to be bound until a certain amount of the stock is subscribed, the corporation is not liable for the salary of an engineer employed before such full subscription. Pierce *v.* Jersey, etc. Co., L. R. 5 Exch. 209 (1870).

A corporation is not liable on the contracts of its promoters to employ plaintiff as a broker, nor does an express ratification of the contract bind it unless a consideration is alleged. Payne *v.* New South, etc. Co., 10 Exch. 283 (1854). An agreement of promoters that the company shall pay an attorney a certain sum for services is not binding on the company — not even by ratification and agreement between the company and the promoters. *Re* Empress, etc. Co., L. R. 16 Ch. D. 125 (1880). It has been held that equity will enforce an agreement of the promoters that, if opposition to the grant of its charter is withdrawn, the company will contract to do certain things which the opposition desired to put into the

should not be weakened.[1] Thus, even though a corporation transfers all its property to another corporation on a contract made prior to incorporation of the latter, yet the latter is not liable unless it accepted the property with knowledge of the contract and upon an express or implied undertaking to carry it out.[2] And a license granted to a person with the right to him to assign it to a corporation does not create any contract between the licensor and the corporation, no assignment having been made, even though the corporation has acted upon it.[3] It is entirely legal, however, for the corporation to ratify, confirm, or adopt the contracts of its promoters. A promoter's contract may be adopted by the corporation in any way in which a contract may be made by the corporation.[4]

A corporation accepting the benefits of the contract of its incorporators must accept the burden, and a promoter's contract which has been ratified or adopted by the corporation, or the benefits of

charter. Edwards *v.* Grand, etc. Ry., 1 Myl. & Cr. 650 (1836), aff'g 7 Sim. 337; questioned in Caledonian, etc. Ry. *v.* Helensburg, etc., 2 Macq. 391 (1855), and held overruled in Earl of Shrewsbury *v.* North, etc. Ry., L. R. 1 Eq. 593 (1865). An agreement to pay a large price for land owned by the opposition party is not so enforceable. Preston *v.* Liverpool, etc. Ry., 5 H. L. Cas. 605 (1856), aff'g 17 Beav. 114; s. c., before amendment of the bill, 1 Sim. (N. S.) 586 (1851). *Cf.* Stanley *v.* Chester, etc. Ry., 3 Myl. & C. 773 (1838); and Eastern, etc. Ry., *v.* Hawkes, 5 H. L. Cas. 331 (1855); Earl of Lindsey *v.* Great Northern Ry., 10 Hare, 664 (1853), in an inferior court. This doctrine is sustained in Earl of Shrewsbury *v.* North, etc. Ry., L. R. 1 Eq. 593 (1865), disapproving Edwards *v.* Grand, etc. Ry., 1 Myl. & Cr. 650 (1836), and Petre *v.* Eastern, etc. Co., 1 Ry. Cas. 462 (1838), and is sustained also in Gooday *v.* Colchester, etc. Ry., 17 Beav. 135 (1852). The articles of association may provide for the payment of promoters' contracts. Terrell *v.* Hutton, 4 H. L. Cas. 1091 (1854). *Cf.* Gunn *v.* London, etc. Ins. Co., 12 C. B. (N. S.) 694 (1862). *Contra*, Mulhado *v.* Porto, etc. Ry., L. R. 9 C. P. 503 (1874); *Re* Empress, etc. Co., L. R. 16 Ch. D. 125 (1880). Under a charter provision that the company shall be liable, see *Re* Brampton, etc. Ry., L. R. 10 Ch. App. 177 (1875), where an attorney was allowed to collect, although he had assured subscribers that they would not be liable; distinguishing Savin *v.* Hoylake Ry., L. R. 1 Exch. 9 (1865). Where the articles of incorporation expressly provide for the payment of a specified amount to a person who had contracted with the promoters to sell the company certain facilities for business, the company is liable. Touche *v.* Metropolitan, etc. Co., L. R. 6 Ch. 671 (1871), rev'g 4 De G., M. & G. 465. A judgment against the company, entered by consent on a claim of a land-owner that the promoters agreed that the company would take his land at a certain price, is binding. Williams *v.* St. George, etc. Co., 2 De G. & J. 547 (1858).

[1] Quoted and approved in Park *v.* Modern, etc. of America, 181 Ill. 214 (1899).

[2] Holyoke, etc. Co. *v.* United States, etc. Co., 65 N. E. Rep. 54 (Mass. 1902).

[3] Bagot, etc. Co. *v.* Clipper, etc. Co., [1902] 1 Ch. 146.

[4] McArthur *v.* Times Printing Co., 48 Minn. 319 (1892), the court holding also that the contract begins only from its adoption, and on that basis the statute of frauds is applicable.

which have been accepted by the corporation with knowledge of such contract, may be enforced against it.[1]

[1] Seymour v. Spring Forest Cem. Assoc., 144 N. Y. 333 (1895); s. c., 157 N. Y. 697; Rogers v. New York, etc. Land Co., 134 N. Y. 197, 211 (1892), the court saying: "While it could have refused, when it came into existence, to accept the one or to be bound by the other, it could not accept the advantages and then refuse to assume the obligations." In Oakes v. Cattaraugus Water Co., 143 N. Y. 430 (1894), prior to incorporation a written agreement was made in the name of the company with a party who agreed to secure the right of way, hydrant rental, and to place investments, etc., and was to receive pay from the corporation. He was also to abandon a rival water-works scheme and to aid generally. The president and general manager of the corporation after the incorporation acknowledged the debt and contract, and promised payment. The court held that the fact that the president called upon the party for performance constituted ratification. The whole question was for the jury. Although the promoters have no authority to bind the company by their agreements as to the construction contract, yet where the company receives a benefit from such agreement, and in its records and minutes recognizes it, the company will be liable in damages for letting the contract to others. Wilson v. King's, etc. R. R., 114 N. Y. 487 (1889).

"A corporation has power, when fully organized, to ratify a contract made by the promoters when it is one within the purposes for which the corporation was organized and appears to be a reasonable means for the carrying out of those purposes." Stanton v. New York, etc. R. R., 59 Conn. 272 (1891). The corporation may accept and ratify a contract of its promoters. Davis v. Montgomery, etc. Co., 101 Ala. 127 (1890). Where promoters agree to employ a person, and the company actually does employ him afterwards, the company thereby ratifies the contract. Pittsburg, etc. Co. v. Quintrell, 91 Tenn. 693 (1892). Bonds and mortgages executed by corporate officers in pursuance of a resolution made by promoters, previous to incorporation, are valid where the directors ordered the issue of the bonds after their execution. Wood v. Whelen, 93 Ill. 153 (1879). A bank, after incorporation, may ratify and become liable on the contract of its promoters to the effect that the bank would give stock and a certain sum of money to a person for his services. McDonough v. Bank, 34 Tex. 309 (1870). Where a corporation is organized before its articles are filed and a contract of purchase is made, the contract price is collectible, the company having received the property after incorporation. Paxton, etc. Co. v. First Nat. Bank, 21 Neb. 621 (1887). A corporation is liable for machinery which is accepted by it on a contract made by its organizers for it before incorporation. Whitney v. Wyman, 101 U. S. 392 (1879). An agreement by corporate organizers that the corporation will pay royalties on a patent is enforceable against the corporation when it has acted on the contract and for a time paid the royalties. Bommer v. American, etc. Co., 81 N. Y. 468 (1880). See also Lorillard v. Clyde, 86 N. Y. 384 (1881). A preliminary agreement that a person may turn in property for stock is valid where the corporation has afterwards accepted the property and issued the stock therefor. Reichwald v. Commercial Hotel Co., 106 Ill. 439 (1883). A contract made by the president, as such, after the certificate of incorporation was signed, but before it was filed, binds the corporation where it has adopted the contract by carrying it out. Grape, etc. Co. v. Small, 40 Md.

The corporation alone is liable where its note is given in fulfillment of a contract entered into in its name, although such contract was prior to its incorporation.[1]

395 (1874). A corporation is not bound by the contracts of its promoters, but it may adopt them after incorporation. Adoption may be in any way in which it might make the contract *de novo*. Battelle *v.* Northwestern, etc. Co., 37 Minn. 89 (1887), and note. The company may of course employ and be liable to a superintendent whom the promoters agreed should be employed. Browning *v.* Great, etc. Co., 5 H. & N. 856 (1860). A grant of a license to use a patent made to an individual with the privilege to assign to a contemplated corporation may, as to royalties, be enforced against the corporation when the corporation expressly adopted the contract and acted on it. Spiller *v.* Paris, etc. Co., L. R. 7 Ch. D. 368 (1878), distinguishing Melhado *v.* Porto Alegre, etc. Ry., L. R. 9 C. P. 503 (1874), as being a case at law. Money paid by a town after its incorporation to a person for bribing the legislature to grant the charter may be recovered back by a bill in equity. Frost *v.* Inhabitants, etc., 88 Mass. 152 (1863). Where persons who give their notes in payment for property deed the property to a corporation, the latter is not bound to reimburse them for amounts paid by them on the notes. Ruby, etc. Co. *v.* Gurley, 17 Colo. 199 (1892). The offer of a party to take such stock as may not be taken by the public when offered to the public may be accepted after the public subscriptions are closed. Especially is this the case where the underwriter afterwards practically accepted the stock. *Re* Hemp, etc. Co., [1896] 2 Ch. 121. Where promoters are entitled to certain stock from the corporation, but such obligation is canceled by mutual agreement, one of them cannot afterwards revive the obligation on the ground that the other promoter, who dominated the corporation, had agreed that it would all be made right. Dillon *v.* Commercial Cable Co., 87 Hun, 444 (1895). Where a promoter agrees to pay a commission for obtaining a bonus for a corporation, the corporation is liable for the commission if it accepts the bonus with knowledge of the contract. Weatherford, etc. R. R. *v.* Granger, 86 Tex. 350 (1894). Promoters are liable on a contract made before incorporation, but are not liable on the contract if it was made for the company and the company adopts it. Ennis, etc. Co. *v.* Burks, 39 S. W. Rep. 966 (Tex. 1897).

A corporation may be liable on a contract entered into by its promoters where such contract was accepted and carried out by the corporation. Chicago, etc. Co. *v.* Talbotton, etc. Co., 106 Ga. 84 (1898). A promoter's contract for the benefit of the company is an open offer to be accepted or rejected by the company when organized, and if the company accepts and retains the benefit thereof it is bound by the contract, and hence a corporation which accepts land and mining claims on a director's contract which called for certain payments to them in stock and cash is bound to make such payments, even though no formal action is taken by the board of directors. Wall *v.* Niagara, etc. Co., 20 Utah, 474 (1899). An agreement between two promoters that certain stock should be assigned to them jointly for the general promotion of the interests of the company, and if not disposed of within three months to be divided between them in a certain way, does not establish a trust in favor of the corporation and does not make the stock treasury stock for the benefit

[1] Case Mfg. Co. *v.* Soxman, 138 U. S. 431 (1891); Shields *v.* Clifton, etc. Co., 94 Tenn. 123 (1894).

Where property is to be turned in to a corporation for stock, but work is to be done by the owners on the property before it is so turned in, the corporation is not liable to third persons for such work, the deeds never having been made to it.[1]

A consolidation agreement between individuals, whereby the consolidated company is to assume a lease owned by another company, cannot be enforced by such other company. It is not a party to the agreement.[2] A contract by which a party turns in land in ex-

of the corporation. Brennan *v.* Vogler, 174 Mass. 272 (1899). Misrepresentations made to promoters in the purchase of property by them, which property they sell to the corporation, do not give a cause of action to the corporation against the parties selling to the promoters. Lebanon, etc. *v.* Dyckman, 57 S. W. Rep. 227 (Ky. 1900). A corporation which with knowledge uses machinery purchased for it by its promoters is liable for the price of the same. Lancaster, etc. Co. *v.* Murray, etc. Co., 19 Tex. Civ. App. 110 (1898). In the case of Mesinger *v.* Mesinger, etc. Co., 44 N. Y. App. Div. 26 (1899), the court held that a promoter's contract that the corporation would employ a person at a certain salary was ratified by the corporation where such promoter became its president and did not as president disavow the contract. It may be for the jury to decide whether the corporation by accepting the benefit of a promoter's contract is bound by it. McKenzie *v.* Poorman, etc., 88 Fed. Rep. 111 (1898). Where a corporation accepts lumber purchased for it before incorporation it must pay therefor. Kaeppler *v.* Redfield, etc. Co., 81 N. W. Rep. 907 (S. Dak. 1900). A promoter's contract that the corporation will pay certain back rent for premises to be occupied by it binds the corporation if the corporation has occupied the premises knowing of such agreement. The president's knowledge is notice to the corporation, even though he was the promoter. Chase *v.* Redfield, etc. Co., 81 N. W. Rep. 951 (S. Dak. 1900). Where one of the organizers of the corporation, who is also its president, sells goods to it for stock, the corporation is protected in its title, even though it turns out that he held part of the goods to sell on commission, but if he retains the stock and the company is dissolved, it is bound to respect the rights of the owner of the goods in distributing its assets. Wyeth *v.* Renz-Bowles Co., 66 S. W. Rep. 825 (Ky. 1902). A subscriber for stock who has given his note in payment may file a bill in equity to compel the corporation to recognize him as a stockholder, where the corporation denies that he is a stockholder and has issued all the stock to other parties who took with notice. It is unnecessary to bring into the suit the other parties who actually have the stock, the stock having been held by the company as collateral security. Morey *v.* Fish, etc. Co., 108 Wis. 520 (1901). See also § 58, *supra.* If the corporation accepts the benefits of the promoters' contracts in its behalf made before organization it must pay therefor. Pitts *v.* Steele, etc. Co., 75 Mo. App. 221 (1898). See § 712, *infra.* A deed dated before incorporation, but actually delivered after incorporation, is good. San Diego, etc. Co. *v.* Frame, 70 Pac. Rep. 295 (Cal. 1902).

[1] Rathbun *v.* Snow, 123 N. Y. 343 (1890).

[2] Lorillard *v.* Clyde, 122 N. Y. 498 (1890). A personal agreement between the incorporators, promoters, and proposed subscribers to the stock of a proposed corporation, by which agreement the corporation is to have the first right to buy the stock of any one who wishes

change for stock may be such as to give him a vendor's lien on such land in case the scheme is not carried out.[1]

Not only may a ratified contract be enforced against a corporation, but it may be enforced by such a corporation.[2]

In Missouri and Massachusetts, however, it is held that a corporation is not bound by its ratification of a promoter's contract,[3] but that a new contract to the same effect may be made by the corporation. In England the Privy Council has held that even though the board of directors adopt and confirm a contract made before incorporation by persons purporting to act for the company, yet this does not create any contractual relation between the company and the other party to the contract, or impose any obligation on the company towards that party.[4]

The corporation is not liable to the promoters for their expenses and labor in effecting the incorporation.[5] But a contract by which

to sell, does not prevent a sale by a stockholder without offering the stock to the corporation. Hence, the corporation cannot refuse to transfer the stock. Ireland *v.* Globe, etc. Co., 20 R. I. 190 (1897); s. c., 21 R. I. 9 (1898).

[1] Slide, etc. Mines *v.* Seymour, 153 U. S. 509, 520 (1894).

[2] An agreement of land-owners with a promoter that they will sell to the contemplated railway a right of way at a specified price may be enforced by the railway. Bedford, etc. Ry. *v.* Stanley, 2 J. & H. 746 (1862). But the company cannot enforce it where no formal ratification has been made. Penn Match Co. *v.* Hapgood, 141 Mass. 145 (1886). A corporation cannot ratify a contract made for it before it was incorporated, but it may adopt the contract expressly. See 3 Ry. & Corp. L. J. 482 (English cases). The mortgagor to a corporation cannot set up usury on the ground that the promoters required him to subscribe for stock in order to obtain the loan. Central, etc. Ins. Co. *v.* Callaghan, 41 Barb. 448 (1864). And see many cases in ch. IV, *supra*, holding that a corporation may enforce subscriptions taken before its incorporation. Where a contract with an individual is fulfilled by a corporation, the latter cannot collect on the contract unless the other party to the contract knew or had reason to know that the corporation was fulfilling, or unless the consideration has been assigned to the corporation. Holmes, etc. Co. *v.* United, etc. Co., 33 N. Y. App. Div. 62 (1898).

[3] There is no such thing as a "ratification" of a promoter's contract. It is the making of an original contract by the corporation and does not release the promoters. Queen City, etc. Co. *v.* Crawford, 127 Mo. 356 (1895). "If a contract is made in the name and for the benefit of a projected corporation, the corporation, after its organization, cannot become a party to the contract, even by adoption or ratification of it." Abbott *v.* Hapgood, 150 Mass. 248 (1889), citing cases.

[4] North, etc. Co. *v.* Higgins, [1899] A. C. 263. In England the law "is settled by a series of decisions that it is impossible for a company to ratify anything that is done or any contract that is made before it comes into existence." Hence, a contract as to the secretary's salary is unenforceable. He can recover only on a *quantum meruit*. *Re* Dale, 61 L. T. Rep. 206 (1889).

[5] Where, prior to the incorporation, property is conveyed to a trustee to be conveyed by him to the corporation, he

a person who has promoted the organization of a company is to have a certain percentage of the capital stock and five per cent. of any increase of the capital stock, such contract being with the corporation itself, is legal and may be enforced as to such increase.[1] A

cannot claim from the corporation compensation for his services, although the promoters agreed that he should have pay. The corporation can compel a conveyance of the property without paying the compensation. Hecla, etc. Min. Co. *v.* O'Neill, 19 N. Y. Supp. 592 (1892). A person suing for services rendered in procuring a construction contract cannot collect if he was not instrumental in obtaining the contract, or if he gave a secret commission to the agent of the party who was to pay the whole commission, unless the principal ratified the contract with knowledge of such commission to the agent. Smith *v.* Seattle, etc. Ry., 72 Hun, 202 (1893). Where two street railways are consolidated, and the stockholders in one are to receive share for share, and the stockholders in the other company are to receive fourteen shares of consolidated stock for one share of the old stock, the stockholders so turning in their stock for new stock cannot also claim from the consolidated company the amount of money which they expended in buying the stock of one of the constituent companies. Wilson *v.* Trenton, etc. R. R., 56 N. J. Eq. 783 (1898). A person who, at the request of a minority of the promoters, attends meetings of the promoters, lobbies for the charter, makes a preliminary survey, and pays some expenses, cannot recover from the subsequently incorporated company. The court said that in all the cases to the contrary "the services were either performed after the charter had been obtained, and there was therefore an inchoate corporation, or there was an informal organization preparatory to obtaining a charter, and the employment was authorized by the organization as such, and was not the mere employment by individuals having no authority, express or implied, to contract for any one." Bell's, etc. R. R. *v.* Christy, 79 Pa. St. 54 (1875). For a case where one of the promoters of a consolidation used his stock to bring it about, but failed to hold the consolidated company liable therefor, see Eldred *v.* Bell Tel. Co., 119 U. S. 513 (1886). The company on winding up is not liable for the promoters' expenses. Terrell's Case, 2 Sim. (N. S.) 126 (1851); *Ex parte* Lloyd, 1 Sim. (N. S.) 248 (1851). A promoter cannot recover from the corporation money which he expended before its incorporation in bribing the legislature to grant the charter. Marchand *v.* Loan, etc. Assoc., 26 La. Ann. 389 (1874). The statute may provide that the corporation shall pay the promoters' expense of obtaining the charter. Hitchins *v.* Kilkenny Ry., 9 C. B. 536 (1850). Where a corporation was not to exist until a certain amount of stock was subscribed, the secretary cannot recover from the corporation any compensation for his services prior to the obtaining of that amount of subscriptions. Franklin, etc. Ins. Co. *v.* Hart, 31 Md. 59 (1869).

[1] Hix *v.* Edison El. L. Co., 10 N. Y. App. Div. 75 (1896), and 27 N. Y. App. Div. 248; aff'd, 163 N. Y. 573. A corporation may legally agree to pay to a person a commission of ten per cent. in stock on all subscriptions to stock which he obtains. Zabel *v.* New State, etc. Co., 127 Mich. 402 (1901). A corporation may give a note in payment for services rendered in incorporating the company even though such note is given to the president, who is also a director. Smith *v.* New Hartford Waterworks, 73 Conn. 626 (1901). Expenses and debts incurred by the promoters for and in behalf of a corporation may be collected from the corporation after it is organized, if

corporation is liable for the fees and disbursements of the attorney who drew the articles of incorporation and organized it.[1] One promoter is not entitled to compensation for services as against the other, unless there was an agreement to that effect.[2]

The question whether a person who has contracted with a corporation as an existing corporation may repudiate his contract on the ground that it was never incorporated is discussed elsewhere.[3]

§ 708. *Acts which must be authorized by stockholders' meetings instead of by directors' meetings — Stockholders make the by-laws.*— The functions of stockholders are exceedingly limited. The theory of a corporation is that stockholders shall have all the profits, but shall turn over the complete management of the enterprise to their representatives and agents, called directors. Accordingly there is little for the stockholders to do beyond electing directors, making

the corporation assumes such debts. Schreyer *v.* Turner Flouring Co., 29 Oreg. 1 (1896). Compare Weatherford, etc. Ry. *v.* Granger, 86 Tex. 350 (1894). Where a promoter contracts to obtain subscriptions and take his pay in stock, and the company, when organized, adopts the contract, and he obtains the subscription, but the company is unable to get legislative authority to cross a river, and so abandons the enterprise, he may collect damages. Stanton *v.* New York, etc. R. R., 59 Conn. 272 (1891). A corporation is liable for the expenses of its promoters in procuring a subscription, where, after its organization, it accepts the subscription with the knowledge of such expenses. Weatherford, etc. R. R. *v.* Granger, 22 S. W. Rep. 70 (Tex. 1893). In Low *v.* Connecticut, etc. R. R., 45 N. H. 370 (1864), a suit at law by a promoter against the company for services rendered in procuring subscriptions was sustained on the ground that "a corporation is liable at law, upon an implied assumpsit, for services rendered before it came *in esse*, but which were necessary to perfect its organization, and which, after such organization was perfected, it accepted, and the benefits of which it enjoyed." Affirmed, 46 N. H. 284 (1865). To same effect, Hall *v.* Vermont, etc. Co., 28 Vt. 401 (1856). Where work has been carried on by the president for his company, he is allowed in his accounting credit for work done, materials furnished, and money advanced before as well as after the full incorporation. Grand River Bridge Co. *v.* Rollins, 13 Colo. 4 (1889).

[1] Freeman, etc. Co. *v.* Osborn, 14 Colo. App. 488 (1900). An attorney may recover from the corporation his fees for incorporating the company. Taussig *v.* St. Louis, etc. Ry., 166 Mo. 28 (1901). In the case of Merchants', etc. Bank *v.* Eckels, 191 Pa. St. 372 (1899), where a lawyer sued a corporation for his services in organizing the same, the court held that it was a case for the jury. A promoter who obtains all the subscriptions, lets the contracts, superintends the construction of the building, and draws the articles of incorporation, is entitled to pay from the corporation after it is formed, and in this case was allowed $350. Farmers' Bank, etc. *v.* Smith, 49 S. W. Rep. 810 (Ky. 1899). A lawyer may recover for his services to a corporation, even though he is president and a director thereof. Kenner *v.* Whitelock, 152 Ind. 635 (1899). See also § 657, *supra.*

[2] Baily *v.* Burgess, 48 N. J. Eq. 411 (1891).

[3] See § 637, *supra.*

by-laws, increasing or decreasing the capital stock, authorizing amendments to the charter, and dissolving the corporation.[1] Of the functions of the stockholders the most important, perhaps, is that of making by-laws. The law is clear that stockholders in meeting assembled have the power to make the by-laws of the corporation.[2] The stockholders also have the power to accept resignations of directors and fill vacancies in the board.[3]

§ 709. *Stockholders cannot carry on the business or enter into contracts for the corporation — These are the functions of the directors — One person owning all the stock — "Dummy" corporations.*— The stockholders cannot enter into contracts with third persons. Contracts between the corporation and third persons must be entered into by the directors and not by the stockholders. The corporation, in such matters, is represented by the former and not by the latter. Such is one of the main objects of corporate existence. To the directors are given the management and formation of corporate contracts. The stockholders cannot, in meeting assembled, bind the corporation by their contracts in its behalf.[4] The ratification by the stockholders of an invalid mortgage made by the directors does

[1] See Eidman *v.* Bowman, 58 Ill. 444 (1871); Metropolitan, etc. Ry. *v.* Manhattan, etc. Ry., 11 Daly (N. Y.), 377 (1884). As to increasing or reducing the capital stock, see § 285, *supra;* amending charter, ch. XXVIII, *supra;* dissolution, ch. XXXVIII, *supra.*

[2] For a full discussion of the subject of by-laws, see § 4*a*, *supra.*

[3] See §§ 603, 624, *supra.*

[4] Quoted and approved in Sellers *v.* Greer, 172 Ill. 549 (1898), rev'g Greer *v.* Sellers, 64 Ill. App. 505, and holding that the court will not grant specific performance of a contract of one of the stockholders to sell all the property of the corporation to another stockholder, even though these two stockholders owned nine hundred and ninety-eight shares of the one thousand shares of the capital stock, and even though the holders of the remaining two shares of stock were merely nominal holders thereof. "When a charter invests a board with the power to manage the concerns of a corporation the power is exclusive in its character. The corporators have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment. The stockholders as such in their collective capacity could do no corporate act. The directors were their representatives and alone authorized to act." McCullough *v.* Moss, 5 Denio, 567, 575 (1846). The stockholders do not make the contracts. Solomon Co. *v.* Barber, 58 Kan. 419 (1897). Stockholders cannot make contracts for a corporation, except, possibly, in meetings at which every stockholder is present. Colorado, etc. Co. *v.* American, etc. Co., 97 Fed. Rep. 843 (1899). Where a corporation is authorized to issue preferred stock it may attach such conditions thereto as it deems best. One of the conditions may be that the corporation may retire the stock at par within a certain time. In retiring such preferred stock the corporation may issue additional common stock to the holders of the old common stock without giving any rights to the holders of preferred stock. Such stock may be retired by a vote of the directors without a vote of the stockholders. Hackett *v.* Northern, etc. R. R., 36 N. Y. Misc. Rep. 583 (1901). In Conro *v.* Port

not validate such mortgage.[1] The stockholders have no power to elect the president. Their action is a nullity.[2] Stockholders cannot elect a committee and compel the directors to act with that committee in corporate matters.[3] It is not for the stockholders to direct how money received on the issue of new stock shall be used.[4] A resolution of the stockholders fixing the rates of mileage to be paid to the directors is not binding on the directors, although if enacted into a by-law it would be binding.[5] A committee appointed by the stockholders to arrange to meet the obligations of the company has no power to make contracts.[6] An assignment for the benefit of creditors is authorized by the directors, and not the stockholders.[7] The stockholders have no power to sell the property of the corporation, either separately or collectively.[8] It is legal for the directors in selling property of the company to make it a condition of the sale that the stockholders shall ratify it.[9]

Henry, etc. Co., 12 Barb. 27 (1851), a lease of iron works was declared void because it was the act of the stockholders and not of the directors. In McCullough *v.* Moss, 5 Denio, 567 (1846), a promissory note signed by the president and secretary of the corporation was held invalid because authorized only by the stockholders and not by the directors; Dana *v.* Bank of United States, 5 Watts & S. (Pa.) 223, 245 (1843); Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565 (1875), holding that it is for the directors and not the stockholders to repudiate corporate contracts made by an authorized agent; Gashwiler *v.* Willis, 33 Cal. 11 (1867), holding that the stockholders have no power to authorize a sale of corporate property. Such authority must come from the directors. The stockholders do not authorize contracts. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629 (1889). Where a guaranty authorized by statute is to be by the company, it may be by the directors without any action of the stockholders. Louisville Trust Co. *v.* Louisville, etc. Ry., 75 Fed. Rep. 433 (1896). The stockholders have no power to authorize a mortgage. Only the board of directors can do so. Blood *v.* La Serena, etc. Co., 113 Cal. 221 (1896). See also § 808, *infra.*

1 Curtin *v.* Salmon, etc. Co., 130 Cal. 345 (1900). Resolutions passed at which a quorum of the directors is not present cannot be validated by action of the stockholders. Bassett *v.* Fairchild, 64 Pac. Rep. 1082 (Cal. 1901).

2 Walsenberg Water Co. *v.* Moore, 5 Colo. App. 144 (1894).

3 Charlestown, etc. Co. *v.* Dunsmore, 60 N. H. 85 (1880).

4 Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234.

5 Mutual F. Ins. Co. *v.* Farquhar, 86 Md. 668 (1898). A by-law requiring certain corporate instruments to be approved by the stockholders before being executed does not apply to an assignment for the benefit of creditors. Goetz *v.* Knie, 103 Wis. 366 (1899).

6 Augsburg Land, etc. Co. *v.* Pepper, 95 Va. 92 (1897).

7 Rogers *v.* Pell, 154 N. Y. 518 (1898).

8 Rough *v.* Breitung, 117 Mich. 48 (1898). An assignment of all the company's property would not be within the power of the stockholders, even though all signed it, without formal action at a meeting held for that purpose. De La Vergne, etc. Co. *v.* German, etc. Inst., 175 U. S. 40 (1899), citing the above section.

9 Kelsey *v.* New England, etc. Ry., 60 N. J. Eq. 230 (1900).

The law seems to be clear that all corporate contracts are to be made by the directors. This includes the original contracts as well as modifications of them. If a contract is within the express or implied powers of the corporation, then the directors need not consult the stockholders nor follow their wishes, even though the latter constitute a majority or a minority, and though these stockholders object in meeting assembled or individually in the courts. Thus, a lease of the corporate property is authorized, not by the stockholders, but by the directors.[1] Even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, although a purchaser with notice cannot enforce it.[2] However, if the contract is beyond the express and implied powers of the corporation, then any stockholder may have the contract enjoined or set aside. He can do so even though a majority of the stockholders approve the act and ratify it in meeting assembled. He may resort to the courts.[3]

[1] Beveridge *v.* New York Elev. Ry., 112 N. Y. 1 (1889); Flagg *v.* Manhattan, etc. Ry., 20 Blatchf. 142 (1881); People *v.* Metropolitan Ry., 26 Hun, 82 (1881); Nashua, etc. R. R. *v.* Boston, etc. R. R., 27 Fed. Rep. 821 (1886). *Contra*, Metropolitan Ry. *v.* Manhattan Ry., 15 Am. & Eng. Ry. Cas. 1 (1884). *Cf.* Harkness *v.* Manhattan Ry., 54 N. Y. Super. Ct. 174 (1886); Cass *v.* Manchester, etc. Co., 9 Fed. Rep. 649 (1881); also § 712, *infra.* Where a corporation is given power to lease its property without the mode of making the lease being prescribed, it may be by a vote of the majority of the stockholders. Dickinson *v.* Consolidated, etc. Co., 114 Fed. Rep. 232 (1902); aff'd, 119 id. 871. A statute requiring leases by corporations to be first approved by the stockholders applies only to leases of property essential to the existence of the corporation for the carrying on of its business, and does not apply to leases of a small portion of a corporate property. Such statute does not apply to purely private corporations at all. Coal, etc. Co. *v.* Tennessee, etc. Co., 106 Tenn. 651 (1901). Directors are never obliged to consult the stockholders in meeting assembled, nor as a majority, as regards corporate contracts. The stockholders cannot, by suit in equity, compel the directors to enter into a contract of lease. Ives *v.* Smith, 8 N. Y. Supp. 46 (1889). Stockholders cannot control the direction of the directors when the latter direct an assignment to be made for the benefit of creditors. So held though the directors were to go out of office in four days. Hutchinson *v.* Green, 91 Mo. 367 (1886). An extension of a railway cannot be enjoined merely because a majority of stockholders oppose it. *Ultra vires* must be alleged. Moses *v.* Tompkins, 84 Ala. 613 (1888).

[2] Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 552 (1899), the court saying, "the distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

[3] See ch. XL, *supra*, and ch. XLIV,

A single stockholder cannot make a contract for and in the name of the corporation which shall have any binding force or validity, except by subsequent ratification or adoption by the corporation in the regular manner.[1] A stockholder may of course be appointed the agent of the corporation.[2]

A company is not liable on the contracts of a person who makes a construction contract with it, even though that person is the principal stockholder and dominates and controls the action of the corporation.[3] A deed of corporate property by a person who

infra. As regards the relation and rights of stockholders towards suits and compromises of suits by or against the corporation, see § 750, *infra.*

[1] Morelock *v.* Westminster Water Co., 4 Atl. Rep. 404 (Md. 1886); Mays *v.* Foster, 13 Oreg. 214 (1886); Rice *v.* Peninsular Club, 52 Mich. 87 (1883); Berford *v.* New York Iron Mine. 4 N. Y. Supp. 836 (1888). See also § 625, *supra.* The misrepresentations of a stockholder inducing a person to purchase stock of the corporation are not binding on the corporation. Burnes *v.* Pennell, 2 H. L. Cas. 497, 519 (1849). The circumstances that a person is a member of an incorporated company gives him no authority to release a debt due to the corporation. Harris *v.* Muskingum, etc. Co., 4 Blackf. (Ind). 267 (1836). A stockholder cannot bind the corporation. Jones *v.* Williams, 139 Mo. 1 (1897). Where all the individuals composing a corporation covenanted in behalf of such corporation for themselves and their heirs that the corporation should do certain acts, they were held to be bound personally. Tileston *v.* Newell, 13 Mass. 406 (1816). In a suit to recover damages of a corporation for flooding the plaintiff's land, it was held error to ask a witness whether individual members of the company had employed him to deprive the plaintiffs of their claim. Shay *v.* Tuolumne, etc. Co., 6 Cal. 74 (1856). Where the plaintiff claims the amount of his disbursements for work on the defendant corporation's road, but the evidence does not prove a request to the plaintiff by the corporation, its directors, or authorized agent, or any stipulation, expressed or implied, to authorize a charge against the corporation for such disbursements, no act of an individual member can be held to bind the corporation. Hayden *v.* Middlesex, etc. Corp., 10 Mass. 397 (1813). The intention of a corporation can only be learned by the language of its recorded acts; and neither the private views nor the public declarations of individual members of such corporation are for this purpose to be inquired after. Thus, a plaintiff resisting a tax may not establish its legality by evidence as to the intent of those voting the levy. Bartlett *v.* Kingsley, 15 Conn. 327 (1843). Stockholders' contracts do not bind the corporation. American Preservers' Co. *v.* Norris, 43 Fed. Rep. 711 (1890); Wright *v.* Lee, 2 S. D. 596 (1892). Damages may be recovered by a corporation for a fraud practiced upon it, even though an agent of the corporation who aided in the perpetration of the fraud was a stockholder in the corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891).

[2] Stoddard *v.* Port Tobacco Parish, 2 Gill & J. (Md.) 227 (1830), where a religious corporation employed a member of its vestry to make sale of pews; Spear *v.* Ladd, 11 Mass. 94 (1814), where the president of a bank was appointed its agent to indorse a note; Northampton Bank *v.* Pepoon, 11 Mass. 288 (1814); Bank Commissioners *v.* Bank of Brest, Harr. Ch. (Mich.) 106 (1840).

[3] Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893).

owns all the stock does not convey good title.[1] Although one person owns a majority of the stock,[2] or all of it,[3] or all but two

[1] Parker *v.* Bethel Hotel Co., 96 Tenn. 252 (1896). In this case some of the stock had been pledged. The stockholders, as such, cannot convey the real estate of the corporation, though they all join in the deed, unless the execution is in pursuance of some vote of the corporation. Isham *v.* Bennington Iron Co., 19 Vt. 230 (1847); Wheelock *v.* Moulton, etc., 15 Vt. 519 (1843). Even though a person owns all but two shares of the capital stock, yet a transfer of corporate property by him is ineffective to convey title. Buffalo, etc. Co. *v.* Medina, etc. Co., 162 N. Y. 67 (1900). Even though the president and a director own all the stock, yet they cannot execute a mortgage in behalf of the corporation where there are four other directors, who are nominal stockholders. Union, etc. Bank *v.* State, etc. Bank, 155 Mo. 95 (1900).

[2] Hopkins *v.* Roseclare Lead Co., 72 Ill. 373 (1874). He cannot sell the corporate property. The person owning a majority of the stock cannot contract for the corporation, and a contract in its name made by him is not binding on it. Allemong *v.* Simmons, 124 Ind. 199 (1890). Where a construction contract is signed by an individual in his own name, the corporation is not liable on it, although he owned nearly all the stock and the work was for its benefit. Donoghue *v.* Indiana, etc. Ry., 87 Mich. 13 (1891). Where, however, a part of the stockholders contract to sell the corporate property to a third person, they are liable in damages for breach of the contract. Curtis *v.* Watson, 64 Vt. 536 (1892).

[3] "The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation — the artificial being created — holds the property, and alone can mortgage or transfer it; and the corporation acts only through its officers, subject to the conditions prescribed by law." Humphreys *v.* McKissock, 140 U. S. 304 (1891). On this subject, see §§ 663, 664, *supra.* A railroad company owning all the stock and bonds of another company does not own the property of the latter, and cannot sue on a cause of action belonging to the latter. Fitzgerald *v.* Missouri Pac. Ry., 45 Fed. Rep. 812 (1891). Stockholders who transfer the corporate property are jointly and severally liable to corporate creditors. Graham *v.* Hoy, 38 N. Y. Super. Ct. 506 (1875). The fact that the manager of a corporation and his brothers own all the capital stock does not make their acts the acts of the corporation. Bank of Monroe *v.* Gifford, 72 Iowa, 750 (1887). Stockholders owning all the stock and bonds of a road cannot destroy the same and then sell the road to another company. Gulf, etc. Ry. *v.* Morris, 67 Tex. 692 (1887). See also Button *v.* Hoffman, 61 Wis. 20 (1884), where it is held that such a stockholder is not the corporation. *Contra*, Swift *v.* Smith, 65 Md. 428 (1886). A railroad company owning practically all of the stock of another company may lease the line of the latter company to another company. Chicago, etc. Ry. *v.* Union Pac. Ry., 47 Fed. Rep. 15 (1891). A bridge owned by a bridge corporation is not to be taxed as railroad property, even though its stock is owned by the stockholders in a railroad corporation, and the stock has been pledged to such railroad corporation, and the bridge itself leased to the latter. St. Louis, etc. Ry. *v.* Williams, 53 Ark. 58 (1890). Where a corporation or person owns all the stock and bonds of another corporation, and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or per-

shares,[1] he does not in consequence thereof acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue.[2]

son. Union Pac. Ry. *v.* Chicago, etc. Ry., 51 Fed. Rep. 309 (1892). The sole owner of the entire capital stock cannot collect a corporate debt by a suit in his own name. Randall *v.* Dudley, 111 Mich. 437 (1897). The corporate entity is distinct, although one party owns the whole stock. Exchange Bank *v.* Macon Constr. Co., 97 Tenn. 1 (1895). The fact that one person owns all the stock does not dissolve the corporation. Harrington *v.* Connor, 51 Neb. 214 (1897). See also § 631, *supra.* Specific performance of a contract to sell stock will be decreed where the property of the corporation is real estate — a brewery — and the real transaction is a sale of the entire property. Megibben *v.* Perin, 49 Fed. Rep. 183 (1892).

[1] England *v.* Dearborn, 141 Mass. 590 (1886), holding that such a stockholder cannot mortgage the corporate property.

[2] Newton Mfg. Co. *v.* White, 42 Ga. 148 (1871). See also Sharp *v.* Dawes, 2 Q. B. D. 26 (1876); Button *v.* Hoffman, 61 Wis. 20 (1884); Swift *v.* Smith, 65 Md. 428 (1886); England *v.* Dearborn, 141 Mass. 590 (1886); Hopkins *v.* Roseclare Lead Co., 72 Ill. 383 (1874); Bellona Co.'s Case, 3 Bland (Md.), 442, 446 (1831); Farmers', etc. T. Co. *v.* Chicago, etc. Ry., 39 Fed. Rep. 143 (1889). The rule is the same where two persons buy all the stock. Russell *v.* McLellan, 31 Mass. 63 (1833). The corporation still subsists, and the two purchasers do not become partners, or joint tenants, or tenants in common of the corporate property. *Cf.* Commonwealth *v.* Cullen, 13 Pa. St. 133 (1850). Although one person owns all or nearly all the stock he cannot act as though he was the corporation. Chase *v.* Michigan, etc. Co., 121 Mich. 631 (1899). The employment of a person as general manager is not proved by proving that the person who owned all the stock of the corporation so employed him. Hammond *v.* Hammond, etc. Co., 72 Conn. 130 (1899). Even though two persons own the entire capital stock of a railroad company, yet if they use a part of its assets for their own individual purposes and make false entries on the books, some of the entries showing cash on hand, but which is not on hand, they are liable to the company later when it has passed into other hands. Saranac, etc. Co. R. R. *v.* Arnold, 167 N. Y. 368 (1901). For an interesting discussion of the question as to why an artificial existence of the corporation, as distinguished from that of stockholders, should be ignored, see Cincinnati, etc. Co. *v.* Hoffmeister, 62 Ohio St. 189 (1900); and Andres *v.* Morgan, 62 Ohio St. 236 (1900). In the case of First National Bank, etc. *v.* Winchester, 119 Ala. 168 (1898), where a private corporation had but four stockholders, and two of them bought the stock of the other two and paid therefor by notes signed by them and the corporation and secured by mortgage on the corporate property, the court held that the notes were not enforceable against the corporation but held that the mortgage was legal as against subsequent creditors, mortgagees, and purchasers from the corporation who took with notice of the facts. Approving Swift *v.* Smith, 65 Md. 428 (1886). Ownership of all the stock by one person does not dissolve the corporation. Louisville, etc. Co. *v.* Kaufman, 105 Ky. 131 (1898). Even though one man owns a majority of the stock of two corporations, and they have dealings with each other, yet upon the insolvency of the one a claim of the other is to be allowed the same as the debt of any other creditor. Lange *v.* Burke, 69 Ark. 85 (1901). A corporation owning

Although one water-works company owns all the stock of another water-works company, a mortgage given by the former company on all its property does not cover the property of the latter company as against *bona fide* purchasers of bonds of the latter company.[1]

A railroad company owning all the stock and bonds of another company does not own the property of the latter, and cannot sue on a cause of action belonging to the latter;[2] and ordinarily is not liable for its debts.[3]

There are, however, two exceptions to the rules given above. The first is that corporate action may arise in other ways than by the formal action of its board of directors or meeting of stockholders or of its agents. It may arise by a long course of dealing which estops the corporation from denying the legality of that mode of dealing,[4] or by the corporation acquiescing, or by its accepting the benefits of the transaction.[5] It may arise by passively allowing

all the stock of another corporation is not liable for the rent due from the latter to a third corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. East St. Louis, etc. Ry. *v.* Jarvis, 92 Fed. Rep. 735 (1899). In a suit by a corporation to obtain property, in accordance with a contract, a trustee who is holding all the stock for the benefit of the stockholders is not a proper party. Havana, etc. Ry. *v.* Ceballos, 49 N. Y. App. Div. 263 (1900). Even though one person owns all the stock except two shares, in a suit by the corporation such stockholder should not be joined. Fox *v.* Robbins, 62 S. W. Rep. 815 (Tex. 1901). Even though a bank, in order to handle real estate which it acquires on foreclosure, organizes a corporation and owns all the stock and is the sole creditor of such corporation, yet it cannot ignore the corporate existence and convey, incumber, or deal with the property as its own. Watson *v.* Bonfils, 116 Fed. Rep. 157 (1902). The fact that one person owns all the stock of a corporation does not make him and the corporation one and the same person. The corporation continues to exist. State *v.* Morgan's, etc. Co., 106 La. 513 (1901).

[1] National Water-works Co. *v.* Kansas City, 78 Fed. Rep. 428 (1896). See also §§ 663, 664, *supra*.

[2] Fitzgerald *v.* Missouri Pac. Ry., 45 Fed. Rep. 812 (1891). See also §§ 663, 664, *supra*.

[3] Although one railroad owns or controls all the stock of another railroad, yet the former is not personally liable for the negligence, debts, etc., of the latter. Atchison, etc. R. R. *v.* Cochran, 43 Kan. 225 (1890). When a corporation or person owns all the stock and bonds of another corporation and causes the latter to lease all its property, it is legal to have the rent made payable to the first-named corporation or person. Union Pac. Ry. *v.* Chicago, etc. Ry., 51 Fed. Rep. 309 (1892).

[4] See many cases in the succeeding sections relative to the authority of various officers. 80 N. Y. App. Div. 85.

[5] Even though an assignment by an insolvent corporation may be only by vote of the stockholders, yet if made on a vote of the directors and the stockholders acquiesce for a considerable time it is legal. Young *v.* Improvement etc. Assoc., 48 W. Va. 512 (1900). A contract between two street railway companies, whereby one is given the right to run its cars over the tracks of the other, is valid, even though it has

itself to be used as an instrument of wrong or illegal acts.[1] It is to be borne in mind also that by unanimous consent a corporation may do many acts which ordinarily would be *ultra vires* of the corporation.[2] It is also a principle of law that a person buying the securities of a company is not bound always to inquire whether regular corporate action has been taken. The supreme court of the United States says: "One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."[3] The second exception is that, where a corporation is merely a "dummy," the court has power to ignore its corporate existence and to hold that the acts of the stockholder are the acts of the corporation itself.[4]

Thus, where a railroad company causes a telegraph company to be incorporated, and subscribes to all its stock and appoints all

not been authorized by the board of directors or a meeting of the stockholders, it being shown, however, that the officers made the contract and that it was approved by a majority of the stockholders, and was reported at the next meeting of the stockholders and was not objected to, and has been carried into effect and payments made and operation carried on in accordance therewith. South, etc. Ry. *v.* Second Ave. etc. Ry., 191 Pa. St. 492 (1899). A contract made by a majority stockholder is binding on the corporation if the corporation with full knowledge ratifies the contract by accepting the benefits of it. Dupignac *v.* Bernstrom, 37 N. Y. Misc. Rep. 678 (1902); aff'd, 76 N. Y. App. Div. 105. Even though the directors have not especially authorized a mortgage, yet, if the person who owns practically all the stock takes part in the transaction and the corporation receives the benefit of it, the mortgage is good. Auten *v.* City, etc. Ry., 104 Fed. Rep. 395 (1900). A record of a stockholders' meeting showing acceptance of an auditor's report is an admission of his employment. Clarke *v.* Warwick, etc. Co., 174 Mass. 434 (1899).

[1] People *v.* North River Co., 121 N. Y. 582, 619 (1890). But an agreement of the stockholders of a corporation that they will not compete with a "trust" into which they have entered will not bind the corporation itself. It may revive its business, even though its stockholders are the ones who entered into the "trust." American Preservers' Co. *v.* Norris, 43 Fed. Rep. 711 (1890).

[2] See § 3, *supra*.

[3] Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record.

[4] See §§ 663, 664, *supra*. Although a new railroad corporation is clearly a "dummy" corporation, its incorporators and officers being officers in another railroad corporation, and its expenses being paid by the latter company, still it is a legal corporation. Southern Kansas, etc. R. R. *v.* Towner, 41 Kan. 72 (1889).

its officers, and holds it out as the future owner of a telegraph system which the railroad owns, and then sells that system to some one else, a person contracting with the telegraph company on the faith of the scheme being carried out may hold the railroad company liable on the contract, on the principle of law that a principal is liable on the contracts of its agents.[1]

Where the corporation does business by organizing branch corporations, and the stockholders in the latter are disregarded, and the main corporation pays up the stock and manages it without regard to its corporate character, the property of the branch corporation is subject to the debts of the parent company.[2]

Sometimes a "dummy" corporation is used to hold land, the stockholders being aliens or foreign corporations.[3]

§ 710. *The expulsion of stockholders.*— The law forbids the directors or stockholders of a corporation having a capital stock from depriving him of his rights as a stockholder. He certainly cannot be deprived of his right to dividends equally with other stockholders.[4] He cannot be deprived of his right to vote.[5] And it is clear that his various rights as a stockholder cannot be taken from him by any or all of the other stockholders. In this respect a corporation having a capital stock is clearly different from a corporation formed for religious, social, charitable, and similar purposes. The former is for purposes of gain, and the property which is represented by stock cannot be taken from a stockholder by expelling him from the corporation.[6] It is doubtful whether a stock corporation can impose a fine upon the stockholder for a violation of its by-laws.[7]

§ 711. *Stockholders cannot change the directors except at elections.*— The term of office of directors is usually fixed by the charter of the corporation or the statutes applying to it. Such being the case, a director having been elected is entitled to hold his position until the expiration of his term of office. He cannot be turned out either by the stockholders,[8] or the directors, or by a

[1] Interstate Tel. Co. *v.* Baltimore, etc. Tel. Co., 51 Fed. Rep. 49 (1892).

[2] Day *v.* Postal Tel. Co., 66 Md. 354 (1887).

[3] See § 694, *supra.*

[4] See § 540, *supra.*

[5] See § 622, *supra.*

[6] The right to forfeit stock for non-payment of calls may possibly be called an "expulsion," but is a misuse of that term. See ch. VIII, *supra.* Brokers' associations frequently have by-laws authorizing the expulsion of members. Concerning expulsion in general, see § 504, *supra.*

[7] Monroe, etc. Assoc. *v.* Webb, 40 N. Y. App. Div. 49 (1899).

[8] Imperial, etc. Hotel Co. *v.* Hampson, L. R. 23 Ch. D. 1 (1882); Powers *v.* Blue, etc. Assoc., 86 Fed. Rep. 705 (1898); Nathan *v.* Tompkins, 82 Ala. 437 (1886), holding also that an election is wholly void where part of those elected are to fill the place of officers illegally removed, there being no particular persons designated to fill the legal vacan-

court.[1] Sometimes, however, the charter, statutes, or by-laws authorize and empower the stockholders to remove directors at any time.[2] And where the stockholders have power by charter or statute to remove directors for cause, the exercise of their discretion therein will not be reviewed in equity.[3] So, likewise, where such a power is given to the stockholders, a court of chancery will not enjoin the holding of a meeting called by the stockholders to consider, among other matters, the removal of the directors.[4] The president of the corporation, duly elected by the board of directors, does not hold his position at the pleasure of the board.[5]

The stockholders of a corporation at a special meeting duly called may amend the by-laws so as to authorize the board of directors to remove the president and treasurer, and the board of

cies. See also Berry *v.* Cross, 3 Sandf. Ch. 1 (1845); Gorman *v.* Guardian Sav. Bank, 4 Mo. App. 180 (1877). *Cf.* dicta in State *v.* Brice, 7 Ohio (pt. 2d), 82 (1836); Adamantine Brick Co. *v.* Woodruff, 4 MacArthur, 318 (1880); Burr *v.* McDonald, 3 Gratt. (Va.) 215 (1846); Bayless *v.* Orme, Freem. Ch. (Miss.) 161 (1841). A director, however, may resign, and in such a case the corporation may accept the resignation. Cloutman *v.* Pike, 7 N. H. 209 (1834), a municipal corporation case. In England the by-laws generally give the stockholders the power to remove directors. See Browne *v.* La Trinidad, L. R. 37 Ch. D. 1 (1887); Isle of Wight Ry. *v.* Tahourdin, L. R. 25 Ch. D. 320 (1883). Where in a corporation the state itself is represented by a certain number of directors, the state may remove those directors at any time, and appoint others in their place. Tucker *v.* Russell, 82 Fed. Rep. 263 (1897).

[1] Johnston *v.* Jones, 23 N. J. Eq. 216 (1872). See also § 624, *supra*, and § 746, *infra.* In the case of State *v.* Boston, etc. Co., 22 Mont. 220 (1899), a question was raised, but not decided, as to the right of a court to remove directors. A director cannot be excluded from his duties as such, nor can his election be declared invalid, merely because of what he may contemplate doing as a director. Ohio, etc. Co. *v.* State, 49 Ohio St. 668 (1892). Directors cannot be ousted from office simply because they have sold all the corporate property to themselves. The proper remedy is a suit to set aside the sale. Stanley *v.* Luse, 36 Oreg. 25 (1899).

[2] Such is the law in Ohio, West Virginia, and many other states. Such, also, is the law applicable to national banks. See U. S. Rev. St., § 5136; also Taylor *v.* Hutton, 43 Barb. 195 (1864). Where by statute "two-thirds of the stockholders" may remove any director from office, this means holders of two-thirds of the stock, the statute further providing that each share of stock shall have one vote. State *v.* Horan, 22 Wash. 197 (1900). The fact that a secretary's salary is annual does not prevent the company from discharging him at any time, where the by-laws provide for removal at any time. Douglass *v.* Merchants' Ins. Co., 118 N. Y. 484 (1890). The president may remove the teller. Harrington *v.* First Nat. Bank, Thompson's N. B. Cas. 760 (1873).

[3] Inderwick *v.* Snell, 2 Macn. & G. 216 (1850).

[4] Isle of Wight Ry. *v.* Tahourdin, L. R. 25 Ch. D. 320 (1883).

[5] Archer *v.* People's Sav. Bank, 88 Ala. 249 (1889). Where three out of five directors met without notice to the other two, and deposed the president and authorized a mortgage, their acts are void. Hatch *v.* Johnson L. & T. Co., 79 Fed. Rep. 828 (1895).

directors may subsequently make such removal under the amended by-laws.[1] A voluntary unincorporated association without articles, constitution, or rules may remove its president or other officer at any time and without notice, except that the meeting held for that purpose must be duly held, and such meeting cannot expel a member without notice.[2]

§ 712. *Directors — Their power as a board and as individuals to contract for the corporation — Ratification by the directors.*— All contracts of a corporation are to be made by or under the direction of its board of directors. The board of directors make corporate contracts by a regular vote of the board; or by authorizing an agent to make them; or by allowing an agent to assume and exercise that power; or by accepting a contract or its benefits after it has been made by an unauthorized agent. And in all cases the board of directors and not the stockholders, nor the president, secretary, treasurer, or other agent, is the original and supreme power in corporations to make corporate contracts. The stockholders, indeed, have very few functions.[3] The board of directors have the widest of powers. All of the various acts and contracts which a corporation may enter into[4] are entered into by and through the board of directors. The board of directors make or authorize the making of the notes, bills, mortgages, sales, deeds, liens, and contracts generally of the corporation. They appoint the agents, direct the business, and govern the policy and plans of the corporation. The directors elect the officers, and in this connection it may be added that "at common law there is no limit to the number of offices which may be held simultaneously by the same person, provided that neither of them is incompatible with any other."[5] They institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or has brought against it.[6]

But there are limitations on their powers. If the board of directors attempt to do an act or make a contract which the corporate charter does not give the corporation the power to do or enter

[1] *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899). Where a directors' by-law, confirmed by the stockholders, fixes their term of office at one year, the stockholders cannot, by amending the by-law, turn the directors out during the year. Stephenson *v.* Vokes, 27 Ont. (Can.) 691 (1896).

[2] Ostrom *v.* Greene, 161 N. Y. 353 (1900), the court saying: "The holding of an office unprotected by rules is not an individual right, but is subject to change at the pleasure of the association."

[3] See §§ 708–711, *supra*.

[4] See ch. XLI, *supra*, and in fact most of the preceding chapters of this book.

[5] Throop on Public Officers, § 30; People *v.* Green, 58 N. Y. 295 (1874). *Cf.* Atty.-Gen. *v.* Detroit, 112 Mich. 145 (1897).

[6] See § 750, *infra*.

into, then any stockholder may enjoin that act or contract.[1] Moreover, the directors can contract and act only as a board, duly notified and assembled. The members of the board cannot agree separately and outside of the meeting and thereby bind the corporation.[2] Nor can a minority of the board meet and bind the board. A majority must be present, and then a majority of that majority binds the corporation.[3]

A single director has no power to contract for the corporation.[4] It is perfectly legal, however, for a board of directors to delegate to an agent the power to make a contract,[5] and this agent may, of

[1] See ch. XL, *supra*. As to ratification of such acts by the stockholders, see ch. XLIV, *infra*.

[2] See § 713*a*, *infra*.

[3] See § 713*a*, *infra*.

[4] Quoted and approved in Alabama, etc. Bank *v.* O'Neil, 128 Ala. 192, 195 (1901). See the cases under § 716, *infra*, where the president even, who is nearly always a director, was held not to have power to contract. A director has no power to bind the corporation. Gaynor *v.* Williamsport, etc. R. R., 189 Pa. St. 5 (1899). A watchman employed by a director without authority cannot recover for his services. Brown *v.* Valley, etc. Co., 127 Cal. 630 (1900). A director has no power, unless specially authorized, to bind the company by a representation. Milwaukee, etc. Co. *v.* Schoknecht, 108 Wis. 457 (1901). A director has no power to employ a physician to attend an employee who has been injured. Sias *v.* Consolidated, etc. Co., 73 Vt. 35 (1901). Misrepresentations by a director of a manufacturing corporation do not affect claims held against it by a bank although such director is cashier of the bank. Hadden *v.* Dooley, 92 Fed. Rep. 274 (1899). A director has no authority to contract for the corporation. Noblesville, etc. Co. *v.* Loehr, 124 Ind. 79 (1890); Allemong *v.* Simmons, 124 Ind. 199 (1890); Goodyear Rubber Co. *v.* Scott Co., 96 Ala. 439 (1892); New, etc. Co. *v.* Upton, 67 N. H. 469 (1893). See also Chicago, etc. R. R. *v.* James, 22 Wis. 194 (1867); Trundy *v.* Hartford, etc. Co., 6 Rob. (N. Y.) 312 (1868), where a director employed a broker; New Haven, etc. Co. *v.* Hayden, 107 Mass. 525 (1871), where a director, stockholder, and overseer contracted to extend the business; Titus *v.* Cairo, etc. R. R., 37 N. J. L. 98 (1874), where a director sold bonds; Lockwood *v.* Thunder, etc. Co., 42 Mich. 536 (1880); Bramah *v.* Roberts, 3 Bing. N. Cas. 963 (1837), where a director accepted a bill; Rice *v.* Peninsular Club, 52 Mich. 87 (1883), where a director said that a purchase was all right. But in Bradstreet *v.* Bank of Rutland, 42 Vt. 128 (1869), it was held that an employee who was employed by three directors might recover. If the corporation is only an intermediary of title, such as payee and indorser, the indorsee may recover against the maker without making strict proof as to the authority of the directors to indorse. Smith *v.* Johnson, 3 H. & N. 222 (1858). Where a director causes work to be done on the corporate property on an agreement that he will pay for the same, the corporation is not liable therefor. Ayers *v.* Green, etc. Co., 48 Pac. Rep. 221 (Cal. 1897). He is not an agent to discount paper. Washington Bank *v.* Lewis, 39 Mass. 24 (1839). Nor to agree to give extra pay. Stoystown, etc. Turnp. Co. *v.* Craver, 45 Pa. St. 386 (1863); Lindley, Companies, p. 155. See also § 726, *infra*.

[5] Spear *v.* Ladd, 11 Mass. 94 (1814); Northampton Bank *v.* Pepoon, 11 Mass. 288 (1814), where a director was authorized to indorse a note; Bank Commis-

course, be a director as well as a third person.[1] The board of directors and the corporation are bound also by the contracts of a director or other person who has assumed to contract for the company, and for some time has been allowed by the board to so act and contract.[2] So also the board of directors and the corporation are bound by an unauthorized agent's contract when the contract is acquiesced in or the benefits of that contract are accepted;[3] or when the corporation expressly ratifies and confirms the contract.[4]

It is an important principle of law that a corporation may be liable on a contract, the benefit of which it accepts, even though such contract was not authorized by the board of directors. Thus, a contract signed in the corporate name, but without the authority of the board of directors, may be validated by the corporation acting under it for a year.[5] Where the president of a railroad renders serv-

sioner *v.* Bank of Brest, Harr. Ch. (Mich.) 106 (1840); Stevens *v.* Hill, 29 Me. 133 (1848); Lester *v.* Webb, 83 Mass. 34 (1861); Abbot *v.* American Hard Rubber Co., 33 Barb. 578 (1861); U. S. Bank *v.* Dana, 6 Pet. 51 (1832); Metropolis Bank *v.* Jones, 8 Pet. 12, 16 (1834); Percy *v.* Millaudon, 3 La. 568 (1833); Pennsylvania Bank *v.* Reed, 1 Watts & S. (Pa.) 101 (1841); Ridgway *v.* Farmers' Bank, 12 Serg. & R. (Pa.) 256 (1825); Leavitt *v.* Yates, 4 Edw. Ch. 134 (1843). As to delegation of discretionary powers, see § 715, *infra;* Sheridan, etc. Co. *v.* Chatham Nat. Bank, 52 Hun, 575 (1889).

1 A director who is authorized to purchase and pay in stock cannot agree to pay in cash. Hayden *v.* Middlesex, etc. Co., 10 Mass. 403 (1813). Authority to a director to make contract for the sale of land does not authorize him to convey the land. Green *v.* Hugo, 81 Tex. 452 (1891).

2 See many cases in the following sections. Also Beers *v.* Phœnix, etc. Co., 14 Barb. 358 (1852), where a director and secretary borrowed money as he was accustomed to do. But unless the custom is known to the directors the corporation is not bound. Lawrence *v.* Gebhard, 41 Barb. 575 (1864). And the act must be *intra vires.* Women's, etc. Union *v.* Taylor, 8 Colo. 75 (1884).

3 See many cases in subsequent sections herein. Also New Hope, etc. Co. *v.* Phenix Bank, 3 N. Y. 156 (1849), where loans of the company's money were made by a director. Where a director has employed an attorney, but such employment is with the knowledge and assent of the board of directors and executive committee, the company is liable for his fees. Germania, etc. Co. *v.* Hargis, 64 S. W. Rep. 516 (Ky. 1901).

4 See § 707, *supra*, on promoters' contracts; also §§ 716–720, *infra.* The ratification of an unauthorized mortgage may be by express resolutions. Purser *v.* Eagle Lake, etc. Co., 111 Cal. 139 (1896). An unauthorized note issued by a corporation may be ratified by the board of directors. Nebraska, etc. Co. *v.* Bell, 58 Fed. Rep. 326 (1893).

5 Jourdan *v.* Long Island R. R., 115 N. Y. 380 (1889). Although a sale of property is not authorized by the board of directors, yet if they accept the pay the sale is valid. Beach *v.* Miller, 130 Ill. 162 (1889). Where a contractor does extra work upon the assurance of a director that the company will pay for it, and had agreed so to do at a meeting, and a majority of the directors knew of the extra work, the company is liable therefor. Tryon *v.* White, etc. Co., 62 Conn. 161 (1892). Ratification in the

ices in litigations and in obtaining loans on the agreement of the board of directors to pay him therefor, he may recover payment for the same, even though there was no formal resolution of the directors, and even though the by-laws were silent as to the duties

case of a land contract may have to be in writing to satisfy the statute of frauds. Salfield *v.* Sutter, etc. Co., 94 Cal. 546 (1892). It may be a question of fact for the jury as to whether the company accepted the contract or not. Chapin *v.* Cambria, etc. Co., 145 Pa. St. 478 (1891). Although mortgage bonds are issued by corporate officers without authority, yet if for several years they are used as a pledge to secure corporate debts, and in the meantime directors and stockholders know of their issue, they are valid. Stainback *v.* Junk, etc. Co., 98 Tenn. 306 (1897). Even though the officers in executing a deed in behalf of the corporation omit a covenant that the grantee assumes a mortgage on the property, as required by the resolutions of the board of directors authorizing such deed, yet if the corporation accepts a consideration for the deed other corporate directors cannot object thereto. White *v.* Sheppard, 41 N. Y. App. Div. 113 (1899). An assessment by the directors to pay a mortgage does not legalize such mortgage if it was not properly authorized, even though signed by the president, secretary, and two-thirds of the stockholders. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629 (1889). An unauthorized purchase of real estate and a mortgage thereon by a corporation may be ratified, but only by the same formalities as if original authority were being given. Blood *v.* La Serena, etc. Co., 113 Cal. 221 (1896). An unauthorized alteration in a mortgage may be ratified by the subsequent acts of the parties. Woodbury *v.* Allegheny, etc. R. R., 72 Fed. Rep. 371 (1895). Bonds issued by a cemetery corporation, and signed and sealed and recognized at many meetings of the directors, are legal. Seymour *v.* Spring Forest Cem. Assoc., 144 N. Y. 333 (1895); s. c., 157 N. Y. 697. Where the corporation has occupied premises under an unauthorized lease, the court may submit to the jury the question of whether it ratified the lease. Hayden *v.* Wheeler, etc. Co., 20 N. Y. Supp. 902 (1892). The regularity or authorization of a corporate mortgage cannot be successfully attacked by a stockholder in an action to foreclose the mortgage, where for twelve years the interest has been paid upon the bonds with the knowledge and acquiescence of the stockholder. Warren *v.* Bigelow Blue Stone Co., 74 Hun, 304 (1893). Where all the directors and all the stock except one share assent to borrowing money and giving a mortgage, the money being used in the business, the loan and mortgage may be enforced. Witter *v.* Grand Rapids, etc. Co., 78 Wis. 543 (1891). A board of directors may ratify and thereby validate a mortgage which may have been executed without authority. Allis *v.* Jones, 45 Fed. Rep. 148 (1891). A corporation is liable for work done, although the officer employing plaintiff had himself contracted to do the work for the corporation. Plaintiff had no notice of this agreement. Salt Lake, etc. Co. *v.* Mammoth Min. Co., 6 Utah, 351 (1890). If the corporation admits in its pleading that a contract was entered into, a judgment for plaintiff will not be disturbed although the pleading was not put in evidence. Teall *v.* Consolidated, etc. Co., 119 N. Y. 654 (1890). A reorganized company may, by accepting the benefits of a contract and liability of the old company, become liable therefor, although the meeting of the directors authorizing the contract was informal. Baker *v.* Harpster, 42 Kan. 511 (1889). That the corporation is liable if the work was ordered and done for its benefit, see

of the president and as to his salary.[1] Where a corporation borrows money and gives its note, it is immaterial that one director was absent from the meeting authorizing the note, where the directors subsequently knew about the note and did not object.[2] Even though an original note was not authorized, yet if the renewal was authorized the note is valid.[3]

A purchase-money mortgage given by a corporation is binding, even though not authorized by the board of directors, where the company used the property for two years.[4]

A corporation may be liable for an accident on a ferry operated in its name, where it knew of the operation and received the benefits of the same.[5] Where a corporation is a mere "dummy," the courts sometimes hold that the corporation is liable for the acts and on the contracts of its stockholders.[6] An express vote of the directors authorizing a note need not be proved where the corporation whose obligation is in question is engaged in a business the nature of which and the duties in relation to which require or justify the giving of negotiable instruments without the officers being authorized thereto by a special vote to that effect.[7] Where a mortgage recites that it was duly executed by authority of the corpora-

Grier *v.* Hazard, 13 N. Y. Supp. 583 (1891). A party accepting the benefit of a contract for a long time cannot repudiate it on the ground that the calls for the meetings of the executive committee and of the stockholders which authorized the contract were insufficient; nor can he set up in such a case that the directors had not authorized the contract. Union Pac. Ry. *v.* Chicago, etc. Ry., 51 Fed. Rep. 309 (1892). Although a mortgage was not authorized, yet where the board of directors subsequently provide for payment of part of it, and do pay part of it, they ratify it. Seal *v.* Puget Sound, etc. Co., 5 Wash. St. 422 (1892). It is a ratification of a contract for the corporation to admit its execution in a pleading. Tingley *v.* Bellingham, etc. Co., 5 Wash. St. 644 (1893). Ratification by a company of an agent's contract is not binding on the other party, if the ratification rejected one provision of the contract. Subsequent ratification of the contract *in toto* is not sufficient unless the other party assents. Crabtree *v.* St. Paul, etc. Co., 39 Fed. Rep. 746 (1889).

[1] Bagley *v.* Carthage, etc. R. R., 165 N. Y. 179 (1900).

[2] Mills *v.* Boyle, etc. Co., 132 Cal. 95 (1901).

[3] Smith *v.* New Hartford Waterworks, 73 Conn. 626 (1901).

[4] Blood *v.* La Serena, etc. Co., 134 Cal. 361 (1901). An irregular meeting of the board of directors authorizing the borrowing of money and the giving of a mortgage may be made legal by the company subsequently accepting and using the money. Murray *v.* Beal, 23 Utah, 548 (1901). Even though a note is signed by two directors as individuals, yet the corporation may be held liable if the loan was to the corporation. McGarry *v.* Tanner, etc. Co., 21 Utah, 16 (1899).

[5] Nims *v.* Mount Hermon Boys' School, 160 Mass. 177 (1893).

[6] See §§ 663, 664, *supra*.

[7] Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890).

tion, neither the corporation nor its creditors can claim that the board of directors did not authorize it in the form in which it was executed.[1] In California it is held that an unauthorized mortgage is not ratified nor is it made valid by estoppel *in pais* except in a manner in writing sufficient to authorize the mortgage.[2] Corporate creditors' rights by attachments which are obtained between the time of the execution of an illegal mortgage and the ratification of the same may have priority over the mortgage.[3]

§ 713. *De facto directors and officers of a corporation — The validity of their contracts.*— A *de facto* officer is one who has the reputation and position of the officer he assumes to be, and yet is not entitled to the office in point of law.[4] A *de jure* officer is one who has the lawful right to the office, but who has either been

[1] Sioux City, etc. Co. *v.* Trust Co., 82 Fed. Rep. 124 (1897); aff'd, 173 U. S. 99 (1899); Baggott *v.* Turner, 21 Wash. 339 (1899). See also § 725, *infra*. Where the seal of the company has been duly affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized. County, etc. Bank *v.* Rudry Merthyr, etc. Co., [1895] 1 Ch. 629. "None but the corporation and its stockholders or creditors can impeach a transfer of property by the corporation for the want of the previous action of the board of directors; and then only by a direct action brought for that purpose." Castle *v.* Lewis, 78 N. Y. 131 (1879); Eno *v.* Crooke, 10 N. Y. 60 (1854).

[2] Blood *v.* La Serena, etc. Co., 113 Cal. 221 (1896).

[3] State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519 (1897).

[4] "To constitute an officer *de facto* there must be a color of election or appointment, or an exercise of the functions of the office under such circumstances and for such length of time, without interference, as to justify the presumption of a due election or appointment. The mere exercise of the functions of the office is in itself insufficient." Moses *v.* Tompkins, 84 Ala. 613 (1888). See also Rex *v.* Bedford Level, 6 East, 356 (1805); Mechanics', etc. Bank *v.* Burnett, etc. Co., 32 N. J. Eq. 236 (1880); Hamlin *v.* Kassafer, 15 Oreg. 456 (1887). *Contra*, Litchfield Iron Co. *v.* Bennett, 7 Cow. 234 (1827); Clark *v.* Farmers' Mfg. Co., 15 Wend. 256 (1836); Waite *v.* Mining Co., 36 Vt. 18 (1863). See also Wait, Insolv. Corp., § 23. Officers are still *de facto* after judgment of ouster is rendered, but before its entry, even though they acted with knowledge of the decision. Mining Co. *v.* Anglo, etc. Bank, 104 U. S. 192 (1881). *Cf.* Walker *v.* Flemming, 70 N. C. 483 (1874). In McCall *v.* Byram, etc. Co., 6 Conn. 428 (1827), it is held that a secretary is *de facto* only where there is at least a pretended election. See Hamlin *v.* Kassafer, 15 Oreg. 456 (1887). A demand on a corporation for certain property is not proved by showing a demand on those who afterwards became its incorporators and officers. McCallum *v.* Purssell Mfg. Co., 1 N. Y. Supp. 428 (1888). Directors whose title is contested are not *de facto* officers as against the old officers holding over. Ellsworth, etc. Co. *v.* Faunce, 79 Me. 440 (1887).

The following definitions have been given of an officer *de facto:* "One who

ousted from it or has never actually taken possession of it. An officer is *de facto* when the statute under which he holds office is unconstitutional;[1] or when he was elected but was ineligible,[2] or was irregularly or illegally elected.[3] An officer who holds over by reason of the failure of the corporation to elect his successor is not only a *de facto* but a *de jure* officer.[4] A director as a *de facto* director may bind the company by his acts, if allowed to continue in his position.[5] And, in general, the contracts of all officers *de facto*, acting within the sphere of their office, are binding upon the corporation.[6]

has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." Parker *v.* Kett, 1 Ld. Raym. 658; Rex *v.* Bedford Level, 6 East, 368 (1805). "One who actually performs the duties of an office, with apparent right, and under claim and color of an appointment or election." Brown *v.* Lunt, 37 Me. 428 (1854). "One who has the color of right or title to the office he exercises; one who has the apparent title of an officer *de jure.*" Brown *v.* O'Connell, 36 Conn. 451 (1870). "On the one hand he is distinguished from a mere usurper of an office, and on the other from an officer *de jure.*" Mallett *v.* Uncle Sam, etc. Min. Co., 1 Nev. 197 (1865); Plymouth *v.* Painter, 17 Conn. 588 (1846). In State *v.* Curtis, 9 Nev. 325 (1874), the court held that in order to make a person an officer *de facto* he should in some way have been put into the office and have secured such a holding thereof as to be considered in peaceable possession and actually exercising the functions of an officer; an intrusion by force is not sufficient.

[1] Leach *v.* People, 122 Ill. 420 (1887).

[2] Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). *Cf.* ch. XXXVII, *supra.*

[3] Baird *v.* Bank of Washington, 11 Serg. & R. 411 (1824), where a minority of the directors elected him; Delaware, etc. Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131 (1853), where the president was not a resident as required by statute.

[4] See § 624, *supra;* Thorington *v.* Gould, 59 Ala. 461 (1877). *Contra*, Curling *v.* Chalklen, 3 M. & S. 496, 510 (1833); Peppin *v.* Cooper, 2 B. & Ald. 431 (1819); People *v.* Twaddell, 18 Hun, 427 (1879).

[5] A director who sells his stock ceases to be a *de jure* director. If he continues and is permitted to act he is a director *de facto.* Beardsley *v.* Johnson, 121 N. Y. 224 (1890).

[6] St. Luke's Church *v.* Matthews, 4 Dessaus. (S. C.) 578 (1815); Vernon Soc. *v.* Hills, 6 Cow. 23 (1826); All Saints Church *v.* Lovett, 1 Hall, 191 (1828); Lovett *v.* German Ref. Church, 12 Barb. 67 (1852); Riddle *v.* Bedford, 7 Serg. & R. (Pa.) 392 (1821); York County *v.* Small, 1 Watts & S. (Pa.) 315 (1841); Kingsbury *v.* Ledyard, 2 Watts & S. (Pa.) 41 (1841); Smith *v.* Erb, 4 Gill (Md.), 437 (1846); Burr *v.* McDonald, 3 Gratt. (Va.) 215 (1846); Granville Charitable Assoc. *v.* Baldwin, 42 Mass. 359 (1840); Green *v.* Cady, 9 Wend. 414 (1832); Elizabeth City Acad. *v.* Lindsey, 6 Ired. L. (N. C.) 476 (1846); McCall *v.* Byram Mfg. Co., 6 Conn. 428 (1827); Lathrop *v.* Scioto Bank, 8 Dana (Ky.), 115 (1839); Delaware, etc. Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131 (1853); St. Mary's Bank *v.* St. John, 25 Ala. 566 (1854); Baird *v.* Washington Bank, 11 Serg. & R. 411 (1824); *Ex parte* Rogers, 7 Cow. 530, n. (1827); *Re* Mohawk, etc. R. R., 19 Wend. 135 (1838); *Re* Chenango Ins. Co., 19 Wend. 635 (1838); Blandford School District *v.* Gibbs, 56 Mass. 39 (1848);

"Where persons have to deal for the first time with an established company, and with those who have been and are acting openly and without challenge as directors of that company, and whom they honestly believe to be directors, they certainly are not

Sampson *v.* Bowdoinham Co., 36 Me. 78 (1853); Penobscot *v.* Dunn, 39 Me. 587 (1855); Fairfield, etc. Co. *v.* Thorp, 13 Conn. 173 (1839); Rex *v.* Bedford Level, 6 East, 356, 368 (1805); Parker *v.* Kett, 1 Ld. Raym. 658 (1701); Wild *v.* Passamaquoddy Bank, 3 Mason, 505 (1825); s. c., 29 Fed. Cas. 1215; Barrington *v.* Washington Bank, 14 Serg. & R. (Pa.) 405 (1826); Minor *v.* Mechanics' Bank, 1 Pet. 46 (1828); Cahill *v.* Kalamazoo Ins. Co., 2 Doug. (Mich.) 124 (1845); M'Gargell *v.* Hazelton Coal Co., 4 Watts & S. (Pa.) 424 (1842), an action for a penalty, in which evidence was admitted to show that the person representing the company was an officer *de facto; Re* County, etc. Co., L. R. 5 Ch. 288 (1870); Mahoney *v.* East, etc. Co., L. R. 7 H. L. 869 (1875); Partridge *v.* Badger, 25 Barb. 146 (1857), where the treasurer was only *de facto;* Doremus *v.* Dutch, etc. Co., 3 N. J. Eq. 332 (1835), where seceding trustees made a mortgage; Mechanics', etc. Bank *v.* Burnet, etc. Co., 32 N. J. Eq. 236 (1880), and Charitable Assoc. *v.* Baldwin, 42 Mass. 359 (1840), where *de facto* directors brought suits; Clark *v.* Easton, 146 Mass. 43 (1888); Cooper *v.* Curtis, 30 Me. 488 (1849), holding that debtors to the corporation cannot set this up; Susquehanna, etc. Co. *v.* General Ins. Co., 3 Md. 305 (1852), holding that a president who executes an instrument is presumed to be president; Hackensack, etc. Co. *v.* De Kay, 36 N. J. Eq. 548 (1883), where *de facto* directors gave a mortgage. The title of the president to his office cannot be questioned in a suit brought by a corporate creditor against the corporation on a contract made by him, the board of directors having acquiesced in his acting as president. Heinze *v.* South, etc. Co., 109 Wis. 99 (1901). A lessee of a corporation who knows that the officers executing the lease had doubtful title to their office. and that their title was in litigation, cannot enforce the lease, if the officers are afterwards ousted. Groveland, etc. Co. *v.* Farmers', etc. Co., 25 Wash. 344 (1901). Directors who are elected at a stockholders' meeting not properly called cannot make and enforce calls. Hawbeach, etc. Co. *v.* Teague, 5 H. & N. 151 (1860). A board of directors who are ineligible cannot revoke an agreement to arbitrate a suit. Richards *v.* Attleborough Nat. Bank, 148 Mass. 187 (1889). See also § 624, *supra.* An exhibition corporation is liable for premiums, although the exhibition was conducted by *de facto* officers, whose title to office was held to be bad a month prior to the exhibition. Richards *v.* Farmers' etc. Inst., 154 Pa. St. 449 (1893). Although a director is not qualified according to the by-laws, yet, if he is elected and permitted to act, his election is valid so far as his acts as director affect third persons. Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). The eligibility of a director who has acted with the consent of all cannot be questioned on an application to have the company dissolved under the statute. *Re* Santa, etc. Co., 4 N. Y. Supp. 173 (1889). The qualifications of a director cannot be questioned by a creditor who is seeking to enforce a statutory liability of officers. Wallace *v.* Walsh, 125 N. Y. 26 (1890). The principle of law that the acts of an ineligible but *de facto* officer may bind the corporation arises often in municipal corporation cases. State *v.* Farrier, 47 N. J. L. 383 (1885); aff'd, 48 N. J. L. 613. Although the directors are not qualified, nevertheless the company cannot repudiate stock issued to a contractor in payment for work, where such work

bound to inquire into the qualifications or validity of appointment of those *de facto* directors."[1]

It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced.[2] The fact that some of the directors are not residents of the state, as required by statute, does not invalidate a mortgage authorized by them.[3] And although the statutes require the directors to be residents of the state, nevertheless, even though the directors are non-residents, the incorporation is valid, and the corporation is not dissolved, nor are the stockholders liable as partners.[4] But the acts

has been received, such contract being authorized by the disqualified directors. The company cannot accept the subscription, and at the same time repudiate the contract mode of payment. *Re* Staffordshire Gas, etc. Co., 66 L. T. Rep. 413 (1892). See also on the general principle that where a corporation allows persons to act publicly as its officers, it is bound by their contracts made in its behalf with third persons, U. S. Bank *v.* Dandridge, 12 Wheat. 64 (1829); Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 392 (1827); Perkins *v.* Washington Ins. Co., 4 Cow. 645 (1825); Troy Turnp. Co. *v.* M'Chesney, 21 Wend. 296 (1839); Warren *v.* Ocean Ins. Co., 16 Me. 439 (1839); Badger *v.* Cumberland Bank, 26 Me. 428 (1846); Davidson *v.* Bridgeport, 8 Conn. 472 (1831); Selma, etc. R. R. *v.* Tipton, 5 Ala. 787 (1843); Detroit *v.* Jackson, 1 Doug. (Mich.) 106 (1843); Farmers' Bank *v.* Chester, 6 Humph. (Tenn.) 458 (1846); Hall *v.* Carey, 5 Ga. 259 (1848); Conover *v.* Albany Ins. Co., 1 Comst. 290 (1848); Lohman *v.* New York, etc. R. R., 2 Sandf. 39 (1848); Beers *v.* Phœnix Glass Co., 14 Barb. 358 (1852); Alabama Bank *v.* Comegys, 12 Ala. 772 (1848); Mead *v.* Keeler, 24 Barb. 20 (1857); Fryeburg Canal *v.* Frye, 5 Me. 38 (1827); Northern Liberties Bank *v.* Cresson, 12 Serg. & R. (Pa.) 306 (1824). Directors may act as such before they acquire qualification shares. *Re* International Cable Co., 66 L. T. Rep. 253 (1892).

[1] Webb *v.* Shropshire Rys., [1893] 3 Ch. 307; also holding such to be the rule where a quorum was not present when they were elected or where they were not qualified. See also § 725, *infra.*

[2] Savage *v.* Miller, 56 N. J. Eq. 432 (1898). Although the statutes require three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee having no knowledge of these facts is protected. Kuser *v.* Wright, 52 N. J. Eq. 825 (1895), reversing Wright *v.* First Nat. Bank, 52 N. J. Eq. 392. Where the statute requires directors to be stockholders, and two of the directors are not stockholders, but a directors' meeting is regularly called, a mortgage authorized at such a meeting is legal, even though one of the directors who held stock and was qualified was not present, especially where he had agreed to the mortgage and the mortgagee took possession and held it for thirteen months and the corporation did not object. Silsby *v.* Strong, 38 Oreg. 36 (1900).

[3] Wheelwright *v.* St. Louis, etc. Transp. Co., 56 Fed. Rep. 164 (1893). The fact that a contract of a Pennsylvania company is made by its president and managers, who are non-residents and not residents as required by statute, does not enable the other party to the contract to raise that objection. Delaware, etc. Canal Co. *v.* Pennsylvania Coal Co., 21 Pa. St. 131 (1853).

[4] Demarest *v.* Flack, 128 N. Y. 205 (1891).

of *de facto* directors cannot be invoked in behalf of themselves or stockholders. Only strangers can rely thereon.[1] The *de facto* director cannot avoid a liability by setting up that he was not a *de jure* director;[2] nor collect a salary as a *de facto* officer;[3] nor make a note to himself and claim that his office gave him the authority.[4] A *de facto* officer is ousted by a *quo warranto* proceeding,[5] and not by a suit in equity,[6] nor by an action in trespass,[7] nor a writ of prohibition.[8]

§ 713a. *Meetings of directors — Place — Notice — Action without meeting — Quorum.*— A meeting of the directors of a corporation may be held outside of the state creating the corporation, unless the charter or a statute expressly forbids such a meeting. The acts, proceedings, and contracts of a meeting of the board of directors held outside of the state are valid and enforceable.[9] Under the

[1] Shellenberger *v.* Patterson, 168 Pa. St. 30 (1895). In a suit brought by a stockholder to set aside a sale of the stock for non-payment of an assessment, the court may investigate the legality of the title of the directors to their office, and if they have not taken an oath as required by statute the assessment made by them is illegal. Schwab *v.* Frisco, etc. Co., 60 Pac. Rep. 940 (Utah, 1900).

[2] Keyser *v.* McKissam, 2 Rawle (Pa.), 139 (1828), involving a bond; Bank of St. Mary's *v.* St. John, 25 Ala. 566 (1854). In a suit for a breach of trust this is no defense. West Bank of Scotland *v.* Baird and others, 11 Ct. of Sess. Cas. (3d series), pp. 96-121 (1872); Easterly *v.* Barber, 65 N. Y. 252 (1875). *Cf.* Craw *v.* Easterly, 54 N. Y. 679 (1873). A director who has acted as such cannot claim that the election was irregular. Hall *v.* West, etc. Pub. Co., 180 Pa. St. 561 (1897). A *de facto* director cannot defend against a statutory liability of directors on the ground that he did not hold sufficient stock to qualify himself to be a director. Donnelly *v.* Pancoast, 15 N. Y. App. Div. 323 (1897). One who assumes the duties of a director cannot say that he never was a director. McDowall *v.* Sheehan, 129 N. Y. 200 (1891). A director who acts, even though not qualified, is subject to the rule disqualifying him from selling property to the company. Stetson *v.* Northern Inv. Co., 104 Iowa, 393 (1898).

[3] Riddle *v.* Bedford County, 7 Serg. & R. (Pa.) 386 (1821).

[4] Lebanon, etc. Co. *v.* Adair, 85 Ind. 244 (1882).

[5] See § 617, *supra.* A superintendent elected by *de facto* directors may be ousted. State *v.* Curtis, 9 Nev. 325 (1874). After the courts have decided that certain persons are directors, *mandamus* will be granted that the defeated parties turn over the books and papers to the former. Matter of Journal Pub. Club, 30 N. Y. Misc. Rep. 326 (1900).

[6] See § 618, *supra.*

[7] Kingsbury *v.* Ledyard, 2 Watts & S. (Pa.) 37 (1842).

[8] San Jose, etc. Bank *v.* Sierra, etc. Co., 63 Cal. 179 (1883).

[9] The first or organization meeting of the directors may be held out of the state. Glymont Imp. etc. Co. *v.* Toler, 80 Md. 278 (1894). A by-law that regular directors' meetings shall be held in the state does not prevent special meetings outside of the state. Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149 (1896); Wright *v.* Bundy, 11 Ind. 398, 404 (1858), where a mortgage of a railway incorporated by Indiana was held valid though executed in Ohio; Bassett *v.* Monte Christo, etc. Co., 15 Nev. 293 (1880),

Illinois statute a mortgage authorized by a directors' meeting held outside of the state is illegal, unless such meeting was authorized or its acts ratified by a vote of two-thirds of the directors at a regular meeting in the state in accordance with the statute.[1]

There has been some controversy and doubt as to the necessity

where power to issue bonds and mortgage real property in Nevada was conferred at a meeting of directors held in New York, the corporation having been chartered by Pennsylvania — but here the charter authorized the corporation to meet and act at any place in the United States; Ohio, etc. R. R. *v.* McPherson, 35 Mo. 13 (1864), where calls for payment of subscriptions to stock made by a board of directors at meetings held outside of the state creating the corporation were held to be valid; Wood Hydraulic, etc. *v.* King, 45 Ga. 34 (1872), in which the minutes of a meeting of directors held out of the state chartering their company were held to be evidence of the acts of the board in making contracts in other states. A directors' meeting out of the state may authorize a mortgage on real estate. Saltmarsh *v.* Spaulding, 147 Mass. 224 (1888); Reichwald *v.* Commercial Hotel Co., 106 Ill. 439 (1883); Galveston, etc. R. R. *v.* Cowdrey, 11 Wall. 459, 476 (1870), in which it was held that *bona fide* holders of railroad bonds could not be prejudiced by the fact that the mortgage by which they were secured was executed by virtue of a resolution of directors at a meeting held out of the state which chartered the road; Bellows *v.* Todd, 39 Iowa, 209, 217 (1874), where a conveyance of real estate was authorized; Arms *v.* Conant, 36 Vt. 744 (1864); McCall *v.* Byram Mfg. Co., 6 Conn. 428 (1827); Smith *v.* Alvord, 63 Barb. 415 (1866); Singer *v.* Salt Lake City, etc. Co., 17 Utah, 143 (1898). *Cf.* Ormsby *v.* Vermont, etc. Co., 56 N. Y. 623 (1874); Aspinwall *v.* Ohio, etc. R. R., 20 Ind. 492, 497 (1863). Corporations incorporated in New Jersey were formerly required by statute to hold their directors' meetings within that state. Hilles *v.* Parrish, 14 N. J. Eq. 380 (1862). The president may call a meeting of the directors at a place other than the chief place of business. Corbett *v.* Woodward, 5 Sawyer, 403 (1879); s. c., 6 Fed. Cas. 531. A person who participates in a directors' meeting held out of the state cannot object to it on that ground. Wood *v.* Boney, 21 Atl. Rep. 574 (N. J. 1891). The directors may hold their meetings outside of the state. Missouri, etc. Co. *v.* Reinhard, 114 Mo. 218 (1893). An assignment of a corporate mortgage may be executed in another state. Gray *v.* Waldron, 101 Mich. 612 (1894). In Brockway *v.* Gadsden, etc. Co., 102 Ala. 620 (1894), a meeting of the board of directors outside of the state was held to be illegal under the Alabama statute which regulates such meetings.

[1] State Nat. Bank *v.* Union Nat. Bank, 168 Ill. 519 (1897). A newly elected president may file a petition to be allowed to file an information in the nature of a *quo warranto* to compel a *de facto* president to surrender the office where the basis of the petition is that the meeting of the board of directors which elected the *de facto* president was held out of the state in violation of the statutes of Illinois. Place *v.* People, 192 Ill. 160 (1901). Under the Illinois statute which prohibits the directors from holding their meetings outside of the state, unless authorized or ratified by a vote of two-thirds of the directors at a regular meeting, a mortgage on land in Missouri authorized at a meeting held in Missouri is illegal, and a subsequent ratification thereof at a meeting regularly held in Illinois does not validate such mortgage as against an attachment levied before such ratification. Union, etc. Bank *v.* State, etc. Bank, 155 Mo. 95 (1900).

of giving notice of directors' meetings. Many cases apply to directors' meetings the same rules that apply to stockholders' meetings. Other cases hold that less formality and strictness are required in calling a directors' meeting. The decisions are quite uniform, however, in holding that as to all special meetings of the board of directors notice must be given.[1]

[1] A mortgage authorized at a special meeting of directors, no notice of which had been given to two directors who were not present, is not enforceable, the minutes not having been approved at any subsequent meeting. Curtin *v.* Salmon, etc. Co., 130 Cal. 345 (1900). A mortgage authorized at a meeting of the board of directors of which no notice was given and some of the directors were absent is not valid, and the declarations of a joint mortgagor that the corporation had authorized the mortgage are inadmissible. Relley *v.* Campbell, 134 Cal. 175 (1901). A chattel mortgage authorized at a directors' meeting at which only half the directors were present, and notice of which had not been given to directors who were not present, is illegal. Broughton *v.* Jones, 120 Mich. 462 (1899). A director who is not a stockholder cannot complain that a meeting of the directors was held without notice to him. Anderson, etc. Co., *v.* Pungs, 127 Mich. 543 (1901). Notice to all the trustees of a religious corporation is necessary. Thompson *v.* West, 82 N. W. Rep. 13 (Neb. 1900). "That all the directors are entitled to notice, either express or implied, of any meeting at which any business is transacted, in order that the business may be binding upon all the persons concerned, admits of no question. . . . If the meetings held are regular meetings,— that is, such as are provided for by charter or the by-laws, fixing time and place,— then notice thereof is implied. Of all other meetings, especially those at which any business not pertaining to the ordinary affairs of the corporation is transacted, express notice must be given of the time and place and the object or purpose of the meeting." Hence an assignment of bank accounts by a corporation to its president, as collateral security, is not valid where no notice was given to all the directors of the meeting authorizing the assignment. Whitehead *v.* Hamilton Rubber Co., 52 N. J. Eq. 78 (1893). A person who is elected a director but does not accept need not be notified of a directors' meeting. Whittaker *v.* Amwell Nat. Bank, 52 N. J. Eq. 400 (1894). A meeting of a majority of the directors at an unusual time and place is not valid where the minority had no notice. First Nat. Bank *v.* Asheville, etc. Co., 116 N. C. 827 (1895). A special meeting of directors is void if no notice is given to absent directors. The fact that a director owns or controls a majority of the stock does not validate such a meeting even though he favored their action. Hill *v.* Rich Hill, etc. Co., 119 Mo. 9 (1893). Where the directors of a bank are accustomed to hold directors' meetings at the bank whenever a quorum is present, this custom will be upheld, and a meeting is legal although no notice thereof is given, there being no by-law or statute on the subject. American Nat. Bank *v.* First Nat. Bank, 82 Fed. Rep. 961 (1897). Directors are required to take notice of an annual meeting, and no notice need be given of an adjournment thereof. Western Imp. Co. *v.* Des Moines Nat. Bank, 103 Iowa, 455 (1897). Even though no notice is given to a director of a meeting of the board, yet where the matter passed upon by the board is one which he would be disqualified from voting upon, the meeting is legal. Troy Min. Co. *v.* White, 10 S. Dak. 475 (1898). An assignment for the benefit of creditors,

The law is inclined to tolerate more freedom in the notice and the calling and holding of directors' meetings, inasmuch as the

authorized at a meeting of the board of directors where a part of the directors were absent and had no notice thereof, is not valid. Simon *v.* Sevier Assoc., 54 Ark. 58 (1890). Notice of a directors' meeting need not be given to a director who resides abroad, nor to another director who is traveling abroad. The court, however, refused to lay down the broad rule that no notice in any case need be given to directors who are abroad. Halifax, etc. Co. *v.* Francklyn, 62 L. T. Rep. 563 (1890). Notice of a directors' meeting cannot be waived in advance by a director where the time and purpose of the meeting have not yet been determined upon. *Re* Portuguese, etc. Mines, L. R. 42 Ch. D. 160 (1889). Where three of seven directors are non-residents, one having sold his stock, one traveling, and one inaccessible for immediate notice, the four remaining directors may hold a meeting and authorize an assignment of the corporate property for the benefit of creditors. The assignment was held to be legal, the traveling director and the inaccessible director having subsequently voted in a meeting for the selection of an assignee. National Bank of Commerce *v.* Shumway, 49 Kan. 224 (1892). A mortgage authorized at a directors' meeting at which four were present and the other received no notice is illegal, the giving of notice being possible, and there being no necessity for immediate action. Bank of Little Rock *v.* McCarthy, 55 Ark. 473 (1892). An assignment for the benefit of creditors, made by order of a directors' meeting at which three directors were present and the other two were not notified, is invalid, and no bar to a creditor's action to collect unpaid subscriptions. Doernbecher *v.* Columbia, etc. Co., 21 Oreg. 573 (1892). Where a directors' meeting, according to the by-laws, may be called by the president, or if there is no president by two directors, the two directors cannot call it even if the president refuses to do so. The acts of a meeting of a board so called are illegal, a majority of the directors only being present. Smith *v.* Dorn, 96 Cal. 73 (1892). A director is entitled to notice of a meeting to elect a president. Undue haste and failure to give notice will suffice to set the election aside. A subsequent meeting of the board cannot ratify it. The election must be held over again. State *v.* Smith, 15 Oreg. 98 (1887); Singer *v.* Salt, etc. Co., 53 Pac. Rep. 1024 (1898).

A notice of a school trustees' meeting need not be given to trustees out of the state who could not have attended anyway. Porter *v.* Robinson, 30 Hun, 209 (1883). In Harding *v.* Vandewater, 40 Cal. 77 (1870), a note given for an assessment upon a subscription which was called at a special meeting of the board of trustees of a mining company, of which two of the trustees had no notice, was held to be void. In Farwell *v.* Houghton Copper, etc., 8 Fed. Rep. 66 (1881), it was held that one who had been a shareholder and purchased all the property of the company at a meeting of the directors held without notice, at which he was present and knew that one director was absent, was bound to know that notice to such absent director was necessary, and that he was not a *bona fide* purchaser without notice. Lane *v.* Brainerd, 30 Conn. 565 (1862), holding that the corporate record of a meeting at which a quorum was present was presumptive proof that all the directors had been duly notified, whether living in the state or elsewhere. Where the deed of settlement provided for special meetings, the time and place of which were to be fixed by notices countersigned by the secretary, it was held that a meeting of the requisite number of directors without pre-

meetings are more frequent, the absences more common, the acts less fundamental, and ratification by acting on the contracts more

vious agreement to meet on any fixed day or hour was not a meeting duly convened within the charter provision. Moore *v.* Hammond, 6 Barn. & C. 456 (1827). To same effect in municipal corporation cases, Smyth *v.* Darley, 2 H. L. Cas. 789 (1849); Rex *v.* Carlisle, 1 Stra. 385 (1720). An adjourned meeting of directors may act to the same extent that the original meeting might have acted. Smith *v.* Law, 21 N. Y. 296 (1860); Wills *v.* Murray, 4 Exch. 843 (1850). A by-law enacted by the directors in reference to the calling of a directors' meeting, even if not complied with, does not invalidate the meeting. Samuel *v.* Holladay, Woolw. 400 (1869); s. c., 21 Fed. Cas. 306. A quorum of directors may bind the corporation, although the other directors are not notified, there being no by-law or charter provision requiring notice. Edgerly *v.* Emerson, 23 N. H. 555 (1851). *Contra*, Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841). An assessment made at an irregularly-called directors' meeting is void. Thompson *v.* Williams, 76 Cal. 153 (1888). Two out of three directors cannot authorize a chattel mortgage, the third not having been notified of the meeting. The mortgagee was one of the directors. Doyle *v.* Mizner, 42 Mich. 332 (1879). A corporate receiver cannot object to a contract on the ground that the directors' meeting authorizing it was not properly convened, but the receiver may avoid corporate notes issued contrary to express statute. Leavitt *v.* Yates, 4 Edw. Ch. 134 (1843). Bonds issued under authority of a meeting of two commissioners of a town without notice to a third commissioner are not valid. Pike County *v.* Rowland, 94 Pa. St. 238 (1880). In Kersey, etc. Co. *v.* Oil, etc. R. R., 12 Phila. 374 (1877), a lease was declared void because it was authorized only by a meeting of directors of which part of the directors had no notice and were not present. A special meeting of an executive committee is irregular unless notice is given to each member. Metropolitan, etc. Co. *v.* Domestic, etc. Co., 44 N. J. Eq. 568 (1888). Where a subsequent meeting of directors expressly ratifies the acts of a preceding meeting, any defect in the notice given of the latter meeting is cured. County Court *v.* Baltimore, etc. R. R., 35 Fed. Rep. 161 (1888). Acts of a board of directors, no notice having been given to absent directors, may be valid by acquiescence. Reed *v.* Hayt, 51 N. Y. Super. Ct. 121 (1884); aff'd, 109 N. Y. 659. Although an allotment of stock may be illegal by reason of notice not having been given of a directors' meeting, yet the allotment may be confirmed by a subsequent legally-called meeting. *Re* Portuguese, etc. Mines, L. R. 45 Ch. D. 16 (1890). A person who commits a trespass on the property of a corporation cannot question the regularity of a contract of such corporation, so far as such regularity turns on the action of a directors' meeting, or meeting of an executive committee, or assent of three-fifths of the stockholders, as required by statute. Farnsworth *v.* Western, etc. Co., 6 N. Y. Supp. 735 (1889). "The evidence that a day was fixed by common consent is sufficient to show notice to all of the meetings on that day." "It was wholly immaterial in what way the day of the regular meetings was fixed." Atlantic, etc. Ins. Co. *v.* Sanders, 36 N. H. 252, 269 (1858). In a case where directors were empowered to meet once a week at their office, without notice or summons, but on such day and at such hour as they should from time to time agree upon, it was held that a resolution come to by a quorum assembled without notice was invalid, inasmuch as no day or hour for the meeting of the directors had ever been fixed. Moore *v.* Hammond, 6 B. &

certain and easy. A preference given by a meeting of the board of directors at which a quorum is present, notice of which was not given to the other directors, may be valid if no officer or stockholder thereafter objected to the same.[1] Where five of eight members of the board of an insolvent company meet and authorize the sale of certain personal property, and such sale is carried out, other creditors cannot raise the objection that no notice was given to the remaining three members of the board.[2] If all the directors are present at a meeting, it is immaterial that notice was not given, even though the by-laws required it.[3] Where meetings of the di-

C. 456 (1827). If the board meeting be specially convened, the general rule is that notice must be served upon every member entitled to be present. Pike County *v.* Rowland, 94 Pa. St. 238 (1880). *Mandamus* lies to compel vestrymen to attend a meeting when by reason of dissensions they decline so to do. People *v.* Winans, 9 N. Y. Supp. 249 (1890). Notice to all is necessary, although a quorum is present. Johnston *v.* Jones, 23 N. J. Eq. 216 (1872), where the meeting was for the purpose of calling a stockholders' meeting. Concerning the differences between the position of municipal corporation officials and the officers of a private corporation, see Wallace *v.* Walsh, 125 N. Y. 26, 36 (1890). A recess may be taken by a board without formal action, and two meetings on the same day may be construed as one meeting with a recess. State *v.* Powell, 101 Iowa, 382 (1897). Where a meeting of the board of directors could not authorize suit to collect assessments because the assessments were not yet due, an adjourned meeting of that meeting cannot authorize such suit, all of the directors not being present at the adjourned meeting and no new notice thereof having been given. Bank of National City *v.* Johnston, 133 Cal. 185 (1901). An assignment by a corporation for the benefit of its creditors, executed by order of a meeting of the board of directors, no notice of which was given to absent directors, is not good as against an execution levied two days after such assignment, although it may be good as to creditors who acquiesce in such assignment. Vaught *v.* Ohio, etc. Co., 49 S. W. Rep. 426 (Ky. 1899). A deed of all the corporate property authorized at a meeting of the board of directors of which no notice was given, and only four out of seven were present, and three of the four were interested in the company which purchased the property, is invalid, and may be set aside by a judgment creditor of the selling corporation. Summers *v.* Glenwood, etc. Co., 86 N. W. Rep. 749 (So. Dak. 1901). A directors' meeting without notice to a director who is not present is not valid. Cupit *v.* Park City Bank, 20 Utah, 292 (1899). Notice need not be given to a director where it is not practicable, or where he secretes himself or is beyond the reach of notice and it is necessary that immediate action be taken. Singer *v.* Salt Lake City, etc. Co., 17 Utah, 143 (1898).

[1] Moller *v.* Keystone, etc. Co., 187 Pa. St. 553 (1898).

[2] Johnson Co. *v.* Miller, 174 Pa. St. 605 (1896).

[3] Minneapolis Times Co. *v.* Nimocks, 53 Minn. 381 (1893). No notice of a directors' meeting is necessary if all are present. Bank of National City *v.* Johnston, 60 Pac. Rep. 776 (Cal. 1900). In Missouri it is held that even though the by-laws provide that a directors' meeting may be held without notice if all are present, yet two of the three directors cannot thereby go into the presence of the third director and declare the meeting on, as against the objection of

rectors can, by the by-laws, be called only by the president or majority of the board, the secretary cannot call one.[1] A party dealing with a corporation is not bound to inquire whether proper notice was given of a directors' meeting.[2] A notice to directors of a corporation of a meeting, not specifying the business to be transacted, is all that is necessary to authorize the transaction of the ordinary business affairs of the corporation.[3]

The notice must be given a reasonable time before the hour of

such third director. State v. Manhattan, etc. Co., 149 Mo. 181 (1899).

[1] Hill v. Rich Hill, etc. Co., 119 Mo. 9 (1893). Where the secretary has power to call a meeting of the directors, but instead of his doing so the president uses a rubber stamp to affix the secretary's name to the call, and it transpires that every director either received the notice or was present at the meeting, the informality is immaterial. Ashley Wire Co. v. Illinois Steel Co., 164 Ill. 149 (1896).

[2] Kuser v. Wright, 52 N. J. Eq. 825 (1895), reversing Wright v. First Nat. Bank, 52 N. J. Eq. 392. A mortgage authorized by a quorum of directors may be valid, though the other directors were not present and were not notified. Bank v. Flour Co., 41 Ohio St. 552 (1885). See also § 712, *supra*, and § 725, *infra*. "One who takes from a railroad or business corporation, in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation." Louisville, etc. Ry. v. Louisville Trust Co., 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record.

[3] *Re* Argus Co., 138 N. Y. 557 (1893); New Haven Sav. Bank v. Davis, 8 Conn. 192 (1830), holding that a meeting of bank directors was legal for an ordinary transaction, although the notice did not specify its object, and that mortgaging its real estate to secure a debt was proper at such meeting. Where, a few days before a new board was to go in, a notice of a directors' meeting states that it is to hear the treasurer's report and transact other business that might come before the board, it is illegal for the board, at such meeting, to make a perpetual lease of all the corporate property. Mercantile Library Hall Co. v. Pittsburgh Library Assoc., 173 Pa. St. 30 (1896). A notice of a special meeting of the board of directors need not specify the business which is to be considered. Wills v. Murray, 4 Exch. 843 (1850). A notice of a special meeting of the trustees of a religious corporation must state the object of the meeting. Maclaury v. Hart, 10 N. Y. Supp. 125 (1890). It is not necessary to state in the notice convening a meeting of the directors of a company the business to be transacted at the meeting, even if it is of an extraordinary character; and any decision come to at such meeting cannot afterwards be questioned on the ground that no notice of such business was given. Compagnie de Mayville v. Whitley, [1896] 1 Ch. 788. Special meetings of the directors may be held, although the by-laws do not provide for such. United Growers' Co. v. Eisner, 22 N. Y. App. Div. 1 (1897).

the meeting, and the mode of giving or serving the notice must be reasonable. All this turns on the circumstances and facts in each case.[1] Where no special method of serving notice of directors' meetings is prescribed, and the notice is served by mail, upon proof of mailing, the receipt of the notice is presumed, even as against a director's doubt as to his having received it.[2] Notice to all the directors is presumed.[3]

[1] A notice of a directors' meeting sent out in the afternoon for the evening is sufficient, if delivered to a servant at a director's residence, even though such director was absent from home, his absence not being known to the party calling the meeting until such notice was delivered. *Re* Argus Co., 138 N. Y. 557 (1893). Notice of a directors' meeting, received on the morning of the day of the meeting, is insufficient although the meeting was to be at four o'clock in the afternoon. The court said: "*Prima facie* this was not a reasonable time. The managers are all reported as business men, who cannot be presumed to be ready to drop their own affairs and attend offhand on such a notice. One full day in advance of the time fixed is as little as the law could presume to be reasonable, and in many cases that would be too short." The court said, however, that a by-law or the practice of the board might vary this rule. Mercantile Library Hall Co. *v.* Pittsburgh Library Assoc., 173 Pa. St. 30 (1896). A meeting of directors called in the morning for two o'clock that day is invalid where one director could not come until three o'clock and another received the notice next morning. A quorum was present. *Re* Homer, etc. Mines, L. R. 39 Ch. D. 546 (1888). Leaving notice of a directors' meeting at a director's business place suffices, even though he is known to be ill. Corbett *v.* Woodward, 5 Sawyer, 403 (1879). Notice to a director is sufficient if given orally to the director's brother at the director's place of business, where a by-law allowed notice to be given by mail or in other ways. Williams *v.* German, etc. Ins. Co., 68 Ill. 387 (1873). Notice to directors, sent by mail, is sufficient if sent in time so that the director, after receiving it, would have time to reach the place of meeting. Covert *v.* Rogers, 38 Mich. 363 (1878). A meeting of the directors may be valid although two of them, being absent from the state, did not receive the notice. Chase *v.* Tuttle, 55 Conn. 455 (1888). Telegraphic notice to two directors out of the state, of a meeting to make an assignment, is sufficient, though not received by them, a majority having met and ordered the assignment. Chase *v.* Tuttle, 55 Conn. 455 (1888).

[2] Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149 (1896). Where written notices of a special directors' meeting, properly addressed, are sent by mail to them, it is presumed that such notices were received, though there is no by-law that notice may be given by mail. Stockton, etc. Works *v.* Houser, 109 Cal. 1 (1895). Notice by postal card of a directors' meeting suffices where it is customary and all received it. People *v.* Albany Med. Coll., 26 Hun, 348 (1882); aff'd, 89 N. Y. 635.

[3] Ross *v.* Crockett, 14 La. Ann. 811 (1859); Chouteau Ins. Co. *v.* Holmes, 68 Mo. 601 (1878). Notice of a meeting of directors is presumed. Hardin *v.* Iowa, etc. Co., 78 Iowa, 726 (1889); Stockton, etc. Works *v.* Houser, 109 Cal. 1 (1895). Where the corporate record shows that a quorum of the directors was present, this is *prima facie* evidence that all had notice. Fletcher *v.* Chicago, etc. Ry., 67 Minn. 339 (1897). Proof that the secretary, twenty-four hours before a meet-

There has been a question whether directors could vote and act as a board without coming together. Many attempts have been made to sustain a vote of the directors, which they had separately and singly agreed to. The law, however, is now clear that such separate assent is void. Directors are elected to meet and confer, and to act after an opportunity for an interchange of ideas. They cannot vote or act in any other manner.[1] Many of the cases to the

ing of the directors, sent to each of them a written notice by his office boy raises a presumption that proper notice was given. Where the minutes of a directors' meeting are written out and signed by the secretary it is presumed that all directors had notice of the meeting. Balfour-Guthrie, etc. Co. *v.* Woodworth, 124 Cal. 169 (1899). It is presumed that directors had notice of a meeting. Mills *v.* Boyle, etc. Co., 132 Cal. 95 (1901). A corporation defending against its note on the ground that all the directors were not notified of a meeting which authorized the same has the burden of proof of showing that such was the case. Barrell *v.* Lake, etc. Co., 122 Cal. 129 (1898). Notice to directors is presumed. Singer *v.* Salt Lake City, etc. Co., 17 Utah, 143 (1898).

[1] Tradesman Pub. Co. *v.* Knoxville Car Wheel Co., 95 Tenn. 634 (1895). *Re* Haycraft, etc. Co., [1900] 2 Ch. 230; Hamlin *v.* Union, etc. Co., 68 N. H. 292 (1895); Peirce *v.* Morse-Oliver, etc. Co., 94 Me. 406 (1900); Monroe, etc. Co. *v.* Arnold, 108 Ga. 449 (1899). A deed of real estate executed by the directors of a corporation separately and at different times, but not formally authorized by them as a board, is not only ineffectual as a conveyance of real property, but equally so as a contract to convey. Baldwin *v.* Canfield, 26 Minn. 43, 54 (1879). The verbal assent of directors to the execution of a mortgage is not good. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629 (1889). Where the directors own all the stock of a corporation, they may authorize its president to sell its assets, and the fact that the authority was not given at a regular directors' meeting is immaterial. Jordan *v.* Collins, 107 Ala. 572 (1895). A mere street conversation between the directors, by which they "agree" that subscriptions shall be called, is not a sufficient call. Branch *v.* Augusta Glass Works, 95 Ga. 573 (1895). A separate assent of a township committee to the construction of a street railway is illegal. West Jersey Traction Co. *v.* Camden, etc. Co., 53 N. J. Eq. 163 (1895). Separate action of the directors without a meeting is not good. Limer *v.* Traders' Co., 44 W. Va. 175 (1897). Separate acquiescence of the directors is not sufficient. Sanderson *v.* Tinkham, etc. Co., 83 Iowa, 446 (1891). The directors of a religious corporation cannot act as a board by the separate assents of the members to the act in question. Columbia Bank *v.* Gospel Tabernacle, 127 N. Y. 361 (1891). The separate assent of the directors to a mortgage is not good. Duke *v.* Markham, 105 N. C. 131 (1890). Directors can act in behalf of the corporation only as a board. Their power is not joint and several, but joint only. Buttrick *v.* Nashua, etc. R. R., 62 N. H. 413 (1882). Directors cannot act except as a board. North Hudson, etc. Assoc. *v.* Childs. 82 Wis. 460 (1892). Directors can act as such in meeting only. Their individual assent is not sufficient. State *v.* People's, etc. Assoc., 42 Ohio St. 579 (1885); Junction R. R. *v.* Reeve, 15 Ind. 236 (1860); Stoystown, etc. Turnp. Co. *v.* Craver, 45 Pa. St. 386 (1863). A bargain and sale deed of corporate property, authorized and executed separately and singly by all the directors without a board meeting, is void. Baldwin *v.* Canfield, 26 Minn. 43 (1879); Gashwiler *v.* Willis, 33 Cal. 11 (1867). Sepa-

contrary may be reconciled by the principle of law that the acts of a board of directors may be validated by subsequent acquiescence, even though the board was summoned irregularly or proceeded irregularly. Thus the separate assent of directors to the president executing a mortgage in the name of the corporation may be equivalent to acquiescence on the part of the directors in his assuming

rate and single consent of a quorum of directors to the secretary's execution of a bond is void. D'Arcy *v.* Tamar, etc. Ry., L. R. 2 Exch. 158 (1867). The assent of a mere majority of the board, given singly and separately, gives no authority to a cashier to do an act outside of his customary duties. Elliot *v.* Abbot, 12 N. H. 549 (1842). Where a mortgage is executed by order of directors assenting apart and not in a meeting, and is executed by a president and secretary who were elected by the stockholders at a meeting not properly called, the stockholders having no power to elect such officers in any case, the mortgage is not good. *Re* St. Helen Mill Co., 3 Sawy. 88 (1874); s. c., 21 Fed. Cas. 161. A pledge of corporate securities to raise money is legal where six of the eight directors consented, even though no meeting was held. Hubbard *v.* Camperdown Mills, 26 S. C. 581 (1887). Directors may bind the corporation by their separate approval of claims when they have been accustomed so to do. Longmont, etc. Co. *v.* Coffman, 11 Colo. 551 (1888). The separate assent of the board of trustees of a religious corporation to the execution of a note is void. They must meet. People's Bank *v.* St. Anthony's, etc. Church, 109 N. Y. 512 (1888). An assignment for the benefit of creditors authorized by the directors acting separately and not as a board is invalid. Calumet Paper Co. *v.* Haskell, etc. Co., 144 Mo. 331 (1897).

Where an officer is sued for malfeasance in office, it is no defense that his acts were authorized by directors who did not meet as a board, but separately and singly assented to acts. Directors bind the corporation by their votes only when they meet as a board. "The law proceeds upon the theory that the directors shall meet and counsel with each other, and that any determination affecting the corporation shall only be arrived at and expressed after a consultation at a meeting of the board attended by at least a majority of its members." National Bank *v.* Drake, 35 Kan. 576 (1886). A tax which is assessed by two trustees in meeting assembled, who then obtain the separate and private assent of the third trustee, is void. Keeler *v.* Frost, 22 Barb. 400 (1856); Schuman *v.* Seymour, 24 N. J. Eq. 143 (1873). The members of a board of highway commissioners cannot authorize or ratify a contract by separate approval. A meeting is necessary. Taymouth *v.* Koehler, 35 Mich. 22 (1876). The majority of a school board cannot act separately and singly, no meeting being held. Herrington *v.* District, etc., 47 Iowa, 11 (1877). The separate consent of three directors was held not good in Bosanquet *v.* Shortridge, 4 Exch. 699 (1850). A due-bill running from the corporation to a person and signed by the directors cannot be defeated by showing that the directors did not meet, but signed it separately and singly. Sampson *v.* Bowdoinham, etc. Corp., 36 Me. 78 (1853); Collins' Claim, L. R. 12 Eq. 246 (1871). The execution of a replevin bond by the president for the corporation is legal, a majority of the directors singly and separately assenting thereto. Bank of Middlebury *v.* Rutland, etc. R. R., 30 Vt. 159 (1858), where Redfield, Ch. J., said: "The cases are numerous where the consent of a majority of the directors given separately has been held binding upon the company." Probably

such authority and may bind the corporation.[1] Where a statute provides that the charter may be amended in certain respects upon the directors or a majority of them making and signing a certificate, such making and signing need not be at a meeting of the directors. No meeting is required.[2]

A director cannot obligate himself to vote in a certain way, even as to the election of president.[3] Directors, of course, cannot act or vote by proxy.[4]

in these last cases the contract would have been binding even if the directors had not acted at all. See also Cammeyer *v.* United, etc. Churches, 2 Sandf. Ch. 186, 229 (1844), holding that the trustees must meet in order to act, and that their affirmative vote in a stockholders' or general assemblage is not sufficient. Collective action as a board, and not individual action as members of the board, is necessary to bind the corporation. Allegheny County Workhouse *v.* Moore, 95 Pa. St. 408 (1880); Twelth St. Market Co. *v.* Jackson, 102 Pa. St. 273 (1883). Where there are but two stockholders, and they are directors, and no directors' or stockholders' meeting has been held since the organization meeting, and these two have carried on the business as though it was a partnership concern, a *bona fide* assignment by these two persons in the name of the corporation to secure preferred creditors of the corporation is good, although no corporate seal was used and no meetings were held authorizing the act. Teitig *v.* Boesman, 12 Mont. 404 (1892). When all the officers assent to a money obligation being given in the corporate name by the chief officer, the prioress, the educational corporation is bound. Louisville, etc. R. R. *v.* St. Rose Literary Soc., 91 Ky. 395 (1891). See also *Re* Great Northern, etc. Works, L. R. 44 Ch. D. 472 (1890), drawing a distinction where *all* of the directors assent. Directors cannot act singly. Morrison *v.* Wilder Gas Co., 91 Me. 492 (1898). Where some of the directors agree privately among themselves to pay for certain things needed by the corporation, and the latter uses them, they alone are liable for the price thereof. Lyndon, etc. Co. *v.* Lyndon, etc. Inst., 63 Vt. 581 (1891).

[1] National, etc. Bank *v.* Sandford, etc. Co., 157 Ind. 10 (1901). Where all the stockholders, being directors, agree informally and without meeting that a certain person shall be the corporate agent and take entire control, he is authorized to bind the corporation by his acts. Wood *v.* Wiley, etc. Co., 56 Conn. 87 (1888). The separate action of all the directors is legal when all the stockholders acquiesce therein and where such action has been carried out by the corporation. Morisette *v.* Howard, 62 Kan. 463 (1901).

[2] Burden *v.* Burden, 159 N. Y. 287 (1899).

[3] Dulin *v.* Pacific, etc. Co., 103 Cal. 357 (1894).

[4] Perry *v.* Tuskaloosa, etc. Co., 93 Ala. 364 (1891); Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 561 (1891); State *v.* Perkins, 90 Mo. App. 603 (1901); *Re* Portuguese, etc. Co., L. R. 42 Ch. D. 160 (1889); McLaren *v.* Fisken, 28 Grant, Ch. (Can.) 352 (1881); Attorney-General *v.* Scott, 1 Vesey, 413 (1749), where the election of a minister was committed to trustees. It was held that they could not delegate to proxies their right to vote. A vote by letter on a particular question would, of course, be the same as voting separately and singly. Although one of the directors illegally voted by proxy, and his vote was necessary, yet the court in Dudley *v.* Kentucky High School, 9 Bush (Ky.), 576 (1873), refused to set the vote aside, the

A majority of the whole board of directors constitute a quorum. When the meeting is properly called and a majority attend, that majority may proceed to transact business. If a majority are present, a majority of that majority bind the board and the corporation, although they are a minority of the whole board.[1]

court saying that only one stockholder objected, and that the majority might ratify.

[1] Wells *v.* Rahway, etc. Co., 19 N. J. Eq. 402 (1869); Cram *v.* Bangor, etc., 12 Me. 354 (1835); Cahill *v.* Kalamazoo, etc. Ins. Co., 2 Doug. (Mich.) 124 (1845); *Ex parte* Willcocks, 7 Cow. 402 (1827); People *v.* Walker, 2 Abb. Pr. 421 (1856); Sargent *v.* Webster, 54 Mass. 497 (1847). If only a minority of the board are present the acts are not valid. Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308 (1869); Ernest *v.* Nichols, 6 H. L. Cas. 401, 417 (1857); Price *v.* Grand, etc. R. R., 13 Ind. 58 (1859); Ridley *v.* Plymouth, etc. Co., 2 Exch. 711 (1848). Where a reduction of the number of directors is attempted, but not made in compliance with the statute, an attempt at voluntary dissolution by a majority of the directors as reduced is not legal, they not being a majority of the original number of directors. Matter of Dolgeville, etc. Co., 160 N. Y. 500 (1899). Resolutions passed at a meeting at which a quorum of the directors is not present cannot be validated by action of the stockholders. Bassett *v.* Fairchild, 64 Pac. Rep. 1082 (Cal. 1901). A director who is present but does not vote is counted in the negative. Commonwealth *v.* Wickersham, 66 Pa. St. 134 (1870). See also § 608, note (*supra*), on this subject. The majority of a board of directors constitute a quorum, and a majority of the quorum decide the action of the board. Leavitt *v.* Oxford, etc. Co., 3 Utah, 265 (1883). A majority of a quorum of directors bind the corporation. Buell *v.* Buckingham, 16 Iowa, 284 (1864). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. Holcomb *v.* Bridge Co., 9 N. J. Eq. 457 (1853). A majority of the trustees are necessary to constitute a quorum. State *v.* Porter, 113 Ind. 79 (1888). A by-law cannot authorize less than a majority to act when the charter requires a majority. State *v.* Curtis, 9 Nev. 325 (1874). A by-law of the corporation authorizing a quorum of five directors, with the president, to transact ordinary business, is valid, though there are twenty-three directors. Hoyt *v.* Thompson, 19 N. Y. 207 (1859). Where by resolution of the board four constitute a quorum, an act at a board of three is not binding. Ducarry *v.* Gill, 4 Car. & P. 121 (1830). Where there are eight vestrymen and the statute requires five to constitute a quorum, four cannot act, although there are three vacancies in the board. Moore *v.* Rector, etc., 4 Abb. N. Cas. 51 (1873). When the presence of the president is by law necessary to the meeting of an executive committee, a meeting without him cannot bind the corporation. Corn Exch. Bank *v.* Cumberland Coal Co., 1 Bosw. 436 (1857). Where two out of six directors have been accustomed to act as a quorum, a forfeiture of stock by two is legal. Lyster's Case, L. R. 4 Eq. 233 (1867). The acts of less than a quorum are valid if they are subsequently ratified by a quorum. Austin's Case, 24 L. T. Rep. (N. S.) 932 (1871). A lease taken by a meeting of a board of directors at which no quorum was present is ratified by the acquiescence of two boards elected in subsequent years, with knowledge and no objection. Oregon Ry. *v.* Oregon Ry. & Nav. Co., 28 Fed. Rep. 505 (1886). "Where there is a definite body in a corporation, a majority of that definite body must not only exist at the time when any

Difficulty has arisen in determining whether a person taking a mortgage from or executing a contract with a corporation is bound to ascertain whether a quorum of the directors were present at the directors' meeting which authorized the instrument, and whether a majority voted in favor thereof. There are many cases where mortgages and contracts have been held void by reason of defects in the calling, holding, or voting at the directors' meeting.[1]

The rule sustained by the great weight of authority, however, is that where a corporate mortgage or contract is signed and sealed by the corporation and delivered to the proper person, who takes

act is to be done by them, but a majority of that body must attend the assembly where such act is done." Rex *v.* Miller, 6 T. R. 268 (1795), per Lord Kenyon. A custom is legal which allows three to constitute a quorum of a board of nine directors. *Re* Regents', etc. Co., W. N. 1867, p. 79 (1867). An allotment of shares by a board of two when the charter requires three is void. The subscription is not collectible. *Re* British, etc. Co., 59 L. T. Rep. 291 (1888). Although a meeting of directors is legally called, yet if a quorum does not attend, those who do attend cannot adjourn to another day. It requires a quorum to adjourn. McLaren *v.* Fisken, 28 Grant, Ch. (Can.) 352 (1881). A managing committee of eight cannot act at a meeting of six only. Brown *v.* Andrew, 13 Jur. 938 (1849). A quorum of the directors must be present to act, and this quorum consists of a majority. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 561 (1891). In a municipal corporation, if all the board are present and four vote one way, while the other four do not vote all, the vote prevails. It is a majority of a quorum. State *v.* Dillon, 125 Ind. 65 (1890). If all six members of a city council are present, three may pass a resolution, although the other three do not vote. Rushville Gas Co. *v.* Rushville, 121 Ind. 206 (1889). Where the record shows that two of the four directors present voted aye and one nay, and the other director was in the chair, and the motion was declared carried, the law presumes that the chairman voted aye. Rollins *v.* Shaver, etc. Co., 80 Iowa, 380 (1890). A meeting of four legally elected and three illegally elected directors of a corporation is not such a meeting as sustains an action for salary by the president who was elected by them. Waterman *v.* Chicago, etc. R. R., 139 Ill. 658 (1892). The confirmation by the board of directors of resolutions passed by a meeting not containing a quorum relates back, and is as if the resolutions were regularly passed in the first place. *Re* Portuguese, etc. Mines, L. R. 45 Ch. D. 16 (1890). Two directors cannot transact business when there are four directors. *Re* Portuguese, etc. Co., L. R. 42 Ch. D. 160 (1889). In an action by an insurance company to collect an assessment, it is no defense that losses were allowed at meetings of the directors where no quorum was present. Atlantic, etc. Ins. Co. *v.* Sanders, 36 N. H. 252, 269 (1858). A majority of the quorum may decide a question, and a plurality may elect any officer, unless otherwise provided by charter or by-laws or by law. *Ex parte* Willcocks, 7 Cow. 410 (1827); Cooley, Const. Lim. (4th ed.) *141; Oldknow *v.* Wainwright, 2 Burr. 1017 (1760); Booker *v.* Young, 12 Gratt. (Va.) 303 (1855). Where twelve are present, and one candidate receives six votes, another four, and another one, and one blank, there is no election. People *v.* Conklin, 7 Hun, 188 (1876).

[1] See §§ 709, 712 and cases in this section; also cases in § 808, *infra;* also § 725, *infra.*

it in good faith, he may act upon it, and is protected even though the directors' meeting was not regularly called or held.[1] A quorum of the directors is presumed to have been present.[2] A quorum is not present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted.[3]

Although a meeting of the board of directors at which a quorum is not present calls a stockholders' meeting, and the stockholders' meeting takes action, yet where no stockholders object until six months thereafter the court will not interfere.[4] Where the charter makes a majority of directors a quorum, a minority cannot fill a vacancy in the board.[5] The president is not entitled to a casting

[1] See §§ 725, 808, *infra*. Even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, although a purchaser with notice cannot enforce such guaranty. Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court." A *bona fide* purchaser of corporate bonds is entitled "to presume that all necessary preliminaries not required to be a matter of public record have been properly performed," and hence it is no defense that the directors met out of the state when they authorized the mortgage securing the issue. Schultze *v.* Van Doren, 53 Atl. Rep. 815 (N. J. 1902).

[2] Sargent *v.* Webster, 54 Mass. 497 (1847).

[3] Bassett *v.* Fairchild, 64 Pac. Rep. 1082 (Cal. 1901). In counting a quorum of the board, a director to whom a mortgage is voted at the meeting cannot be counted. Curtin *v.* Salmon, etc. Co., 130 Cal. 345 (1900). Where a board of directors, consisting of six, sell corporate property to two of them, the sale being authorized at a meeting at which five were present, including the two, the remaining three do not constitute a quorum and the sale is illegal. Leary *v.* Interstate, etc. Bank, 63 S. W. Rep. 149 (Tex. 1901). Money received by a director of a co-operative insurance company for substituting other directors and transferring its business to another company can be recovered back on the ground of fraud, and such director is chargeable with notice of the facts which he knew or might have learned by the exercise of reasonable care. McClure *v.* Wilson, 70 N. Y. App. Div. 149 (1902).

[4] Southern, etc. Bank *v.* Rider, 73 L. T. Rep. 374 (1895); 71 Pac. Rep. 865.

[5] State *v.* Curtis, 9 Nev. 325 (1874). A director who is chosen by the board when less than a quorum is present may be treated as not a director, even though he has met with the board frequently when a majority was present. His remedy is not *mandamus*. People *v.* New York, etc. Asylum, 7 N. Y. St. Rep. 277 (1887). A purchaser of property at an execution sale cannot contest the right of the corporation to redeem on the ground that such redemption was by a board of directors illegally elected, in that a minority of the

vote, in case of a tie, where he has already voted once.[1] Although there are less directors than the statute or charter requires, yet the acts of these are sufficient to sustain obligations incurred by the corporation with third persons.[2] A corporate creditor attaching

board filled vacancies in the board and then proceeded to take action. Baggott v. Turner, 21 Wash. 339 (1899). Under the statutes of California, where a bank becomes insolvent the court may appoint directors to fill vacancies. Braslan v. Superior Court, etc., 124 Cal. 123 (1899).

[1] A by-law cannot give him this right. State v. Curtis, 9 Nev. 325 (1874). The president does not have, in addition to his first vote, a casting vote as president. Toronto, etc. Co. v. Blake, 2 Ont. (Can.) 175 (1882).

[2] Welch v. Importers', etc. Bank, 122 N. Y. 177 (1890); Wallace v. Walsh, 125 N. Y. 26 (1890). Where the charter provided that two directors might act, although vacancies existed in the board, it is immaterial that the number of directors is less than the minimum charter number. *Re* Scottish, etc. Co, L. R. 23 Ch. D. 413 (1883). Although the statutes require three directors who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. Kuser v. Wright, 52 N. J. Eq. 825 (1895), rev'g Wright v. First Nat. Bank, 52 N. J. Eq. 392 (1894). Where the charter requires three directors who shall be and continue to be stockholders, and one of them sells his stock, the remaining two cannot act, yet the remaining directors may call a stockholders' meeting to hold an election. Toronto, etc. Co. v. Blake, 2 Ont. (Can.) 175 (1882). It is held in Faure, etc. Co. v. Phillipart, 58 L. T. Rep. 525 (1888), that where the board of directors was to consist of from three to seven, but the quorum to consist of two, and where by resignation the whole board is reduced to two, these two cannot act; nor can they elect one or more to fill the vacancies. The quorum can act only when the board consists of the requisite number. This objection, however, cannot be raised by one who takes part as director. Where by charter the board of directors is to be from five to seven, and three may act, three cannot act when there are but four directors. The act is not binding on the corporation. Kirk v. Bell, 16 Q. B. 290 (1851). See also Bottomley's Case, L. R. 16 Ch. D. 681 (1880); Lindley, Companies, p. 157. A company whose directors are to be twelve may act, although by resignation or death the number is less than twelve. Thames, etc. Ry. v. Rose, 4 Man. & G. 552 (1842). Where a majority of the directors may fill vacancies, and of seven directors only two remain, they cannot fill the vacancies. Moses v. Tompkins, 84 Ala. 613 (1888).

Although there are vacancies in a board consisting of fifteen members, yet action may be taken by eight or more of the directors at a meeting duly called. New England, etc. Co. v. Haynes, 71 Vt. 306 (1899). A mortgage made by four directors when the statute required five, there being one vacancy, is legal if the mortgage is ratified by the full board, and such ratification may be by recognition of the mortgage in a second mortgage. Porter v. Lassen County, etc. Co., 127 Cal. 261 (1899). Where there are two vacancies in a board of five, the act of two of the remaining three directors is not legal, under the statutes of California. Brown v. Valley, etc. Co., 127 Cal. 630 (1900). Where the by-laws provide that notwithstanding vacancies, continuing directors may act, two directors may act, they being the only directors, although the by-laws provide that there should be from three to nine di-

property of the company which has already been assigned to another creditor cannot attack such assignment on the ground that, while the statute required three directors, only two directors existed, the third one having resigned.[1]

A statute that upon an officer in a bank borrowing money of the bank without security, his office shall become vacant and he shall cease to become a director, is self executing.[2]

Even though a director resigns for the sole purpose of avoiding a statutory liability and causes his son to be elected director in his place and continues to be the agent and manager of the business, nevertheless he is not liable under the statute.[3]

The question of whether the directors may delegate their authority to an executive committee has given rise to much contro-

rectors. Moreover, persons dealing with the corporation in ignorance of defects in the constitution of the board are not bound to take notice of it and may enforce their claims. *Re* Bank of Syria, [1900] 2 Ch. 272; aff'd, [1901] 1 Ch. 115. Where there are vacancies in the board of directors the remaining directors have no power to act unless the charter or by-laws of the company authorize them to act under such circumstances; but as to all matters in the ordinary course of business of the company, persons dealing with the corporation in good faith are protected, even though there are vacancies in the board of directors. Lindley on Companies (5th ed.), p. 157. A committee of arbitration may act by a majority vote unless the agreement provides otherwise. The resignation of one member just before the award is made does not invalidate the award. Republic of Colombia *v.* Cauca Co., 106 Fed. Rep. 337 (1901).

[1] Castle *v.* Lewis, 78 N. Y. 131 (1879).

[2] His continuance in office may bind the corporation by his acts, but does not prevent a creditor attacking an assignment for creditors made by him in behalf of the bank. Cupit *v.* Park City Bank, 20 Utah, 292 (1899). Where a director, who is also treasurer, sells his stock to the other directors, it being a part of the sale that he give up his offices, the corporation may treat his offices as vacant. Anderson, etc. Co. *v.* Pungs, 127 Mich. 543 (1901). An injunction suit by a director to restrain the other directors from excluding him from the board fails where the charter provides that any director accepting an office for profit in the company thereby vacated his directorship, and he had accepted a position of trustee of a corporate mortgage. Astley *v.* New Tivoli, Ltd., [1899] 1 Ch. 151. Notes issued by directors who are disqualified by having sold their stock and as a scheme to create a liability on the part of the stockholders are not good, especially where the meeting of the directors was not properly called. Close *v.* Potter, 155 N. Y. 145 (1898). Directors cannot be ousted from office simply because they have sold all the corporate property to themselves. The proper remedy is a suit to set aside the sale. Stanley *v.* Luse, 36 Oreg. 25 (1899).

[3] Brown *v.* Clow, 62 N. E. Rep. 1006 (Ind. 1902). Where the board of directors allow an illegal preference to one director they are personally liable to other creditors to the extent of such preference, and even though one of them resigns, the liability continues for the benefit of past as well as future creditors. Nix *v.* Miller, 26 Colo. 203 (1899). See also § 624, *supra*.

versy. Such a delegation of authority has become very common, and is sustained by the courts. This question is discussed elsewhere.[1]

§ 714. *Minute-book of directors' meetings and other books of the corporation as evidence of acts and contracts of the corporation and authorization of agents.*— The minute-book of the proceedings of the directors' meetings is the proper evidence to prove a corporate contract or the authority of a corporate agent to act or contract for it.[2] Where the resolutions of the directors authorize the mak-

[1] See § 715, *infra.*

[2] Quoted and approved in Torras *v.* Raeburn, 108 Ga. 345 (1899). The corporate record of the vote of the directors and the signature of the recording officer satisfies the statute of frauds as to answering for the debts of another. Lamkin *v.* Baldwin, etc. Co., 72 Conn. 57 (1899). The authority of a corporate agent to manage the affairs of a company cannot be proved by a question to a witness in the absence of the vote of the directors or proof that the resolution cannot be found. St. Regis, etc. Co. *v.* Hotchkiss, 45 Atl. Rep. 11 (Conn. 1900). The corporate records may be shown to be such by the testimony of a director who is also treasurer at the time. Illinois, etc. Assoc. *v.* Plagge, 177 Ill. 431 (1898). A resolution of the board of directors may be sufficient evidence of a contract relative to land. Newport News, etc. Co. *v.* Newport News, etc. Ry., 97 Va. 19 (1899). Entries in the minute-book fifty years old are admissible in behalf of the corporation to prove title to land claimed by the corporation by adverse possession. Hamershlag *v.* Duryea, 58 N. Y. App. Div. 288 (1901). Even though the secretary did not sign the minutes of a meeting as copied into the record book, yet such minutes may be used to prove that a resolution was passed at that meeting. Woodhaven Bank *v.* Brooklyn, etc. Co., 69 N. Y. App. Div. 489 (1902). A party may introduce in evidence a portion of the minutes pertaining to the matter in litigation, leaving it to the opposite side to introduce the remainder if the latter desires. Fouche *v.* Merchants', etc. Bank, 110 Ga. 827 (1900). Where the appointment of an agent is by resolution of the directors, or in any other manner requiring a record of the matter, the entry upon the minutes or books of the corporation may be introduced in evidence of the appointment. Buncombe Turnp. Co. *v.* McCarson, 1 Dev. & B. (N. C.) 306 (1835); Owings *v.* Speed, 5 Wheat. 420, 424 (1820); Thayer *v.* Middlesex Ins. Co., 27 Mass. 326 (1830); Narragansett Bank *v.* Atlantic Silk Co., 44 Mass. 282 (1841); Clark *v.* Farmers' Mfg. Co., 15 Wend. 256 (1836); Methodist Chapel *v.* Herrick, 25 Me. 354 (1845); Haven *v.* New Hampshire Asylum, 13 N. H. 532 (1843). Where a corporate agent is appointed by a resolution, his authority cannot be proved by parol. The extent of the authority in such a case is a question of law for the court. McCreery *v.* Garvin, 39 S. C. 375 (1893). In order to make the corporate books admissible, proof must be given as to who kept them, and that the entries were made at the proper time or by the proper directors, and that the entries were properly made. Powell *v.* Conover, 75 Hun, 11 (1894). A contract duly accepted and agreed to in a directors' meeting and entered on the minutes, which are duly signed, is a contract in writing. Texas, etc. Ry. *v.* Gentry, 69 Tex. 625 (1888). An entry on the corporate minutes of a resolution to form a corporate contract is sufficient on notice of the same to the other party, and suffices to form the contract. It satisfies the statute of frauds. Argus Co. *v.*

ing of a contract, and the contract is subsequently prepared and executed, its terms being more full than the resolutions of the di-

Mayor, etc., 55 N. Y. 495 (1874). An entry on the directors' minute-book, duly signed, is sufficient to prevent a contract being void by the statute of frauds. Jones *v.* Victoria, etc. Co., L. R. 2 Q. B. D. 314 (1877). Directors' minutes are evidence of a contract, though written up after the meeting. Wells *v.* Rahway, etc. Co., 19 N. J. Eq. 402 (1869). In a suit by an employee of a corporation for pay for services, the defendants' books, properly kept by its proper officers, are admissible in evidence to prove payments to plaintiff on account of services. Ganther *v.* Jenks, etc. Co., 76 Mich. 510 (1889). A resolution of the board of directors authorizing an assignment for the benefit of creditors is sufficient. Tripp *v.* Northwestern Nat. Bank, 45 Minn. 383 (1891). The minutes of directors' meetings as they appear in a corporate book will not be excluded as evidence merely because the secretary swears that they were written up several years after the meetings and were made partially from the recollections of the president. McIlhenny *v.* Binz, 80 Tex. 1 (1890). In proving a *de facto* corporation, the meetings and the issue of stock and the transaction of business may be proved by parol without producing the books. Johnson *v.* Akerstrom, 70 Minn. 303 (1897). After notice to the corporation to produce its records is given, secondary evidence may be introduced. Thayer *v.* Middlesex, etc. Co., 27 Mass. 325 (1830); Elems *v.* Ogle, 15 Jur. 180 (1850); Lohman *v.* New York, etc. R. R., 2 Sandf. 39 (1848), holding that the failure to produce may send the question to the jury. To same effect, Narragansett Bank *v.* Atlantic Silk Co., 44 Mass. 282 (1841). The presumption is that a suit in the corporate name was authorized by it. Bangor, etc. R. R. *v.* Smith, 47 Me. 34 (1859). In proving employment, notice to produce must be given. Haven *v.* New Hampshire Asylum, 13 N. H. 532 (1843). So also in proving agency. Clark *v.* Farmers', etc. Co., 15 Wend. 256 (1836); Montgomery R. R. *v.* Hurst, 9 Ala. 513 (1846). As to proving subscription to stock, see ch. IV, *supra.* Parol evidence cannot explain the minutes. Gould *v.* Norfolk, etc. Co., 63 Mass. 338 (1852). The rough minutes are evidence if not subsequently written out. Waters *v.* Gilbert, 56 Mass. 27 (1848). It may be shown that the minutes are incorrect. Van Hook *v.* Somerville, etc. Co., 5 N. J. Eq. 137, 169 (1845). If on production of the books no resolution is found, proof of acts, etc., may be given. Melledge *v.* Boston, etc. Co., 59 Mass. 158, 179 (1849). See also § 721. Proof that the book is a corporate record is made by the person having custody of the book. Smith *v.* Natchez, etc. Co., 2 Miss. 479, 492 (1837). It must be proved that it is a corporate book, kept as such, and by the proper officer. Highland Turnp. Co. *v.* McKean, 10 Johns. 154 (1813); Whitman *v.* Granite Church, 24 Me. 236 (1844). Proof may be by the secretary. Stebbins *v.* Merritt, 64 Mass. 27 (1852). The book-keeper may prove his entries. Union Bank *v.* Knapp, 20 Mass. 96 (1825). Or, if he is dead, his handwriting may be proved. Union Bank *v.* Knapp, 20 Mass. 96 (1825); also Chenango, etc. Co. *v.* Lewis, 63 Barb. 111 (1872). Where a corporation is disproving agency it is held to strict proof. Its records are inadmissible unless proof is given that they were kept by the proper officer, and unless he testifies to them. Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565 (1875). See Gafford *v.* American, etc. Co., 77 Iowa, 736 (1889). For a very full note on the admissibility of corporate books as evidence, see 23 Cent. L. J. 468–473. An examination before trial, to ascertain whether the defendant corporation authorized a person to make a contract

rectors, the contract between the parties is the one which was actually executed.[1] A director has a right to examine all the books and papers of the company.[2]

A corporation may enter into a written contract under seal without a formal vote or written entry of a vote by the directors. Where the directors are present, and all assent to the execution of the contract, this is sufficient. Proof of corporate resolutions or votes, and of votes of the directors, is made by producing the original minutes or record-book of the corporation. But where the record-book is lost, or no record was ever made, secondary evidence may be resorted to.[3]

for it, was granted in Bloom *v.* Pond's Extract Co., 18 N. Y. Supp. 179 (1891).

[1] Keystone, etc. Co. *v.* Bate, 196 Pa. St. 566 (1900). Even though the resolution of the board of directors accepting an oral proposition does not contain the entire proposition made to a corporation, yet the entire oral proposition may be binding on the corporation. Rochester, etc. Co. *v.* Browne, 55 N. Y. App. Div. 444 (1900).

[2] See § 511, *supra.*

[3] Zihlman *v.* Cumberland Glass Co., 74 Md. 303 (1891). The minutes of a meeting at which directors were elected may be proved by parol if the written record has been lost. Hudson *v.* J. B. Parker, etc. Co., 173 Mass. 242 (1899). A by-law may be proved by oral evidence where there was no written entry of the same in the corporate records. Masonic, etc. Assoc. *v.* Severson, 71 Conn. 719 (1899). A resolution of the board of directors releasing the mortgage may be proved by parol, no record having been made. *In re* Bank of West Superior, 109 Wis. 672 (1901). The best proof of a corporate act is the record of the board of directors, and other evidence cannot be introduced unless such record does not exist or is inaccessible. Topeka Co. *v.* Oklahoma Co., 7 Okl. 220 (1898). Although the record does not show that certain stock was voted, yet it may be proved by parol evidence that it was voted. Franklin T. Co. *v.* Rutherford, etc. Co., 57 N. J. Eq. 42 (1898). Where no written minutes are kept of the proceedings of stockholders, they may be proved by parol. Birmingham, etc. Co. *v.* Birmingham Traction Co., 29 S. Rep. 187 (Ala. 1900). Where no record is kept of directors' resolutions authorizing a mortgage, they may be proved by parol. Murray *v.* Beal, 23 Utah, 548 (1901). If no record is kept, the action of the board of directors may be proved by parol. Hendrie, etc. Co. *v.* Collins, 13 Colo. App. 8 (1899). The fact that a majority of the members of the corporation voted for a loan, as required by statute, may be shown by parol evidence, even though such vote does not appear in the records of the corporation. Illinois, etc. Assoc. *v.* Plagge, 177 Ill. 431 (1898). Where the corporate books are lost, a contract that a certain person should not pay toll, in consideration of closing a private way, may be proved by parol. Pigg *v.* Stacey, 49 S. W. Rep. 1065 (Ky. 1899). Where all the directors are present and assent thereto, a written contract may be made by the corporation without any formal vote or entry in the minutes. Indiana, etc. Co. *v.* Robinson, 63 N. E. Rep. 797 (Ind. 1902). Where there are but two directors and one of them is general manager and carries on the entire business, and he and the president sell all the property of the company, it is immaterial that they did not hold a formal meeting as directors to authorize such sale. Magowan *v.* Groneweg, 91 N. W. Rep. 335 (S. D. 1902).

But a stockholder cannot prove by parol that a dividend was declared, the records not showing the same. His remedy is by proceedings to correct the corporate record.[1]

A creditor cannot complain that the corporation sold some of its property to two directors in consideration of their paying certain of the debts; neither can he claim that the transaction was not duly authorized by the board of directors or signed by the proper officers, where he has participated in the results of their action. Swentzel *v.* Franklin, etc. Co., 67 S. W. Rep. 596 (Mo. 1902). Where a street-railway company employs a person as its agent to purchase a majority of the stock of another street-railway company, and he does so, and the former pays him for the stock and for his services, he cannot refuse to deliver the stock on the ground that the company had no power to purchase or on the ground that it had passed no resolutions authorizing him to purchase, and the former may recover the stock from a transferee with notice from the agent. Manchester St. Ry. *v.* Williams, 52 Atl. Rep. 461 (N. H. 1902). Even though no formal resolutions are passed or record made, yet, if all the stockholders and directors are present, and it is agreed that one stockholder should loan money to the company, the company must repay the same. Burke *v.* Sidra Bay Co., 92 N. W. Rep. 568 (Wis. 1902). A mortgage authorized at a stockholders' meeting at which all the directors were present is legally authorized. Crossette *v.* Jordan, 92 N. W. Rep. 782 (Mich. 1902). It may be shown by parol that a resolution gave the vice-president a certain salary, where such resolution was not entered on the record and he performed services other than those pertaining to his office. Selley *v.* American, etc. Co., 93 N. W. Rep. 590 (Iowa, 1903). "The entry of a resolution in a minute is not essential to the validity of the resolution, which is proved *aliunde*." *Re* Great Northern, etc. Works, L. R. 44 Ch. D. 472 (1890). Although a resolution is not inserted in the minutes of the meeting, it may be proved by other evidence. So held as to a resolution authorizing the secretary to borrow money. Bank of Yolo *v.* Weaver, 31 Pac. Rep. 160 (Cal. 1892). "Parol evidence is admissible to prove the action of the board of directors or stockholders where the record fails to state it." Allis *v.* Jones, 45 Fed. Rep. 148 (1891). "Where a corporation consists of a small number of persons, like a partnership, they may transact all their business by conversation, without formal votes; and it would be a violation of the plainest principles of justice to hold those who deal with them to prove all their acts by written votes, which they do not keep or do not produce." Melledge *v.* Boston, etc. Co., 59 Mass. 158, 179 (1849). Parol evidence may be given to prove a vote of a salary to an officer where the secretary is dead and the minute-book does not contain a record of the vote. Pickett *v.* Abney, 84 Tex. 645 (1892). A vote of the directors employing a person is not a contract. It must be known to and accepted by the person employed. It may be shown by parol that the contract was to be binding only in case certain negotiations were carried out. A statement by the treasurer, showing the liabilities and making no mention of his salary, is admissible as evidence. Sears *v.* King's, etc. R. R., 152 Mass. 151 (1890). See also, on this subject, U. S. Bank *v.* Dandridge, 12 Wheat. 64, 95 (1827); Union Bank *v.* Ridgely, 1 Har. & G. (Md.) 324, 425 (1827); St. Mary's Church *v.* Cagger, 6 Barb. 576 (1849); Maxwell *v.* Dulwich College, 1 Fonbl. Eq. 296 (1834); Magill *v.* Kaufman, 4

[1] Dennis *v.* Joslin, etc. Co., 19 R. I. 666 (1896).

The question of whether the books are evidence against officers, and whether the officers are conclusively presumed to have notice

Serg. & R. (Pa.) 317 (1818); Brady *v.* Brooklyn, 1 Barb. 584 (1847); Essex Turnp. Corp. *v.* Collins, 8 Mass. 292, 298 (1811); Marshall *v.* Queensborough, 1 Sim. & S. 520 (1823); Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392 (1849); Garvey *v.* Colcock, 1 Nott & McC. (S. C.) 231 (1815); Bates *v.* Bank of Alabama, 2 Ala. 452 (1841). The corporate secretary's letters to a vendor are admissible as evidence. Scott *v.* Middletown, etc. R. R., 86 N. Y. 200 (1881). The minutes of a directors' meeting may by parol be shown not to include the whole agreement where the party being contracted with was present at the meeting and discussed the matter with the board. Tibbals *v.* Mount Olympus Water Co., 10 Wash. 329 (1894). A verbal agreement of the directors in meeting assembled to pay the treasurer a certain salary is binding on the company, although no written resolution thereof is entered in the minutes. Outterson *v.* Fonda Lake Paper Co., 20 N. Y. Supp. 980 (1892). When there are but a few persons interested in a corporation, "ordinary business may be transacted without the formality of resolutions. It may be done by conversation without formal votes." Hall *v.* Herter, 83 Hun, 19 (1894). See s. c., 90 Hun, 280, and 157 N. Y. 694. The resolutions of directors need not be reduced to writing in order to be valid. Columbia, etc. Co. *v.* Vancouver, etc. Co., 32 Oreg. 532 (1898). Corporate minutes need not be written out by the secretary himself. It is sufficient that he sign them. United Growers' Co. *v.* Eisner, 22 N. Y. App. Div. 1 (1897). A resolution of the board of directors that the company execute an assignment for the benefit of creditors may be carried out by the president without further authority, but he should not select himself as assignee. Rogers *v.* Pell, 154 N. Y. 518 (1898). Authority to an agent, given by the board of directors, may be proved by oral evidence, there being no record of the same in the corporate books. There is no law requiring a board of directors to keep a record of their proceedings. Morrill *v.* C. T. Segar Mfg. Co., 32 Hun, 543 (1884). *Contra,* Andover, etc. Turnp. Co. *v.* Hay, 7 Mass. 102, 107 (1810): Colcock *v.* Garvey, 1 Nott & McC. (S. C.) 231 (1815); Peek *v.* Detroit, etc. Works, 29 Mich. 313 (1874); but see Taymouth *v.* Koehler, 35 Mich. 22 (1876). The acts of the directors need not be formally entered on the corporate minutes. Nashua, etc. R. R. *v.* Boston, etc. R. R., 27 Fed. Rep. 821 (1886); Morrill *v.* Segar, etc. Co., 32 Hun, 543 (1884); Moss *v.* Averell, 10 N. Y. 449 (1853). Parol evidence may show that the corporate records have been burned. Baptist House *v.* Webb, 66 Me. 398 (1877). Or lost. Wallace *v.* First Parish, etc., 109 Mass. 263 (1872); Prothro *v.* Minden Sem., 2 La. Ann. 939 (1847). It may be proved by parol that the board of directors authorized an agent to draw a bill of exchange. No corporate seal or record evidence are necessary. Preston *v.* Missouri, etc. Co., 51 Mo. 43 (1872). The directors' votes may be proved by parol when they were not recorded. Edgerly *v.* Emerson, 23 N. H. 555 (1851); Wait, Insolv. Corp., § 529. It may be for the jury to say whether a subsequent meeting changed the minutes. Delano *v.* Smith Charities, 138 Mass. 63 (1884). The company is not bound by fraudulent insertions, at least where strangers have not relied thereon. Holden *v.* Hoyt, 134 Mass. 181 (1883). See also Perkins *v.* Washington Ins. Co., 4 Cow. 645 (1825); Hoag *v.* Lamont, 60 N. Y. 96 (1875); Fleckner *v.* Bank of U. S., 8 Wheat. 338 (1823); Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392 (1849), holding that an appointment need not be entered upon the records of

of all that is contained in the corporate books, is considered elsewhere.[1] The books, of course, are not admissible as evidence against strangers dealing with the corporation.[2] Where there is no statute or by-law requiring a private corporation to keep a minute-book, it seems that the certificate of the secretary under the corporate seal

the corporation. Secondary evidence of the records is not admissible unless the officers are first examined and the originals are not to be found. Mullanphy Sav. Bank *v.* Schott, 135 Ill. 635 (1891). In a suit to set aside an alleged illegal sale of stock for non-payment of assessments, the records of the corporation cannot be proved by oral evidence. Corcoran *v.* Sonora, etc. Co., 71 Pac. Rep. 127 (Idaho, 1902). Entries in the corporate books should be proved by the books themselves, and not by the clerk, unless an excuse is given for their non-production. National Bank *v.* Navassa, etc. Co., 56 Hun, 136 (1890). Where the original minutes have been destroyed, the minutes as they have been copied into the minute-book are admissible. Brower *v.* East, etc. Co., 84 Ga. 219 (1890). The books of the company are the best evidence, and not the testimony of officers as to what they had seen on the books. Dial *v.* Valley, etc. Assoc., 29 S. C. 560 (1888). A copy of a resolution of the directors of an alien corporation is not evidence until proof of a reasonable effort to obtain the original is given. Bowick *v.* Miller, 21 Oreg. 25 (1891). Sworn copies taken from corporate books are incompetent unless evidence is given of the loss of the book itself. Latourette *v.* Clark, 51 N. Y. 639 (1872). Entries need not be proven by the clerk who made the entries. First Nat. Bank *v.* Tisdale, 84 N. Y. 655 (1881). Books of the board of directors, in which their proceedings are recorded, proved by proving the handwriting of the clerk and president, are competent evidence to prove the facts therein recorded. Owings *v.* Speed, 5 Wheat. 420 (1820). Acts of a board of directors may be shown by parol when no record of them has been made. Zalesky *v.* Iowa, etc. Co., 102 Iowa, 512 (1897). In an action by a foreign corporation, oral proof of the corporate books, papers, and records, in the possession of the corporation outside the state, is not admissible in its behalf. Mandel *v.* Swan, etc. Co., 154 Ill. 177 (1895). Query, whether, under the statutes of Tennessee requiring the board of directors to keep a full and true record of all their proceedings, an authorization of a mortgage is legal where no such record of the authorization is made? Lowry Banking Co. *v.* Empire Lumber Co., 91 Ga. 624 (1893). Even though the resolutions authorizing a mortgage were oral, and no written record was made, yet they may be proved to sustain the mortgage. Boggs *v.* Lakeport, etc. Assoc., 111 Cal. 354 (1896). Where the secretary is dead, and his memoranda of the minutes cannot be found, and no record has been made, the minutes may be proved by parol. New Boston, etc. Co. *v.* Saunders, 67 N. H. 249 (1892). Resolutions of the board may be shown by parol where only a part of the business has been entered in the minutes. Cameron *v.* First, etc. Bank, 34 S. W. Rep. 178 (Tex. 1896). The acts and resolutions of the directors, if not recorded, may be proved by parol. Langsdale *v.* Bonton, 12 Ind. 467 (1859); Bay, etc. Assoc. *v.* Williams, 50 Cal. 353 (1875). Minutes not signed by the chairman are not evidence of a call; nor is a subsequent ratification of those minutes. Cornwall, etc. Co. *v.* Bennett, 5 H. & N. 423 (1860). See 120 Fed. Rep. 318; id. 925.

[1] See § 727, *infra*.

[2] See § 727, *infra*.

that a resolution was passed cannot be questioned by any one claiming under or through the corporation.[1]

A resolution adopted at a stockholders' meeting is valid, although only a pencil memorandum was made of it and no formal record made until long afterwards. The proceedings may be proved by parol.[2]

§ 715. *Executive committee.*— There formerly was some doubt as to whether the powers of a board of directors might be delegated to an executive committee. The right of the board of directors to delegate to agents generally the transaction of the ordinary and routine business of the corporation is unquestioned, and indeed is absolutely necessary.[3] But in matters involving discretion there are decisions to the effect that the directors cannot delegate that discretion.[4] The clear weight of authority, however, holds that

[1] Prentiss, etc. Co. *v.* Godchaux, 66 Fed. Rep. 234 (1894). A certified copy of resolutions sent to a mortgagee, and authorizing a mortgage, are sufficient proof without proving loss of the corporation records. Purser *v.* Eagle Lake, etc. Co., 111 Cal. 139 (1896). A person purchasing a mortgage from a savings bank through its treasurer and secretary may rely upon a copy of a resolution passed by the trustees authorizing such sale, and duly signed by the secretary. So though the secretary had intentionally made the copy different from the original. Whiting *v.* Wellington, 10 Fed. Rep. 810 (1882). A copy of the directors' resolution is evidence, not when merely certified to by the secretary, but when sworn to by him. Hallowell, etc. Bank *v.* Hamlin, 14 Mass. 178 (1817).

[2] Handley *v.* Stutz, 139 U. S. 417 (1891). The records of the stockholders' meetings may be used to show the purpose of a stockholder's resolution. Wiley *v.* Athol, 150 Mass. 426 (1890).

[3] The corporation may authorize its president to sell and assign its negotiable paper. Stevens *v.* Hill, 29 Me. 133 (1848); Northampton Bank *v.* Pepoon, 11 Mass. 288 (1814). Nearly all corporate acts are done by means of subordinate agents. Such delegations of authority are necessary. See Manchester Ry. *v.* Fisk, 33 N. H. 297 (1856). Difficulty occurs in defining the line which separates powers that may be delegated from those which may not be. See Lyon *v.* Jerome, 26 Wend. 485 (1841); Gillis *v.* Bailey, 21 N. H. 149 (1850). A corporation owning water-works outside of a city may agree to furnish water to one inside the city, the general distribution of the water to be under the joint control of two agents, each corporation appointing one and the profits to be divided equally. San Diego Water Co. *v.* San Diego Flume Co., 108 Cal. 549 (1895). Directors may authorize two of their number to execute corporate notes to a person. Leavitt *v.* Oxford, etc. Co., 3 Utah, 265 (1883). Or appoint an agent to execute a deed. Arms *v.* Conant, 36 Vt. 744 (1864). Where various corporations appoint a committee to carry on litigation, they are each liable for the attorneys' fees, the attorneys having no knowledge of a limitation of the powers of the committee in the matter. Prindle *v.* Washington L. Ins. Co., 73 Hun, 448 (1893); aff'd, 149 N. Y. 614. Directors having power to fix the rates of their railroad may delegate that power to agents. Manchester, etc. R. R. *v.* Fisk, 33 N. H. 297 (1856). See also many cases in the following sections of this work. See also § 712, *supra*.

[4] Directors cannot delegate to two of

the powers of a board of directors may be delegated to an executive committee of that board, and the acts and contracts of such a committee may be made binding on the corporation.[1]

their number the question of whether a conditional subscription to shares should be accepted. Howard's Case, L. R. 1 Ch. 561 (1866). Two directors acting as agents to receive calls have no power to waive a forfeiture of stock and receive the calls thereon. Card *v.* Carr, 1 C. B. (N. S.) 197 (1856). Directors cannot delegate to a committee the power to forfeit and sell stock for non-payment of calls. York, etc. R. R. *v.* Ritchie, 40 Me. 425 (1855). A Pennsylvania railroad corporation cannot authorize its board of directors to delegate to an executive committee the location of the route. Weidenfeld *v.* Sugar, etc. R. R., 48 Fed. Rep. 615 (1892). In Gillis *v.* Bailey, 21 N. H. 149 (1850), it was held that a board of directors could not delegate to an agent the power to lease various pieces of property owned by the corporation. Power to make assessments cannot be delegated by the directors. Farmers', etc. Ins. Co. *v.* Chase, 56 N. H. 341 (1876); Silver Hook Road *v.* Greene, 12 R. I. 164 (1878), where the delegation was to the treasurer. But see Read *v.* Memphis, etc. Co., 9 Heisk. (Tenn.) 545 (1872), where such delegation to the president was upheld. *Cf.* Lindley, Companies, p. 156. The directors' duty to pass on paper offered for discount cannot be delegated in Louisiana. Percy *v.* Millaudon, 3 La. 568 (1832). *Cf.* Morse, Banks and Banking, 108. Directors having power to purchase stock cannot delegate that power to a general manager. No ratification arises from the fact that the purchase was entered on the books. Cartmell's Case, L. R. 9 Ch. 691 (1874). A corporation by the action of its board of directors and consent of all its stockholders may agree that a certain percentage of its profits shall be paid annually to a person for services already rendered by him. In a suit by him to enforce such agreement and asking an injunction against any sales of stock, except with notice of such agreement, stockholders are necessary parties defendant. Such an agreement is not an exclusion of future boards of directors from the management of the company. Dupignac *v.* Bernstrom, 76 N. Y. App. Div. 105 (1902). See also § 534, *supra*.

[1] An executive committee may be appointed under the statutory power of the company "to appoint such subordinate officers and agents as the business of the corporation shall require." The executive committee may delegate to one of their number the indorsing of checks, etc. Sheridan, etc. Light Co. *v.* Chatham Nat. Bank, 127 N. Y. 517 (1891). A contract between two railroads, by which one was given the right to run over the tracks of the other, is legal, although it is executed by the authority only of the executive committee and of a meeting of the stockholders, the court saying the determination of the management of the corporate affairs rests with its stockholders, and that the stockholders had the power to authorize the board of directors to delegate the power to the executive committee to do any and all acts which the board itself was authorized to do. Union, etc. Ry. *v.* Chicago, etc. Ry., 163 U. S. 564, 597 (1896), aff'g 51 Fed. Rep. 309 (1892), and 47 Fed. Rep. 15 (1891). See also Black River Imp. Co. *v.* Holway, 85 Wis. 344 (1893), and Hoyt *v.* Thompson's Executor, 19 N. Y. 207 (1859), where the committee consisted of any five or more directors who attended meetings of which notice was given to all. See also Hoyt *v.* Shelden, 3 Bosw. 267 (1858).

The acts and contracts of a *de facto* executive committee were upheld in Salem, etc. Co. *v.* Lake Superior, etc. Mines, 112 Fed. Rep. 239 (1901), on the ground that the corporation and the

The majority of the directors cannot, however, exclude the minority from the meetings and from being heard, by delegating power

board of directors had for a long time allowed such executive committee to act as though it had been regularly constituted and authorized so to act. A party dealing with a special committee of the board of directors of a corporation must take notice of the powers of such committee. Kelsey *v.* New England, etc. Ry., 60 N. J. Eq. 230 (1900). Where the charter provides that the business shall be managed by three executive officers they may execute a mortgage, it appearing that no directors have ever been elected. Bell, etc. Co. *v.* Kentucky, etc. Co., 106 Ky. 7 (1899).

In Tempel *v.* Dodge, 89 Tex. 68 (1895), it was held that a corporation had no right to create by its by-laws an executive committee to exercise the powers of the board of directors. "The managers might, undoubtedly, clothe a committee, in the intervals between the sittings of the board, with all their own authority to conduct the ordinary business of the company." But it seems that this executive committee cannot delegate its power to one of their number. Olcott *v.* Tioga R. R., 27 N. Y. 546, 558 (1863). Where the by-laws authorize the directors to transact business through a committee, that committee may consist of one person. *Re* Tourine Co., L. R. 25 Ch. D. 118 (1883). The by-laws may authorize the directors to delegate their powers to a committee. Harris's Case, L. R. 7 Ch. 587 (1872), where the committee allotted shares. Directors may delegate to a committee power to sell corporate property, and a mortgage given by the committee is valid. Certainly so where the board of directors subsequently accepted the papers connected with it. Burrill *v.* Nahant Bank, 43 Mass. 163 (1840). In Andres *v.* Fry, 113 Cal. 124 (1896), the contract of the executive committee authorized to purchase patent-rights was declared legal. The constitution of an incorporated camp-meeting association may authorize an executive committee and give it power to make regulations as to the use of the grounds. Round Lake Assoc. *v.* Kellogg, 141 N. Y. 348 (1894). An employee of a company who sues for services, under a written contract made with the "chairman" and "managing director," may collect; their authority is presumed as agents or executive committee. Totterdell *v.* Fareham Brick Co., L. R. 1 C. P. 674 (1866). In New York it is clearly held that the directors of a banking or loan and trust company may appoint an executive committee and authorize it to act for the board of directors, and that the acts of this committee are as binding, valid, and effective as though they had been authorized by the board of directors directly. Palmer *v.* Yates, 3 Sandf. 137 (1849). *Cf.* Bank Com'rs *v.* Bank of Buffalo, 6 Paige, 497 (1837). In Bank of Columbia *v.* Patterson's Adm'r, 7 Cranch, 299 (1813), the right of the directors to delegate their power to contract to a committee was not questioned. Stockholders cannot elect a committee not consisting of directors and compel the directors to act with that committee in corporate matters. Boot, etc. Co. *v.* Dunsmore, 60 N. H. 85 (1880). It is fraudulent for an executive committee to vote large compensation to themselves for services as promoters. Blatchford *v.* Ross, 54 Barb. 42 (1869). In St. Louis, etc. Assoc. *v.* Augustin, 2 Mo. App. 123 (1876), a loan committee contracted for the corporation. Where the executive committee can act only when the president is present, action without his presence is void. Corn, etc. Bank *v.* Cumberland, etc. Co., 1 Bosw. 436 (1857). As to committees of municipal corporations, see Dillon, Mun. Corp., §§ 60, 374. Contracts, etc., by an executive committee have often been recognized as valid. See Tracy *v.*

to a committee, and "even if the minority had a voice given to them, still, if there existed a combination among the majority, before that voice was heard, to overbear it," the acts of such a body would be illegal.[1] Where the board of directors delegates to a committee the power to act for it, due notice of meetings of the executive committee must be given to all its members, but a majority of the committee suffices to constitute a meeting and proceed to business, and a majority of that majority binds the committee, the directors, and the corporation by its vote.[2] An auditing com-

Guthrie, etc. Soc., 47 Iowa, 27 (1877). A stockholder's request to such a committee to bring an action to remedy a corporate wrong is sufficient. Hazard *v.* Durant, 11 R. I. 196 (1875). The committee's consent to an arbitration may be ratified by the company. Fryeburg Canal *v.* Frye, 5 Me. 38 (1827). Although a contract is irregularly made by the executive committee of a corporation, there being no notice and no quorum, yet, by accepting the benefits of the contract afterwards, the company is bound. Metropolitan, etc. Co. *v.* Domestic, etc. Co., 44 N. J. Eq. 568 (1888). In Curtis *v.* Leavitt, 15 N. Y. 9 (1857), a finance committee had authorized the issue of bonds. The charter required a resolution of the board of directors. The court held that acquiescence cured the defect. In Taylor *v.* Agricultural Assoc., 68 Ala. 229 (1880), the executive committee was provided for by charter. A committee authorized to settle with a person cannot also settle with a firm in which he is interested, but the company may ratify. Merchants', etc. Co. *v.* Rice, 70 Iowa, 14 (1886). The acts of the executive committee may be construed to be subject to the approval of the next meeting of the board of directors. Indianapolis, etc. R. R. *v.* Hyde, 122 Ind. 188 (1890). An executive committee having the general direction and superintendence of the affairs of the company have no power to issue stock. the whole capital stock being already issued. Ryder *v.* Bushwick R. R., 134 N. Y. 83 (1892). A person sued on a tort cannot raise the objection that the proceedings of an executive committee or board of directors were irregular, or that stockholders did not consent to a contract. Farnsworth *v.* Western, etc. Co., 6 N. Y. Supp. 735 (1889). See also Black River Imp. Co. *v.* Holway, 85 Wis. 344 (1893).

[1] Great Western Ry. *v.* Rushout, 5 De G. & Sm. 290, 310 (1852).

[2] Burleigh *v.* Ford, 61 N. H. 360 (1881); Metropolitan, etc. Co. *v.* Domestic, etc. Co., 44 N. J. Eq. 568 (1888). Such also is the case with municipal corporations. State *v.* Jersey City, 27 N. J. L. 493 (1859); Junkins *v.* Doughty Falls, etc. Dist., 39 Me. 220 (1855). The directors may delegate to a committee the power to procure plans and let a contract. A majority of that committee may act and bind the corporation. A third party is justified in acting on the ostensible authority of the committee. McNeil *v.* Boston Chamber of Com., 154 Mass. 277 (1891). A committee appointed by the directors cannot act unless all are present, although a majority may govern. *Re* Liverpool, etc. Assoc., 62 L. T. Rep. 873 (1890). Where many persons authorize eight to act as a managing committee, those persons are not liable for debts contracted by a meeting of six of that committee. Brown *v.* Andrew, 13 Jur. 938 (1849). Power to an executive committee of directors "to do all acts necessary for the prosperity" does not authorize the purchase of real estate by a majority of the executive committee, nor is the company bound by that same majority improving the land. Tracy

mittee with the power to pay or reject claims have no power to rescind or settle contracts, or determine the future action of the company.[1]

§ 716. *President — His power to contract for the corporation.* — The president of a corporation has no power to buy, sell, or contract for the corporation, nor to control its property, funds, or management.[2] This is a rule established by the great weight of authority. In Illinois, however, a different rule prevails,[3] and

v. Guthrie, etc. Soc., 47 Iowa, 27 (1877). The minority of the committee certainly cannot act. Trott *v.* Warren, 11 Me. 227 (1834). The managing committee of an unincorporated association may legally resolve that checks signed by any three of them shall bind all. Maitland's Case, 4 De G., M. & G. 769 (1853). The executive committee cannot delegate their powers to one of their number. Cook *v.* Ward, L. R. 2 C. P. D. 225 (1877). See also Lyon *v.* Jerome, 26 Wend. 485 (1841), where canal commissioners delegated their powers to an engineer. One of two supervisors cannot contract. Cooper *v.* Lampeter, 8 Watts (Pa.), 125 (1839). A committee of arbitration may act by a majority vote unless the agreement provides otherwise. The resignation of one member just before the award is made does not invalidate the award. Republic of Colombia *v.* Cauca Co., 106 Fed. Rep. 337 (1901).

1 Skinner *v.* Walter, etc. Co., 140 N. Y. 217 (1893).

2 Quoted and approved in Groeltz *v.* Armstrong, etc. Co., 89 N. W. Rep. 21 (Iowa, 1902).

3 The president and general manager may together bind an insurance company to an agreement that its mortgagor may redeem even after foreclosure. Union Mut. etc. Ins. Co. *v.* White, 106 Ill. 67 (1883). The president of a railroad company has power to contract for the transportation of railroad iron. Chicago, etc. R. R. *v.* Coleman, 18 Ill. 297 (1857). A deed of land executed by the president and secretary is valid where all the stockholders join also in the deed. Hull *v.* Glover, 126 Ill. 122 (1888). The president of a railroad company may assign notes and mortgages given to it to aid in constructing the road. Irwin *v.* Bailey, 8 Biss. 523 (1879); s. c., 13 Fed. Cas. 114. A judgment note of a corporation may be executed by its president and secretary. It is good as a mere note, even though not as a judgment note. Matson *v.* Alley, 141 Ill. 284 (1892). A corporate note signed by the president and secretary, giving the payee the right to enter judgment, is sufficient to sustain such a judgment although the note was not under seal. Snyder Bros. *v.* Bailey, 46 N. E. Rep. 452 (Ill. 1896). A duly executed contract of a corporation to give a judgment note is authority to the president to give that note. McDonald *v.* Chisholm, 131 Ill. 273 (1890). The president has no power to agree that an absolute subscription for stock shall be changed so as to be conditional. Morgan County *v.* Thomas, 76 Ill. 120 (1875). The president has power to offer a reward for the arrest of a defaulting teller. Bank *v.* Griffin, 168 Ill. 314 (1897). The president is presumed to have authority to assign a chattel mortgage. Anderson *v.* South, etc. Co., 173 Ill. 213 (1898). In Illinois a president has power to give a corporate judgment note. Anderson Transfer Co. *v.* Fuller, 174 Ill. 221 (1898). A sale of land by the president and secretary of a building association binds the company, unless the purchaser knows that they have no authority. Domestic, etc. Assoc. *v.* Guadiano, 63 N. E. Rep. 98 (Ill. 1902). The vice-president

there are a few decisions in some other states following the Illinois rule.[1]

The board of directors may of course expressly authorize the president to contract; or his authority to contract may arise from his having assumed and exercised that power in the past; or the corporation may ratify his contract or accept the benefits of it and thereby be bound. But the general rule is that the president cannot act or contract for the corporation any more than any other director. This question has frequently been before the courts, and many decisions have been rendered in regard to it. A large number of the cases are given in the notes below.[2]

has no inherent power to make an assignment for the benefit of creditors, even though the president is dead, and even though the vice-president owns most of the stock. Friedman *v.* Lesher, 64 N. E. Rep. 736 (Ill. 1902).

[1] Where the president is apparently in charge of the business, he may bind the corporation by a contract made by him in its behalf. Meating *v.* Tigerton, etc. Co., 89 N. W. Rep. 152 (Wis. 1902). The court in this case follows the Illinois rule and declares that, even where the president assumes the right to act as general agent, a *bona fide* contractor with the corporation through him is protected. A bank president may assign a judgment held by a bank. Guernsey *v.* Black, etc. Co., 68 N. W. Rep. 777 (Iowa, 1896). In Iowa it is held that the president is presumed to have authority to act in all matters arising in the ordinary course of the corporate business. White *v.* Elgin, etc. Co., 108 Iowa, 522 (1899). The agreement of a president of a bank, who has had entire charge of the bank, that if a creditor will not sue for six months to enforce the liability of the bank as a stockholder the bank will not set up the statute of limitations, is legal. Wells, etc. Co. *v.* Enright, 127 Cal. 669 (1900). Where a steam railroad is interfering with the rights of a street railroad, and the latter does not apply for an injunction, relying on the promise of the steam railroad to the president of the street railroad that the steam railroad would pay all the damages, such promise is binding, and the street railroad cannot thereafter maintain an ejectment. Fresno, etc. R. R. *v.* Southern Pac. R. R., 135 Cal. 202 (1901). The president and secretary of a corporation are presumed to have authority to execute a promissory note in the name of the corporation, and the holder of such note will not be affected by the fact that such authority did not exist unless he is shown to have had notice thereof. American, etc. Bank *v.* Oregon, etc. Co., 55 Fed. Rep. 265 (1892). The president is presumed to have authority to issue notes. Dexter Sav. Bank *v.* Friend, 90 Fed. Rep. 703 (1898). The fact that the president of a corporation indorsed and transferred in its behalf its negotiable paper does not prevent the indorsee being a *bona fide* holder, without proof of the authority of the president to so transfer the paper. Jones *v.* Stoddart, 67 Pac. Rep. 650 (Idaho, 1902). Where a contract consists of letters, the fact that they are signed by the president does not prevent his signature being considered that of the company. Towers *v.* Stevens, etc. Co., 83 Minn. 243 (1901).

[2] The president of a slate company has no power to make a time contract with a railroad to ship the product of the company over such road, and knowledge of such contract by the president is not notice to the corporation. Bangor, etc. Ry. *v.* American, etc. Co., 52 Atl.

The question seems to have arisen in many forms, and the great weight of authority holds that a president has no inherent power to

Rep. 40 (Pa. 1902). Where a corporation is sued on a note, and it denies that the president had authority to sign the note, such authority must be proved. Marshall, etc. Co. *v.* Oren, etc. Co., 90 N. W. Rep. 618 (Iowa, 1902). The president of a bank has no power to modify the cashier's bond where by statute such bond was controlled by the board of directors. Ida County, etc. Bank *v.* Seidensticker, 92 N. W. Rep. 862 (Iowa, 1902). "In the absence of anything in the act of incorporation bestowing special power upon the president, he has from his mere official station no more control over the corporate property and funds than any other director." Titus *v.* Cairo, etc. R. R., 37 N. J. L. 98 (1874).

In the case of De La Vergne, etc. Co. *v.* German, etc. Inst., 175 U. S. 40 (1899), a contract was made by which the president of an Illinois manufacturing corporation sold all its assets to a rival New York corporation, and all the shares of stock in the Illinois corporation were also delivered to the New York corporation. The court held the transaction to be illegal on the ground that the president was not authorized to sell the assets, and that on the other hand the New York corporation was prohibited by its charter from purchasing stock in other corporations. The president of a street railway company has no authority to indorse its name to a note given by the construction company in payment for machinery. Worthington *v.* Schuylkill, etc. Ry., 195 Pa. St. 211 (1900). The president and treasurer are not authorized to contract that the excess realized by the corporation in the sale of property taken by strict foreclosure shall belong to the mortgagor. Holland *v.* Laconia, etc. Assoc., 68 N. H. 480 (1896). A mortgage made by the president without authority is not binding on the company and cannot be validated after the company has become insolvent, where the statute prohibits assignments after insolvency. Howell *v.* Keen, 43 Atl. Rep. 1070 (N. J. 1899). Where the corporate seal is not attached to a mortgage the authority of the president to execute it must be shown. American, etc. Assoc. *v.* Smith, 122 Ala. 502 (1899). The president and secretary have no power to execute a note for the corporation, and even though they are two of the five directors, and two other directors know of the note and do not object, yet the note is not enforceable. Crawford *v.* Albany Ice Co., 36 Oreg. 535 (1900). The president has no authority to discharge the secretary, who was elected by the board of directors. Mobile, etc. R. R. *v.* Owen, 121 Ala. 505 (1899). Where two officers jointly are authorized to make leases, the terms of the lease, when once fixed by them, cannot be changed without the consent of the board of directors. Aliunde, etc. Co. *v.* Arnold, 67 Pac. Rep. 28 (Colo. 1901). Misrepresentations by the president of a bank to a surety company in order to obtain a bond from the cashier do not bind the bank. United States, etc. Co. *v.* Muir, 115 Fed. Rep. 264 (1902). The president and secretary have no power to make a contract by which the corporation issues certain stock and agrees to take it back within a certain time and to pay the equivalent of dividends thereon in the meantime. Fontana *v.* Pacific, etc. Co., 129 Cal. 51 (1900). A dentist cannot avoid payment for goods which he buys of a corporation by setting up that he was to make payment in professional services to the president and his family, such agreement not being known to the board of directors. Bowditch, etc. Co. *v.* Jones, 50 Atl. Rep. 41 (Conn. 1901). The president and secretary have no inherent power to execute a corporate mortgage. Mason, etc. Co. *v.* Metcalfe Mfg. Co., 44 S. W. Rep.

represent or contract for the corporation. His duties are confined to presiding and to voting as a director. The fact, however, that

629 (Ky. 1898). The president has no authority to direct the treasurer to refuse to receive payments of subscriptions. Potts *v.* Wallace, 146 U. S. 689 (1892). The president has no power to employ an architect to prepare plans, and the company is not liable therefor. Wait *v.* Nashua, etc. Assoc., 66 N. H. 581 (1891). A president has no inherent power to execute a mortgage. Alta Silver Min. Co. *v.* Alta Placer Min. Co., 78 Cal. 629 (1889). The president has no implied power to mortgage the corporate property. National State Bank *v.* Vigo, etc. Bank, 141 Ind. 352 (1895). The president has no power to mortgage, even though he has been given power to pledge notes and contracts. Currie *v.* Bowman, 25 Oreg. 364 (1894). The president has no inherent authority. Brush, etc. Co. *v.* City, etc. Montgomery, 114 Ala. 433 (1897). The president has no authority to increase the price of construction work. Grant *v.* Duluth, etc. Ry., 66 Minn. 349 (1896). The president and secretary have no inherent power to execute notes in the name of the corporation. Estes *v.* German Nat. Bank, 62 Ark. 7 (1896). The president has no power to assign a patent belonging to the company to pay a corporate debt, where there is no meeting of the board of directors to authorize the same. Kansas, etc. Co. *v.* Devol, 72 Fed. Rep. 717 (1896). The president has no power to confess judgment for the corporation. Raub *v.* Blairstown Creamery Assoc., 56 N. J. L. 262 (1893). A president and secretary have no implied power to give a corporate note. Edwards *v.* Carson Water Co., 21 Nev. 469 (1893). The president cannot bind the corporation by his agreement that it will pay the debts of a person. Hamilton *v.* Bates, 35 Pac. Rep. 304 (Cal. 1893). The president of a roadroad company has no inherent authority to negotiate a loan of $150,000 and agree to pay ten per cent. thereof as brokerage. Tobin *v.* Roaring, etc. R. R., 86 Fed. Rep. 1020 (1898). The fact that a person buying land is president of a company and gives a draft on the company in part payment does not make it a purchase by the company for which it is liable. *Re* Seymour, 83 Mich. 496 (1890). The president of a literary and biblical institution has no power to buy lumber for it, and it is not liable therefor although it has used it, where some of the directors had agreed among themselves to pay for the lumber. Lyndon Mill Co. *v.* Lyndon, etc. Inst., 63 Vt. 581 (1891). A president of a bank cannot agree that sureties on paper given to the bank will not be held liable. First Nat. Bank *v.* Bennett, 33 Mich. 520 (1876). The president and cashier cannot agree with an indorser that he will not be held liable. Bank of U. S. *v.* Dunn, 6 Pet. 51 (1832); Bank of Metropolis *v.* Jones, 8 Pet. 12 (1834). The president of a bank has no power to release a claim. Olney *v.* Chadsey, 7 R. I. 224 (1862); Hodges *v.* First Nat. Bank, 22 Gratt. (Va.) 52 (1872). The president and cashier have no power to execute a mortgage. Leggett *v.* New Jersey, etc. Co., 1 N. J. Eq. 541 (1832). Nor has the president alone that power. Corbett *v.* Woodward, 5 Sawyer, 403 (1879); s. c., 6 Fed. Cas. 531. The president of a bank has no power to sell and assign a note held by it. Hallowell, etc. Bank *v.* Hamlin, 14 Mass. 178 (1817). The president of a national bank cannot bind it by his purchase of bonds and stock for it. First Nat. Bank *v.* Hoch, 89 Pa. St. 324 (1879). The president of a railroad corporation has no power to let a construction contract. Templin *v.* Chicago, etc. Ry., 73 Iowa, 548 (1887); Griffith *v.* Chicago, etc. R. R., 74 Iowa, 85 (1888). The president and a director of a miner's water supply company have no power to pur-

he is almost always the corporate officer who is directed to sign the corporate contracts that have been authorized by the board of

chase land for an extension of the works, but the board of directors may ratify the purchase. Blen *v.* Bear, etc. Co., 20 Cal. 602 (1862). The president of a ditch company has no power to exchange half of its ditch for half of the ditch of another company. Bliss *v.* Kaweah, etc. Co., 65 Cal. 502 (1884). A railroad president cannot sell its ties. Walworth, etc. Bank *v.* Farmers', etc. Trust Co., 14 Wis. 325 (1861). The president cannot execute a note for the company. Bacon *v.* Mississippi Ins. Co., 31 Miss. 116 (1856). The president of a railroad company cannot give a chattel mortgage on one of its engines, even though he is also its "business and financial agent." Luse *v.* Isthmus, etc. Ry., 6 Oreg. 125 (1876). If the president of a bank sells its securities he is liable to it for any loss incurred thereby. First Nat. Bank *v.* Lucas, 21 Neb. 280 (1887). The president of a bank has no power to compromise a debt due to it from an insolvent firm. Wheat *v.* Bank of Louisville, 5 S. W. Rep. 305 (Ky. 1887). The president of a lumber company has no power to employ a general agent in another part of the country. The latter can hold the company liable for his salary only by proving that at least a majority of the directors knew thereof and acquiesced. Murray *v.* Nelson Lumber Co., 143 Mass. 250 (1887). The president of a railroad cannot sell its bonds. Titus *v.* Cairo, etc. R. R., 37 N. J. L. 98 (1874). The president has no power to sell goods unless he is specially authorized or has made similar sales without objection. Pittsburgh Melting Co. *v.* Reese, 118 Pa. St. 355 (1888). The president of a company cannot agree for it to redeem certain outstanding claims against it — "labor tickets." Stanley *v.* Sheffield, etc. Co., 83 Ala. 260 (1888). The president cannot increase the pay allowed to a director by a vote of the directors. Hodges *v.* Rutland, etc. R. R., 29 Vt. 220 (1857). A president authorized to execute a mortgage cannot insert the usual terms — such as that the principal sum should become due at the option of the bondholder in case of non-payment of interest. Jesup *v.* City Bank, etc., 14 Wis. 331 (1861). Misrepresentations of the president as to property which the company sells are not binding upon it. Crump *v.* U. S. Min. Co., 7 Gratt. (Va.) 352 (1851). The president and cashier cannot even conjointly sell the safe of a bank. Asher *v.* Sutton, 31 Kan. 286 (1884). One who is president, treasurer, and general manager cannot confess judgment for the company, even though he owns all but two shares of the stock. Stokes *v.* New Jersey, etc. Co., 46 N. J. L. 237 (1884). Nor give a mortgage. England *v.* Dearborn, 141 Mass. 590 (1886). Nor give accommodation or renewal notes. McLellan *v.* Detroit, etc. Works, 56 Mich. 579 (1885). The president of a bank has no power to transfer its paper. Smith *v.* Lawson, 18 W. Va. 212, 228 (1881). A director is liable to his bank on a note given to it by him, although the president, who has purchased stock of the director, cancels the note in payment for the stock and considers himself indebted to the bank for that amount. There was no ratification by the bank. Rhodes *v.* Webb, 24 Minn. 292 (1877).

Brokers employed by the president cannot hold the corporation liable, even though the corporation has had the benefit of their services, the board of directors having no knowledge thereof. Twelfth St. Market Co. *v.* Jackson, 102 Pa. St. 269 (1883); Allegheny County Workhouse *v.* Moore, 95 Pa. St. 408 (1880); in the last case the superintendent joined in employing the broker. The president cannot employ workmen. Mt. Sterling, etc. Co. *v.* Looney, 1 Metc. (Ky.) 550 (1858). Nor agree to pay a salary.

directors has led to an enlargement of his importance as a corporate officer. Hence the rule has arisen in New York that a contract,

Murray *v.* Nelson Lumber Co., 143 Mass. 250 (1887); Wood, Railw. Law, pp. 436–439. The president may accept a conditional subscription to stock. Pittsburgh, etc. R. R. *v.* Stewart, 41 Pa. St. 54 (1861). A president of a bank may bind it by his agreement with an indorser of a note that the maker of a note will not give a mortgage, and that the indorser will not be held liable. Cake *v.* Pottsville Bank, 116 Pa. St. 264 (1887). Where the corporation is merely an intermediary of title to a note, less strict proof is required. Brown *v.* Donnell, 49 Me. 421 (1860). The president cannot lease land. Yellow, etc. Co. *v.* Stevenson, 5 Nev. 224 (1869). Where he is authorized to discharge one mortgage, the company is not bound by his mistake in discharging two mortgages. Smith *v.* Smith, 117 Mass. 72 (1875); Mobile, etc. Ry. *v.* Gilmer, 85 Ala. 422 (1888). The president of a national bank has no power inherent in his office to execute a note in the name of the bank. National Bank, etc. *v.* Atkinson, 55 Fed. Rep. 465 (1893). The president cannot be held personally liable for plans which he orders for the corporation, unless want of authority to give the order is shown. Johnson *v.* Armstrong, 83 Tex. 325 (1892). The president of a national bank has power to take property in payment of a debt and bind the bank to pay off a lien on it. Panhandle Nat. Bank *v.* Emery, 78 Tex. 498 (1890). The president and managing agent renders his corporation liable for a bonus of stock in another corporation which he gives secretly and corruptly to the agent of the latter corporation in order to get a contract for the former corporation. Grand Rapids, etc. Co. *v.* Cincinnati, etc. Co., 45 Fed. Rep. 671 (1891), holding the former corporation liable for the par value of the stock, inasmuch as it was the original issue of that stock. Where an executor is president of a corporation, no formal demand for payment of a claim by the corporation against the estate need be made. Brown *v.* Brown, 58 Conn. 85 (1889). A bank may reclaim money paid by the cashier on overdrafts of the president to pay his private debts, such overdrafts not having been authorized by the board of directors. Dowd *v.* Stephenson, 105 N. C. 467 (1890). A corporate deed by the president conveying what he owns personally does not estop him from claiming the property. Carothers *v.* Alexander, 74 Tex. 309 (1889). An offer of a corporation to sell out in consideration of stock in another corporation, the latter to pay all existing debts, is not enforceable by the former company where the latter company accepted the offer on condition that the debts should not exceed a certain amount. Not even the assent of the president of the former company to the condition is sufficient. Bi-Spool, etc. Co. *v.* Acme Mfg. Co., 153 Mass. 404 (1891). The president of a bank has no implied power to borrow money for it. Western Nat. Bank *v.* Armstrong, 152 U. S. 346 (1893). As to the declarations or admissions of the president, see § 726, *infra*. The president has no power to employ an architect. Mathias *v.* White S. S. Assoc., 19 Mont. 359 (1897). The president and secretary have no power to buy machinery for the corporation. Des Moines, etc. Co. *v.* Tilford, etc. Co., 9 S. Dak. 542 (1897). In Ford *v.* Hill, 92 Wis. 188 (1896), the court held that the president had no inherent power to confess judgment, but that under the circumstances of the case the court would not set the judgment aside. The president and secretary have no power to sell the property of the corporation or to authorize anybody else to sell it. Johnson *v.* Sage, 44 Pac. Rep. 641 (Idaho, 1896). The president has no power to waive the purchase-money mortgage of

which apparently is a corporate contract, being signed by the president, is presumed to be a corporate contract until the want of authority of the president is shown by the corporation.[1]

the corporation upon land sold by the corporation. Franco-Texan Land Co. *v.* McCormick, 85 Tex. 416 (1893).

[1] "Where a contract made in the name of a corporation by its president is one the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified." Patterson *v.* Robinson, 116 N. Y. 193 (1889); Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 (1881); Lee *v.* Pittsburgh Coal, etc. Co., 56 How. Pr. 373 (1877); aff'd, 75 N. Y. 601. Where a bank and a mill company have the same individual as president, his action as representing the bank in regard to the application of moneys to particular paper due from the mill to the bank is valid and binding on the bank, if fair and reasonable. Patterson *v.* Robinson, 116 N. Y. 193 (1889). The signature of the president and secretary of a religious corporation does not raise any presumption as to its being the vote of the corporation. Columbia Bank *v.* Gospel Tabernacle, 127 N. Y. 361 (1891). Although a note is signed by the president, secretary, and treasurer of a religious corporation, yet it may be shown that they were not authorized by the board of trustees to sign. People's Bank *v.* St. Anthony's, etc. Church, 109 N. Y. 512 (1888). The president has no power to sell treasury stock. *Re* Utica, etc. Co., 154 N. Y. 268 (1897). A tender of calls on stock may be made to the president in order to avoid a forfeiture. Mitchell *v.* Vermont, etc. Co., 67 N. Y. 280 (1876). The company is liable to an architect who has done work at the instance of the president and two directors. Hooker *v.* Eagle Bank, 30 N. Y. 83 (1864). A corporation may demand a bill of particulars in order to ascertain what officers executed a contract which the corporation denies was ever authorized. Fruin, etc. Co. *v.* Marks, 48 N. Y. App. Div. 51 (1900). The president of a corporation engaged in conducting a large department store has power to make a contract with a pattern publishing company in regard to the pattern department of the store, there being but five stockholders in the corporation. Standard, etc. Co. *v.* Siegel-Cooper Co., 44 App. Div. 121 (1899). A national bank which sells securities to a person by means of misrepresentations of its president as to the character of the securities and by means of a breach of trust on his part is liable for the money so paid to it. Carr *v.* National Bank, etc., 43 App. Div. 10 (1899). The president has no authority to make an assignment for the benefit of creditors. Schaefer *v.* Scott, 40 N. Y. App. Div. 438 (1899). Where the president, who is also managing director, presents for discount a note running to himself and indorsed both by him and the corporation, and states that the proceeds are to be used to pay a corporate obligation, the purchaser of the note is protected. Orvis *v.* Warner & Co., 75 N. Y. App. Div. 463 (1902). A telegram from the president authorizing an agent to contract is insufficient proof of authority. Felton *v.* McClave, 46 N. Y. Super. Ct. 53 (1880). Where the president of a bank receives money on deposit from himself as attorney and subsequently withdraws it and misappropriates it, the bank is liable. Smith *v.* Anderson, 57 Hun, 72 (1890). The president has no power to modify a resolution of the board that certain notes shall be subject to the joint order of himself and the secretary. Tradesmen's Nat. Bank *v.* Manhattan Lumber Co., 18 N. Y. Supp. 920 (1892). "It is not within the authority of the president of a bank, when he discounts paper for the bank, to promise the maker that he need not

A person taking a company's note from the president in payment of an individual debt is bound to inquire into the regularity of the issue of the note.[1]

A president, however, may employ an attorney for the company

pay it." First Nat. Bank *v.* Tisdale, 18 Hun, 151 (1879); aff'd, 84 N. Y. 655. The president cannot borrow money for the company unless the charter or the board of directors authorizes him. Life & F. Ins. Co. *v.* Mechanics' F. Ins. Co., 7 Wend. 31 (1831). In Powers *v.* Schlicht, etc. Co., 23 N. Y. App. Div. 380 (1897), the court stated that the president of a business corporation has implied power to make contracts in its behalf. The president of a national bank has no power to bind it to accept drafts in the future drawn by a railroad company, where the party relying thereon knew that the bank directors objected. Stallcup *v.* National Bank, 15 N. Y. St. Rep. 39 (1888). The president and secretary cannot issue drafts in the company's name. Dabney *v.* Stevens, 40 How. Pr. 341 (1870). A resolution authorizing the president to sign checks, drafts, etc., does not authorize an indorsement of commercial paper by him in the company's name and in its behalf. Hitchings *v.* St. Louis, etc. Co., 68 Hun, 33 (1893). A corporation is not liable for commissions promised by its president to a broker, even though a sale resulted. Bright *v.* Canadian, etc. Co., 83 Hun, 482 (1895). The president of a manufacturing company cannot buy goods for it. Westerfield *v.* Radde, 7 Daly, 326 (1877). *Cf.* Silva *v.* Metropolitan. etc. Co., 42 N. Y. Super. Ct. 307 (1877). Where a contract to build a railroad is made by contractors with a committee of directors duly authorized to make it, a provision against sub-letting cannot be waived by the president of the railroad and a director. Western R. R. *v.* Bayne, 11 Hun. 166 (1877); affirmed, 75 N. Y. 1. A bank receiving funds from its president in payment of his debts to it, which funds he had fraudulently obtained from another bank by using his standing as president of the former, is bound to pay over the same to the defrauded bank, where such president had complete control of the former bank. City Nat. Bank *v.* National Park Bank, 32 Hun, 105 (1884). A president authorized by resolution of the board of directors to sell bonds cannot loan them; if he does so it is a conversion of the property of the corporation. Second Ave. R. R. *v.* Mehrback, 46 N. Y. Super. Ct. 267 (1883). The president of an insurance company cannot indorse and transfer notes. Marine Bank, etc. *v.* Clements, 3 Bosw. 600 (1858). But in an earlier case it was held that the indorsee in good faith was protected. Caryl *v.* McElrath, 3 Sandf. 176 (1849). A bank president has no implied authority from the bank to agree to pay interest on a particular deposit, there being no evidence of special authority nor of a bank custom to that effect. The president of a corporation has no implied authority to check corporate funds out of the bank unless there is an established usage to that effect. Fulton Bank *v.* New York, etc. Canal Co., 4 Paige, 127 (1833). The president, secretary, and general agent cannot issue the corporate notes. McCullough *v.* Moss, 5 Denio, 567 (1846). *Cf.* Moss *v.* Rossie, etc. Co., 5 Hill, 137 (1843). A railroad president cannot contract to pay a commission to a promoter who induces a contractor to build the road. Risley *v.* Indianapolis, etc. R. R., 1 Hun, 202 (1874); rev'd on other points, 62 N. Y. 240. The president cannot increase the pay of a director. Bailey *v.* Buffalo, etc. R. R., 14 Hun, 483 (1878). See also De Bost *v.* Albert Palmer Co., 35 Hun, 386 (1885).

[1] Wilson *v.* Metropolitan, etc. Ry., 120 N. Y. 145 (1890). See also § 295, *supra*.

and authorize him to prosecute or defend a case.[1] And in all cases the president binds the corporation by his acts and contracts when he is expressly authorized to so act or contract,[2] or when he has

[1] Beebe *v.* George H. Beebe Co., 64 N. J. L. 497 (1900); American Ins. Co. *v.* Oakley, 9 Paige, 496 (1842); Mumford *v.* Hawkins, 5 Denio, 355 (1848); Potter *v.* New York Inf. Asylum, 44 Hun, 367 (1887). He may also employ special counsel. Davis *v.* Memphis, etc. Ry., 22 Fed. Rep. 883 (1883); Recamier Mfg. Co. *v.* Seymour, 5 N. Y. Supp. 648 (1889), holding that he may do so, though the suit is by the corporation against the board for fraud. *Contra*, Bright *v.* Metairie Cem. Assoc., 33 La. Ann. 58 (1881). The president may bring a writ of entry to foreclose a mortgage. Smith Charities *v.* Connolly, 157 Mass. 272 (1892). The president cannot authorize an attorney to accept service where the board of directors were accustomed to vote on the employment of attorneys. Bridgeport Sav. Bank *v.* Eldredge, 28 Conn. 556 (1859). The case of Ashuelot, etc. Co. *v.* Marsh, 55 Mass. 507 (1848), holds that the president cannot cause an action to be commenced. Where the president is dead the vice-president may employ an attorney. Coleman *v.* West, etc. Co., 25 W. Va. 148 (1884). A hold-over president and manager for sixteen years may institute a suit in behalf of the corporation. Lucky Queen Min. Co *v.* Abraham, 26 Oreg. 282 (1894). The president and general manager may engage an attorney to give advice in company's matters. Dallas, etc. Co. *v.* Crawford, 18 Tex. Civ. App. 176 (1898). A bank president has no power to employ an attorney. Pacific Bank *v.* Stone, 121 Cal. 202 (1898).

[2] The board of directors may, of course, authorize the president to sign the company's name to a promissory note. McCormick *v.* Stockton, etc. R. R., 130 Cal. 100 (1900). A resolution authorizing the president to execute a chattel mortgage does not authorize him to give a chattel mortgage which can be foreclosed on ten days' notice and which gives other executory powers to the mortgagee. Monroe, etc. Co. *v.* Arnold, 108 Ga. 449 (1899). Even though the president has full power to sell corporate property, yet where he refers the party to the superintendent and the latter makes the sale, it is not binding on the company, even though the president stated that the superintendent had full authority to sell. He could not so delegate his authority. Trent *v.* Sherlock, 24 Mont. 255 (1900). Under express power to have full control of the business, the president may purchase materials. Castle *v.* Belfast, etc. Co., 72 Me. 167 (1881). Under power to adjust and pay losses he may transfer papers. Baker *v.* Cotter, 45 Me. 236 (1858); Aspinwall *v.* Meyer, 2 Sandf. 186; s. c., 3 N. Y. 290 (1850), where the express power was very general. Express authority, of course, may be given to the president to sell and assign the securities of the corporation. Mitchell *v.* Deeds, 49 Ill. 416 (1867). Authority to the president to borrow includes authority to give ordinary securities, *i. e.*, bonds, notes, acceptances, and collaterals. A person dealing with him may rely on it. He is not bound to know that the president's authority has been revoked. Hatch *v.* Coddington, 95 U. S. 48 (1877). Where the president has, by by-laws, authority to make a contract, and does make one, and it is signed by him as such, though no corporate seal and no resolution are recited, the president may compromise and release the same. Six months' delay by directors in repudiating the compromise after knowledge is a fatal delay. Rolling Mill *v.* St. Louis, etc. R. R., 120 U. S. 256 (1886). Parol authority to the president suffices to enable him to pay out money. New Orleans Bldg. Co. *v.* Lawson, 11 La. 34 (1837).

been permitted by the corporation for some time to act and contract for it.[1]

Although the president is given power to make a contract, yet the directors may make it, and their action overrules his. East, etc. Co. *v.* Brower, 80 Ga. 258 (1888). Authority to sell gives authority to contract to sell. Augusta Bank *v.* Hamblet, 35 Me. 491 (1853). Officers authorized to give a note cannot agree to pay attorney fees. Hardin *v.* Iowa, etc. Co., 78 Iowa, 726 (1889). The authority of a president to sell or lease gives him power to point out and make representations as to the boundaries. Holmes *v.* Turner's Falls Co., 150 Mass. 535 (1890). The president who makes an assignment of the company's assets for the benefit of creditors under a resolution of the board of directors cannot afterwards attack it. *Re* George T. Smith, etc. Co., 86 Mich. 149 (1891). The authority of the president to buy property gives authority also to buy on credit. Arapahoe, etc. Co. *v.* Stevens, 13 Colo. 534 (1889). Under a by-law giving him authority, the president may purchase on credit. Siebe *v.* Joshua, etc. Works, 86 Cal. 390 (1890). An assignment of a corporate claim by the manager and president in the regular course of business, and with the knowledge and consent of the board of directors, is sufficient. Greig *v.* Riordan, 99 Cal. 316 (1893). Under a broad power given to the president to make contracts he may take a lease of property. Hawley *v.* Gray, etc. Co., 106 Cal. 337 (1895). The president and secretary authorized to execute a mortgage have no authority to insert a provision to pay the attorney fee in case of foreclosure. Ratification of the mortgage by the directors without knowledge of such provision is not ratification thereof. Pacific, etc. Mill *v.* Dayton, etc. Ry., 5 Fed. Rep. 852 (1881).

[1] Where the president of a construction company takes entire charge of its business, and is allowed so to do by the directors, the company is bound by notes given in the corporate name by him for the company's business. "The execution of the paper could not be held to be in excess of the powers given, and it was clearly the duty of the directors to give contrary instructions, if they wished to withdraw the general management from the president; and to disaffirm the action of their agents promptly and at once, if they objected to it." Fitzgerald, etc. Co. *v.* Fitzgerald, 137 U. S. 98, 109 (1890). Where the president has been accustomed to exercise power without the dissent of the company and with its acquiescence, the law implies that he has such power. Chambers *v.* Lancaster, 160 N. Y. 342 (1899). As to the evidence necessary to prove that the officers of a corporation consented and acquiesced in acts of the president, see Corn, etc. Bank *v.* American, etc. Co., 163 N. Y. 332 (1900). A sale of all the property by the president and general manager will be sustained where they have been allowed to take entire charge of the company and the directors did not repudiate the sale. Northwestern, etc. Co. *v.* Lee, 102 Wis. 426 (1899). Where the president is allowed for several years to carry on all the business of the corporation and sign its name to contracts, notes, etc., a note signed by him in the name of the corporation is valid, especially where he and another stockholder, who sign the note, own nearly all of the stock. The same rule applies to a mortgage executed by him in the name of the corporation. First Nat. Bank *v.* G. V. B. Min. Co., 89 Fed. Rep. 439 (1898). Where a corporation has recognized the authority of its president to make certain contracts, this is *prima facie* evidence of his authority to make another contract of that kind. Scribner *v.* Flagg, etc. Co., 175 Mass. 536 (1900). Where the president has

So also the company is bound when it ratifies or accepts the contract after it is made, or accepts the benefit of the contract. Hav-

been allowed by the board of directors to carry on all the business as though it was his own, a mortgage in the name of the corporation executed by him on the corporate property is valid. National, etc. Bank *v.* Sanford, etc. Co., 157 Ind. 10 (1901). Where the president is also general manager and practically the whole corporation, a bill of sale of corporate property by him is good. Quee Drug Co. *v.* Plaut, 55 N. Y. App. Div. 87 (1900). Where the corporation allows all its affairs to be conducted by its president, without observing legal formalities, a note and mortgage executed by him is valid, it being shown that such note had been renewed several times. G. V. B. Min. Co. *v.* First Nat. Bank, etc., 95 Fed. Rep. 23 (1899). Where the president had been accustomed to act and contract for the company without express authority, and his acts had always been accepted, his order to a contractor to stop work binds the company. Leroy, etc. R. R. *v.* Sidell, 66 Fed. Rep. 27 (1895).

A note signed by the president and secretary is binding, if they have been accustomed to sign notes, especially where a corporation obtains the benefit of the note. Bullen *v.* Milwaukee, etc. Co., 109 Wis. 41 (1901). Where the president of a national bank manages its business he may, for the benefit of the bank, rediscount paper held by the bank. Hanover, etc. Bank *v.* First, etc. Bank, 109 Fed. Rep. 421 (1901). Where the president of a railroad has been accustomed to sign notes without action of the board of directors, a note signed by him is enforceable, even though he used the money for his own purposes. Texarkana, etc. Ry. *v.* Bemis, etc. Co., 67 Ark. 542 (1900). Where the board of directors of a bank allow the president to transact all the business of the bank the bank is bound. Tourtelot *v.* Whithed, 84 N. W. Rep. 8 (N. Dak. 1900). The president has no inherent power to contract for the company, but where he has been allowed to carry on the whole business of the corporation, the company is bound by a contract within the ordinary business of the corporation, such as selling timber land on time. St. Clair *v.* Rutledge, 92 N. W. Rep. 234 (Wis. 1902). Where a corporation allows certain officers to manage its business it is responsible for their contracts, unless it is shown that such contracts were unauthorized. Anderson *v.* Wallace, etc. Co., 70 Pac. Rep. 247 (Wash. 1902). The president binds the company when he does all the business with the knowledge and consent of the directors. McComb *v.* Barcelona, etc. Assoc., 134 N. Y. 598, 608 (1892). Where for eight years the president has been allowed to manage and carry on the whole business of the company, and to indorse its name to notes in order to raise money for the business, and the company had no cash capital and no other way of obtaining money, it is for the jury to say whether the company is bound by such an indorsement by him. Fifth Nat. Bank *v.* Navassa, etc. Co., 119 N. Y. 256 (1890). *Cf.* National Bank *v.* Navassa Phosphate Co., 56 Hun, 136 (1890). Where for many years the president has managed a company, the company's note executed by him binds the company without special authority. Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890), aff'g 44 Hun, 130 (1887). Where the president for several years has run the company, borrowed money for it, and given its notes, etc., and the by-laws give him "general supervision over the property and affairs of the corporation," the company's note made by him, and an assignment of "$150,000 of such good and collectible accounts now existing or that shall hereafter accrue or be acquired in the conduct of the business,"

ing knowingly received the benefit of a contract made and carried out by the president, even without authority, the corporation must

are valid. Preston Nat. Bank *v.* George T. Smith, etc. Co., 84 Mich. 364 (1890). A president who has been accustomed to issue corporate notes may bind the corporation by a similar note. McDonald *v.* Chisholm, 131 Ill. 273 (1890).

A general understanding that the president and secretary shall manage the business and make contracts, and their open and public assumption of that power, with the knowledge and acquiescence of the directors, are equal to a vote of the directors authorizing them to make contracts. Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890). Where the president and secretary of a mining company have for a long time signed checks, and they have been paid by a bank, they may continue to draw checks and the bank must pay them. The corporation is liable for overdrafts caused thereby. Mining Co. *v.* Angelo, etc. Bank, 104 U. S. 192 (1881). A uniform practice of a company for several months previous to the transfer of a corporate note by its president, in cases of notes negotiated for the purpose of raising money to carry on its legitimate business, where such notes were payable to the company, to have them indorsed by the president, is sufficient authority for his indorsement. Marine Bank *v.* Clements, 31 N. Y. 33 (1865). See also, in general, Chicago, etc. Ry. *v.* James, 24 Wis. 388 (1869); First Nat. etc. Bank *v.* North, etc. Co., 86 Mo. 125 (1885), where the president and secretary were accustomed to make notes. Where the board of directors for three years relinquishes to the president the exclusive management of the business of the corporation and the purchase of all classes of articles, giving corporate notes, bills, and securities therefor, and then the directors took charge and for several years continued business without repudiating his acts, his purchase of locomotives and giving corporate notes therefor while he was in charge binds the corporation. Olcott *v.* Tioga R. R., 27 N. Y. 546 (1863). If accustomed so to do, the president may settle an account and take a due-bill in payment. Dougherty *v.* Hunter, 54 Pa. St. 380 (1867). Where the president has been accustomed to make and indorse paper, the corporation will be bound, even though the directors supposed that all business had been stopped. National Park Bank *v.* German, etc. Co., 53 N. Y. Super. Ct. 367 (1886). Where the president has several times been authorized to pledge corporate securities, and now does so without special authorization, and a majority of the directors ratify the act, not in meeting, but separately, the pledge is legal. Bibb *v.* Hall, 101 Ala. 79 (1893). Where the president owns practically all the stock, and for years has managed the business without any meeting of the board of directors, a sale of the corporate property by him is legal. McElroy *v.* Minnesota, etc. Co., 96 Wis. 317 (1897). The authority of the president to discharge mortgages may be shown by the fact that he has done so many times before. Swasey *v.* Emerson, 168 Mass. 118 (1897). The power of a president of a bank to rediscount paper may arise from his having done so for a long time to the knowledge of the board of directors. U. S. Nat. Bank *v.* First Nat. Bank, 79 Fed. Rep. 296 (1897). Where the president of a bank is practically manager, he may settle a claim by taking an assignment of a judgment. First Nat. Bank *v.* New, 146 Ind. 411 (1896). Long usage may give the president authority. Estes *v.* German Nat. Bank, 62 Ark. 7 (1896); Missouri Pac. Ry. *v.* Sidell, 67 Fed. Rep. 464 (1895). Where the president, who is also general manager and financial agent, is accustomed to borrow money for the corporation, he binds the com-

perform on its part.[1] The authority of the president of a railroad to take a lease of a hotel in behalf of the company may be inferred

pany by a loan, even though he misapplies the proceeds. Kraft *v.* Freeman, etc. Co., 87 N. Y. 628 (1881). If he has been accustomed for a long time to sign notes, a person taking a note without his signature is not protected. Davis, etc. Co. *v.* Best, 105 N. Y. 59 (1887). The president has no implied power to sell the lands of the company, and the power given by usage to former presidents to sell and take a purchase-money lien does not give power to sell without retaining that lien. Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306 (1891). The president, even though he is also manager, head, and majority stockholder, cannot bind the corporation by his statement that the corporation was to indemnify him from loss on certain indorsements made by him. Minneapolis Trust Co. *v.* Clark, 47 Minn. 108 (1891). Where the board of directors allow one of its officers the exclusive management of its affairs, the company is bound by its acts. Davies *v.* New York Concert Co., 13 N. Y. Supp. 739 (1891); Sparks *v.* Dispatch Transfer Co., 104 Mo. 531 (1891). Although the president has been accustomed to issue corporate notes, yet, if the bank taking the note in question knew that the proceeds were to be used by him in his private business, the note cannot be enforced. Third Nat. Bank *v.* Marine Lumber Co., 44 Minn. 65 (1890).

[1] Quoted and approved in Bennett *v.* Millville Imp. Co., 51 Atl. Rep. 706 (N. J. 1902); Pittsburgh, etc. Ry. *v.* Keokuk Bridge Co., 131 U. S. 371 (1889). Where the president bought railroad iron without authority so to do, but the directors stood by and allowed the corporation to use it, the company is liable for the price. Scott *v.* Middletown, etc. R. R., 86 N. Y. 200 (1881). If a corporation retains and uses money borrowed for it by its officer in excess of his authority, it ratifies the transaction, and is liable. Willis *v.* St. Paul Sanitation Co., 53 Minn. 370 (1893). Even though a mortgage is not authorized at a formal meeting of the directors, nevertheless if the directors knew and approved of the same and the corporation accepted the benefits, the mortgage will be enforced, it having been signed by the president and secretary and the corporate seal having been attached. Nevada, etc. Syndicate *v.* National, etc. Co., 96 Fed. Rep. 133 (1899). Where one person is president and general manager and owns all the stock, a note executed by him in the name of the corporation is valid, the proceeds being used in the corporate business. Africa *v.* Duluth, etc. Co., 82 Minn. 283 (1901). Where a corporation accepts the benefit of a lease made by the president it is bound thereby. Alexander *v.* Culbertson, etc. Co., 85 N. W. Rep. 283 (Wis. 1901). Proof that a corporation carried out a contract and accepted the benefits of it is sufficient to show that it was duly authorized, it having been signed by the president. Neosho, etc. Co. *v.* Hannum, 10 Kan. App. 499 (1901). A chattel mortgage executed by the president and secretary of an insolvent corporation, with the knowledge and consent of all the stockholders, is valid. Kalamazoo, etc. Co. *v.* Winans, etc. Co., 106 Mich. 193 (1895). Even though the president sells property without authority, yet if the board of directors receive the interest on a note given in part payment they ratify the sale. Poche *v.* New Orleans, etc. Co., 52 La. Ann. 1287 (1900). Where a corporation ratifies its president's contract it is bound by his declarations as to the meaning of the contract. Balfour *v.* Fresno, etc. Co., 123 Cal. 395 (1899). Where but one meeting of the board of directors was ever held and then the charter was forfeited, and the president, with the consent of the

from the facts of his signing, sealing, and delivering the instrument, and of the company's entering into possession under the lease

directors, individually, and of all the stockholders, conveyed away the property, and creditors were not injured, the transaction is legal. Aransas, etc. Co. *v.* Manning, 63 S. W. Rep. 627 (Tex. 1901). A corporate creditor cannot attack a sale of all the assets of the corporation for a valuable consideration and in good faith, even though such sale was not formally authorized by the board of directors or stockholders. Magowan *v.* Groneweg, 86 N. W. Rep. 626 (S. Dak. 1901). The board of directors may ratify an act of the president without a formal resolution being spread on the minutes. Texas, etc. Ry. *v.* Davis, 54 S. W. Rep. 381 (Tex. 1899). A note guaranteed by a corporation through its president, the act being within the corporate power, is binding if the corporation had the benefit, even though the president had no authority to make such indorsement. Hunt *v.* Northwestern, etc. Co., 92 N. W. Rep. 23 (S. Dak. 1902). Where the president agrees to pay an employee a certain percentage of the profits of the business and the corporation acquiesces in the contract and has been benefited by it, the corporation is bound. Bennett *v.* Millville Imp. Co., 51 Atl. Rep. 706 (N. J. 1902). If the board of directors by their acts accept a modification made by the president in a contract, the company is bound, although there was no formal ratification. Taylor, etc. Co. *v.* Wood, 119 Fed. Rep. 966 (1903). A pledge of bonds by the president is ratified by the directors knowing thereof and accepting the proceeds. Prentiss, etc. Co. *v.* Godchaux, 66 Fed. Rep. 234 (1894). A bank is liable for money received, and used by it in its business, even though the president was not authorized to borrow it. Blanchard *v.* Commercial Bank, 75 Fed. Rep. 249 (1896). A bank cannot enforce notes which its president obtains for it by misrepresentations inducing the maker of the notes to give them in exchange for the notes of a worthless party. Wilson *v.* Pauly, 72 Fed. Rep. 129 (1896). The president may release a mortgage where a majority of the directors separately authorized it, and the stockholders in meeting assembled gave him general authority. Smith *v.* Wells, etc. Co., 148 Ind. 333 (1897). By acquiescence of the board of directors the president's contract employing an editor and manager of a newspaper may bind the company. Jones *v.* Williams, 139 Mo. 1 (1897). Allowing the contract to be completed cures any defect of power on the part of the president to make the contract. Omaha, etc. Co. *v.* Burns, 49 Neb. 229 (1896). Accepting the benefit of the president's contract cures any defect in his authority. Davies *v.* Harvey Steel Co., 6 N. Y. App. Div. 166 (1896). By accepting a deed of a right of way a corporation accepts written covenants which its president made in connection therewith. Mobile, etc. Ry. *v.* Gilmer, 85 Ala. 422 (1888). Where the president, as the financial manager, pledges the company's bonds, and for more than a year such pledge continues without objection, the pledge is ratified. Illinois T. & S. Bank *v.* Pacific Ry., 117 Cal. 332 (1897), holding also that although the by-laws require notes to be signed by the secretary, yet by acquiescence a note signed by the president alone may bind the corporation. A chattel mortgage given by the president and treasurer, without previous authority from the directors, may be validated by the corporation accepting the benefit of the same. Edelhoff *v.* Horner, etc. Co., 86 Md. 595 (1898). A contract made by the president without authority may be considered ratified by the fact that the directors individually knew of the same, although they did not act upon

and exercising acts of ownership and control over the demised premises, even if the minutes of the company failed to disclose such

the matter as a board. Henry *v.* Colorado, etc. Co., 10 Colo. App. 14 (1897). A railroad contractor may enforce his construction contract with a railroad corporation, although he made it with the president, and the board of directors did not pass upon it, where the contractor proceeded to perform. The contractor was justified in stopping work when he was not paid according to the contract. Cunningham *v.* Massena, etc. R. R., 63 Hun, 439 (1892); aff'd, 138 N. Y. 614. Acquiescence in sales by the president, where a vendor's lien was retained, does not sustain a sale by him without retaining such a lien. Fitzhugh *v.* Franco-Texas Land Co., 81 Tex. 306 (1891). Although the president accepts in the corporate name a draft drawn on him personally, yet where the bank of the corporation pays the draft and charges it to the corporation, and the latter acquiesces for nine months, it cannot hold the bank liable. McLaren *v.* First Nat. Bank, 76 Wis. 259 (1890). The president's contract with an attorney may be ratified. Merrill *v.* Consumers' Coal Co., 114 N. Y. 216 (1889). A transfer of all the property by the president is valid where the directors and all the stockholders knew of it and assented to it. Fort Worth Pub. Co. *v.* Hitson, 80 Tex. 216 (1890). The company, by accepting and using property purchased by the president without authority, thereby ratifies the purchase. West Salem Land Co. *v.* Montgomery Land Co., 89 Va. 192 (1892). That stockholders may ratify and validate notes and mortgages given by the president, see Martin *v.* Niagara, etc. Mfg. Co., 122 N. Y. 165 (1890). The contracts of the president may be ratified subsequently by the board of directors. Wehrhane *v.* Nashville, etc. R. R., 4 N. Y. St. Rep. 541 (1886). For a clear statement of this principle, see Dabney *v.* Stevens, 40 How. Pr. 341 (1870) Rates as advertised by the president bind the railroad when it continues to accept them. Hilliard *v.* Goold, 34 N. H. 230 (1856). The president's unauthorized contracts, when known to and acted upon by the directors and corporation, are binding. Perry *v.* Simpson, etc. Co., 37 Conn. 520 (1871); 93 N. W. Rep. 882.

Where the president of a bank instructs its correspondent bank to charge to the former a debt due by him to the latter bank, and the accounts of the latter to the former bank showed to that effect, and no objection is made, the former bank is bound. Burton *v.* Burley, 13 Fed. Rep. 811 (1880). A lease by the president and treasurer without authority may be ratified by the stockholders. Mount Washington Hotel Co. *v.* Marsh, 63 N. H. 230 (1884). A bank is liable on an agreement of its president to give a person ten shares of stock if he would deposit with it, the deposits having been made. Rich *v.* State Nat. Bank, 7 Neb. 201 (1878). Where the company acquiesces in work done by contract with the president it is liable. Grape Co. *v.* Small, 40 Md. 395 (1874). The company may ratify a mortgage given by him. Krider *v.* Western College, 31 Iowa, 547 (1871); Sherman *v.* Fitch, 98 Mass. 59 (1867), where all but one of the directors knew and acquiesced. The acquiescence of a minority of the directors is insufficient. Yellow, etc. Co. *v.* Stevenson, 5 Nev. 224 (1869). Acceptance of the property purchased, with knowledge, is ratification. Dent *v.* North, etc. Co., 49 N. Y. 390 (1872). The failure of the president to repudiate at once an agent's unauthorized act is ratification. First Nat. Bank *v.* Fricke, 75 Mo. 178 (1881); Alabama, etc. R. R. *v.* Kidd, 29 Ala. 221 (1856). See also § 727, *infra*, on notice. Ratification of a president's acts may arise by long use of the results, even though the directors

authority expressly given.[1] The stockholders of a corporation at a special meeting duly called may amend the by-laws so as to authorize the board of directors to remove the president and treasurer, and the board of directors may subsequently make such removal under the amended by-laws.[2]

The same rules apply to a vice-president that apply to the president on this subject.[3] A stockholder cannot act as temporary presi-

expressly repudiated the acts, but did not notify the other party. Belleville Sav. Bank *v.* Winslow, 35 Fed. Rep. 471 (1888). It is a sufficient ratification if the directors discuss the matter at a meeting, though they take no action. Walworth, etc. Bank *v.* Farmers', etc. Co., 16 Wis. 629 (1883). A corporate agent with full powers may ratify the president's act. Perry *v.* Simpson, etc. Co., 37 Conn. 520 (1871). Acquiescence of the board of directors may cure the omission of a previous resolution as required by the charter in the issue of the bonds. Curtis *v.* Leavitt, 15 N. Y. 9 (1857), the court saying of the board (p. 49): "They may previously resolve; they may subsequently acquiesce; they may expressly ratify; they may intentionally receive and appropriate the proceeds of the unauthorized transaction, and so put it out of their power to dispute its validity." 54 Atl. Rep. 385.

[1] Jacksonville, etc. Nav. Co. *v.* Hooper, 160 U. S. 514 (1896).

[2] *In re* Griffing Iron Co., 63 N. J. L. 168 (1898); aff'd, 63 N. J. L. 357 (1899).

[3] The mere fact that a deed is executed by the vice-president instead of the president does not require additional proof as to why the vice-president signed it instead of the president doing so. Ellison *v.* Branstrator, 153 Ind. 146 (1899). It is legal for the board of directors to authorize the vice-president to execute a deed. American, etc. Bank *v.* Ward, 111 Fed. Rep. 782 (1901). The unauthorized action of the vice-president in delivering a note which had been duly indorsed by the corporation is ratified by the corporation receiving the benefit therefrom. Johnson *v.* Weed, etc. Co., 103 Wis. 291 (1899). A lumber company is not liable for transactions of its vice-president with outsiders, where such vice-president had no power to represent it. Shavalier *v.* Grand Rapids, etc. Co., 87 N. W. Rep. 212 (Mich. 1901). The vice-president of a bank may, by reason of having for a long time conducted the business of the bank, have power to assign a judgment owned by the bank. Cox *v.* Robinson, 82 Fed. Rep. 277 (1897). The vice-president may sign a corporate deed if the president refuses to do so. Smith *v.* Smith, 62 Ill. 492 (1872). The fact that a vice-president swears to a complaint does not raise a presumption that the company authorized its service. American Water-works Co. *v.* Venner, 18 N. Y. Supp. 379 (1892). The vice-president may make an assignment for the benefit of creditors, where he is authorized "to use all means and do all acts and make all deeds by him deemed necessary or proper to serve the best interest of the association, and to use the corporate seal for such purpose." Huse *v.* Ames, 104 Mo. 91 (1891). The vice-president has no power to sell the bonds of the company, even though he is a director, member of the executive committee, and one of the two persons who "run" the company. The purchasers are not *bona fide.* American L. & T. Co. *v.* St. Louis, etc. Ry., 42 Fed. Rep. 819 (1890). It may be proved that the vice-president had authority to accept a draft, although drawn by himself upon the company. Rumbough *v.* Southern Imp. Co., 106 N. C. 461 (1890). A suit is presumed to be authorized where the vice-president swears to the

dent of the board of directors where he has never been elected a director.[1]

§ 717. *Secretary and treasurer — Their power to contract for the corporation.*— The secretary of a corporation has no power, merely as secretary of the company, to make contracts for it.[2] The secretary is one of the corporate officers, but he has practically no authority.[3] The corporation may, of course, expressly authorize the secretary to contract for it, or may accept and ratify his contracts after they are made.[4]

pleading. Lacaze *v.* Creditors, 46 La. Ann. 237 (1894). The vice-president's contracts may be ratified by the directors. Dallas *v.* Columbia, etc. Co., 158 Pa. St. 444 (1893). The vice-president may, in certain circumstances, employ counsel. Streeten *v.* Robinson, 102 Cal. 542 (1894). The vice-president has no power to sign notes. Morris *v.* Griffith, etc. Co., 69 Fed. Rep. 131 (1895). As to the powers of a vice-president, see also Missouri, etc. Ry. *v.* Faulkner, 88 Tex. 649 (1895).

1 Benson *v.* Keller, 37 Oreg. 120 (1900).

2 "A secretary is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all." Hence a receipt by the secretary that certificates of stock had been actually lodged in the corporate office for transfer does not bind the corporation where they were not actually lodged, and the receipt was a part of a fraud. George Whitechurch, Ltd. *v.* Cavanagh, [1902] A. C. 117. Where the secretary wrongfully deposits another person's money to the credit of the company, and then checks it out for his private debts, the company is not liable therefor. Glendale, etc. Assoc. *v.* Harvey, etc. Co., 90 N. W. Rep. 456 (Wis. 1902). The secretary has no power to assign the company's claims for goods sold by it. The assignee's rights are not perfected by the directors' resolution made after he sues on the account. Read *v.* Buffum, 79 Cal. 77 (1889). The secretary of a religious corporation cannot contract for paving for the corporation. Thomason *v.* Grace, etc. Church, 113 Cal. 558 (1896). The secretary has no implied power to bind the company. Wolf *v.* Davenport, etc. R. R., 93 Iowa, 218 (1895). He cannot sell and assign its notes, Blood *v.* Marcuse, 38 Cal. 590 (1869); nor sign a draft for it, First Nat. Bank *v.* Hogan, 47 Mo. 472 (1871); nor purchase iron for it, Williams *v.* Chester, etc. R. R., 15 Jur. 828 (1850); nor accept a bill of exchange, Neale *v.* Turton, 4 Bing. 149 (1827); nor bind it to pay a debt of an old company whose property it purchased upon a reorganization, American, etc. Ry. *v.* Miles, 52 Ill. 174 (1869); nor rent a place for the company, Ridley *v.* Plymouth, etc. Co., 2 Exch. 711 (1848); nor accept accommodation paper, Farmers', etc. Bank *v.* Empire, etc. Co., 5 Bosw. 275 (1859); nor purchase, Kingsbridge Flour Mill Co. *v.* Plymouth, etc. Co., 2 Exch. 718 (1848). Where the assistant secretary signs a mortgage instead of the secretary, it is sufficient to prove that he was the *de facto* assistant secretary. Augusta, etc. R. R. *v.* Kittel, 52 Fed. Rep. 63 (1892). The secretary has no power to execute a note. Thompson *v.* Des Moines, etc. Park, 84 N. W. Rep. 678 (Iowa, 1900); Sanders *v.* Chartrand, 59 S. W. Rep. 95 (Mo. 1900). A letter signed by the secretary employing a person is not sufficient to prove a contract. Hallenbeck *v.* Powers, etc. Co., 117 Mich. 680 (1898).

3 Hastings *v.* Brooklyn Life Ins. Co., 138 N. Y. 473 (1893).

4 Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833), where the secretary was authorized to affix the corporate seal; New

The treasurer of a corporation has no power, merely by reason of his office as treasurer, to contract for the corporation.[1] But if the treasurer has been accustomed to make certain contracts for the corporation, and the corporation has acquiesced in them, it is bound

England, etc. Ins. Co. *v.* De Wolf, 25 Mass. 56 (1829), where the company accepted the benefits. A note signed by the corporate secretary as directed by the president, the money therefor being used by the corporation, is enforceable against it. Jansen *v.* Otto Stietz, etc. Co., 1 N. Y. Supp. 605 (1888). Although corporate notes given by the secretary to a bank are unauthorized, yet if the money was used regularly in the business of the company it is liable. Pauly *v.* Pauly, 107 Cal. 8 (1895). Where the secretary has been permitted to sell the notes of the corporation, a transfer of a note by him to a bank makes the latter a *bona fide* purchaser, the corporation being the payee. Commercial Nat. Bank *v.* Brill, 37 Neb. 626 (1893). The secretary has power to indorse the company's note for discount or sale where for a long time he has been allowed to do so. Blake *v.* Domestic, etc. Co., 38 Atl. Rep. 241 (N. J. 1897). By allowing the secretary to conduct the business the company is bound by his contracts. Hess *v.* Sloane, 66 N. Y. App. Div. 522 (1901). Where a corporation pays the expense of collecting notes owned by it and assigned by its secretary, it thereby ratifies such assignment. McCormick *v.* Bittinger, 13 Colo. App. 170 (1899).

[1] The treasurer has no power to borrow money and give the corporate note therefor, and the company is not liable where the money was paid into the corporate treasury and immediately embezzled by the treasurer. Craft *v.* South Boston R. R., 150 Mass. 207 (1889). A treasurer has no power to sign the corporate name to promissory notes unless he is expressly given that power. If the note is made payable to his own order, the purchaser of it must take notice that it was issued without authority. Chemical Nat. Bank *v.* Wagner, 93 Ky. 525 (1892). Notes of a cattle company purporting to be signed by it through its treasurer are presumed to have been authorized. Corcoran *v.* Snow Cattle Co., 151 Mass. 74 (1890). Where a corporation repudiates a pledge of stock made by its treasurer, it cannot sue the pledgee for the money received by the pledgee upon a sale of the stock by the latter. Holden *v.* Metropolitan Nat. Bank, 151 Mass. 112 (1890). The treasurer cannot, upon the sale of a note held by the company, indorse the note so as to render the company liable, even though a trustee was aware thereof, the opening of an account with the bank being unknown to the company. Columbia Bank *v.* Gospel Tabernacle, 57 N. Y. Super. Ct. 149 (1889). A treasurer has no power to issue corporate notes, and where he does so, the proceeds being used to pay his personal debt to the corporation, the notes are not binding on the company. First Nat. Bank *v.* Council Bluffs, etc. Co., 56 Hun, 412 (1890). The corporate indorsement of a note by the treasurer without authority and for accommodation does not bind the corporation. Wahlig *v.* Standard, etc. Co., 9 N. Y. Supp. 739 (1890). The treasurer has no inherent authority to indorse. Security Bank *v.* Kingsland, 5 N. Dak. 263 (1895). The treasurer has no implied power to make a corporate note. Oak, etc. Co. *v.* Foster, 7 N. M. 650 (1895). The treasurer of a manufacturing corporation has no implied power to bind the corporation as an accommodation indorser, and a person taking the note with notice cannot enforce such indorsement. Usher *v.* Raymond Skate Co., 163 Mass. 1 (1895). An arbitration agreed to by the treasurer was sustained in Remington Paper Co. *v.* Lon-

by a new contract of that kind entered into by him.[1] It is for the jury to decide whether such a custom exists.[2] A treasurer has no power to indorse the company's note for discount or sale, but if allowed to do so for a long time such indorsements are legal.[3] If the treasurer is accustomed to act as the managing agent of the corporation he can sell its property,[4] and borrow money and give security.[5] The treasurer binds the corporation by a contract which he is expressly authorized to make.[6] The secretary and treasurer

don Assur. Corp., 12 N. Y. App. Div. 218 (1896). A demand for rent may properly be made on the secretary and treasurer. State *v.* Felton, 52 N. J. L. 161 (1889). He cannot compromise or relinquish its claims, Carver Co. *v.* Manufacturers', etc. Co., 72 Mass. 214 (1856); nor sell and indorse its paper, Bradlee *v.* Warren, etc. Bank, 127 Mass. 107 (1879); Holden *v.* Upton, 134 Mass. 177 (1883). *Contra*, Perkins *v.* Bradley, 24 Vt. 66 (1851); nor assume the debt of a third person, Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144 (1861); nor sell and assign a mortgage owned by the corporation, even though he uses the corporate seal. Jackson *v.* Campbell, 5 Wend. 572 (1830). He may employ an attorney to collect unpaid bills. Bristol, etc. Bank *v.* Keavy, 128 Mass. 298 (1880). He cannot give a release under seal. Dedham Inst. *v.* Slack, 60 Mass. 408 (1850). He may accept money. Brown *v.* Winnissimmet Co., 93 Mass. 326 (1865). The treasurer of a manufacturing corporation is presumed to have authority to indorse and sell to a bank a note running to the corporation. Standard, etc. Co. *v.* Windham Nat. Bank, 71 Conn. 668 (1899). As to admissions by him, see § 726, *infra*.

[1] The treasurer has no inherent power to sign and indorse corporate notes, but long usage may constitute such authority. Page *v.* Fall River, etc. R. R., 31 Fed. Rep. 257 (1887); Lester *v.* Webb, 83 Mass. 34 (1861), where the treasurer indorsed a note; Bank of Attica *v.* Pottier, etc. Co., 1 N. Y. Supp. 483 (1888); Partridge *v.* Badger, 25 Barb. 146 (1857); Foster *v.* Ohio, etc. Co., 17 Fed. Rep. 130 (1883), where he gave a note. Where the secretary and treasurer have been accustomed to manage the entire business and make contracts, a contract entered into by them for the company is legal and enforceable. Moore *v.* H. Gaus Co., 113 Mo. 98 (1892).

[2] Foster *v.* Ohio, etc. Co., 17 Fed. Rep. 130 (1883); Fifth, etc. Bank *v.* First Nat. Bank, 48 N. J. L. 513 (1886), where the treasurer pledged securities.

[3] Blake *v.* Domestic, etc. Co., 38 Atl. Rep. 241 (N. J. 1897). Where the corporation has allowed the secretary and treasurer to indorse notes received by it, such indorsements are legal. Black *v.* First Nat. Bank, 54 Atl. Rep. 88 (Md. 1903).

[4] Phillips *v.* Campbell, 43 N. Y. 271 (1870).

[5] Fay *v.* Noble, 66 Mass. 1 (1853); Fifth, etc. Bank *v.* First Nat. Bank, 48 N. J. L. 513 (1886). Where the treasurer has been accustomed to handle the finances of the corporation, a judgment note with warrant of attorney by him is valid. Chicago, etc. Co. *v.* Chicago Nat. Bank, 176 Ill. 224 (1898). Where the secretary and treasurer and a director have been allowed to transact the business of the company and they borrow money for the company and give the company's bond and mortgage therefor, and produce a certified copy of a resolution passed by the board of directors, the lender may rely on such certified copy, even though it afterwards turns out to have been unauthorized. Hutchison *v.* Rock Hill, etc. Co., 43 S. E. Rep. 295 (S. C. 1902).

[6] Odd Fellows *v.* Bank of Sturgis, 42 Mich. 461 (1880), where the authority

cannot even conjointly bind the corporation by their purchases of the article in which it deals;[1] nor can they borrow money for the corporation;[2] nor release the maker of a note to the corporation;[3] nor subscribe for stock in another corporation.[4] But if the company acquiesces in a contract made by either or both of these officers it is bound.[5] By usage the treasurer may have power to sell

was oral; Gafford v. American, etc. Co., 77 Iowa, 736 (1889). Funds drawn out by the treasurer on the express authority of the directors and kept apart from his funds are held by him at the risk of the corporation. Butler v. Duprat, 51 N. Y. Super. Ct. 77 (1884). Where a corporation authorizes its agent to pledge its bonds the agent may make the pledge on the usual terms as to selling the bonds in case of default. Morris, etc. v. East Side Ry., 104 Fed. Rep. 409 (1900), rev'g 95 Fed. Rep. 13. Where a corporation keeps two accounts in the same bank, and in one account the checks are to be signed by the president and the treasurer, and in the other by the treasurer alone, a check on the first account signed by the treasurer alone is not good, and the bank is liable if it pays it. Shoe, etc. Co. v. Western Nat. Bank, 70 N. Y. App. Div. 588 (1902). Where an officer is authorized to issue notes, a note issued by him is legal if in the hands of a *bona fide* holder, though the purpose was unauthorized. Hence he cannot be held personally liable, and the notes are binding on the corporation. Dexter Sav. Bank v. Friend, 90 Fed. Rep. 703 (1898).

[1] Alexander v. Cauldwell, 83 N. Y. 480 (1881), where a coal company was held not liable for coal so purchased, there being no evidence that the corporation authorized it, or used it, or ratified it. *Cf.* Alexander v. Brown, 9 Hun, 641 (1877). The secretary and treasurer has no power to sell machinery of the company. Winsted, etc. Co. v. New Britain, etc. Co., 69 Conn. 565 (1897).

[2] Adams v. Mills, 60 N. Y. 533 (1875). The secretary and treasurer of a coal company has no implied power to borrow money for it. Alabama, etc. Bank v. O'Neil, 128 Ala. 192 (1901). The secretary and treasurer has no authority to agree to pay a commission to an agent for selling property belonging to the corporation, Extension, etc. Co. v. Skinner, 28 Colo. 237 (1901). A *bona fide* purchaser of a promissory note executed by the officers of a private trading corporation is protected in assuming that the officers have not exceeded their authority in issuing the note. National, etc. Co. v. Rockland Co., 94 Fed. Rep. 335 (1899).

[3] Moshannon, etc. Co. v. Sloan, 7 Atl. Rep. 102 (Pa. 1885). The secretary and treasurer of a company organized to deal in mortgages may authorize a debtor of the company to transfer real estate to one of the company's creditors in settlement of both claims. First Nat. Bank v. Garretson, 107 Iowa, 196 (1899).

[4] The secretary and treasurer of a cotton trading company has no power to subscribe in the name of the company for stock in a cotton manufacturing company. Wells Co. v. Avon Mills, 118 Fed. Rep. 190 (1902).

[5] St. James's Parish v. Newburyport, etc. R. R., 141 Mass. 500 (1886), where the treasurer gave an obligation under seal and reported it in his reports, and a committee approved. If the company ratifies a contract made by the president and secretary, the company may compel its officers to give it the benefit of the contract. Church v. Sterling, 16 Conn. 388 (1844). Accepting the benefit of an insurance contract made by the secretary and president accepts the contract itself. Emmet v. Reed, 8 N. Y. 312 (1853). An indorse-

goods.[1] In Massachusetts it is held that the treasurer of a trading or manufacturing company has implied power to execute notes in behalf of the corporation, and the *bona fide* holder of such notes may enforce them. This rule was also applied to a gas-light company.[2] And in Vermont it is held that the treasurer has power to buy, where the company's letterheads direct that all correspondence be addressed to him.[3] Where the treasurer of a corporation uses its money for his own purposes he may be sued therefor, even though he continues to be treasurer.[4] A new treasurer may bring suit against a former treasurer to recover corporate funds, and such suit may be in equity.[5] A treasurer sued by the corporation for money held by him as treasurer cannot offset a debt due from the corporation to him individually.[6] A peremptory *mandamus* granted without notice is not the proper remedy to compel the treasurer of

ment by the secretary, with the knowledge and acquiescence of the directors, is binding. Williams *v.* Cheney, 69 Mass. 215 (1855). So, also, where he pledges bonds with their knowledge and acquiescence. Darst *v.* Gale, 83 Ill. 136 (1876). And see Durar *v.* Hudson, etc. Ins. Co., 24 N. J. L. 171 (1853), in insurance contracts; and Conover *v.* Mutual Ins. Co., 1 N. Y. 290 (1848), where he was accustomed to contract for the company; Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453 (1872); Talladega Ins. Co. *v.* Peacock, 67 Ala. 253 (1880), where the secretary was accustomed to sign notes. Where a corporation uses a wharf under a contract made by its treasurer, it is liable for the contract price. Taylor *v.* Albemarle, etc. Co., 105 N. C. 484 (1890). Taking the benefit of a piece of statuary for advertising purposes binds it to pay therefor, though the treasurer made the contract. Ellis *v.* Howe, etc. Co., 9 Daly, 78 (1880). The secretary and treasurer may bind the company by being allowed to do all the business of the company. Colorado, etc. Co. *v.* American, etc. Co., 97 Fed. Rep. 843 (1899). Where the secretary and treasurer has managed the business as though the property was his own, a sale of all the property with the consent of ninety-five per cent. of the stockholders to an innocent purchaser for value is legal, even though no meeting of the directors or stockholders authorized the sale. Magowan *v.* Groneweg, 86 N. W. Rep. 626 (S. Dak. 1901). Where the treasurer signs the company's name to a note without authority, but the company uses the money, it is liable on the note. Wayne, etc. Co. *v.* Schuylkill, etc. Ry., 191 Pa. St. 90 (1899). Where the treasurer has had entire management of the business, an extension of the company's notes by him is legal. Franklin Sav. Bank *v.* Cochrane, 66 N. E. Rep. 200 (Mass. 1903).

[1] Nashua, etc. Co. *v.* Chandler, etc. Co., 166 Mass. 419 (1896).

[2] Merchants' Nat. Bank *v.* Citizens' Gas Light Co., 159 Mass. 505 (1893).

[3] Woodbury Granite Co. *v.* Mulliken, 66 Vt. 465 (1894).

[4] Marlborough Assoc. *v.* Peters, 179 Mass. 61 (1901).

[5] Hunter *v.* Robbins, 117 Fed. Rep. 920 (1902). See also § 648, *supra.* A corporation may file a bill to compel its secretary and treasurer to account for funds coming into his hands, and need not resort to a suit at law. Such a suit is practically one to compel a trustee to account. Consolidated, etc. Works *v.* Brew, 88 N. W. Rep. 603 (Wis. 1902).

[6] Oregon, etc. Co. *v.* Schmidt, 60 S. W. Rep. 530 (Ky. 1901).

the corporation to pay a debt in accordance with the order of the executive committee.[1] Where the statute prescribes that officers and agents shall hold their places during the pleasure of the board, the board may oust the secretary and treasurer at any time.[2]

§ 718. *Cashier — The extent of his powers.*— The cashier of a bank has greater inherent powers than any other corporate officer. By virtue of his office he performs many and important acts for the bank. He may pledge the bank's securities;[3] and sell and assign its paper;[4] and extend the payment of a note;[5] and certify checks;[6] and may bind the bank by various other acts.[7] But a cashier cannot authorize a person to loan money to the bank, and deliver it to an agent to carry it to a distant city;[8] nor any other

[1] Horton *v.* State, 60 Neb. 701 (1900).

[2] Darrah *v.* Wheeling, etc. Co., 50 W. Va. 417 (1901).

[3] Coats *v.* Donnell, 94 N. Y. 168 (1883); Barnes *v.* Ontario Bank, 19 N. Y. 152 (1859); Donnell *v.* Lewis County Sav. Bank, 80 Mo. 165 (1883). As to the power of the cashier to borrow money for the bank, compare Coats *v.* Donnell, 94 N. Y. 168 (1883). with Western Nat. Bank *v.* Armstrong, 152 U. S. 346 (1893).

[4] Smith *v.* Lawson, 18 W. Va. 212, 227 (1881); Wild *v.* Bank, 3 Mason, 505 (1825); s. c., 29 Fed. Cas. 1215; Lafayette Bank *v.* State Bank, 4 McLean, 208 (1847); Everett *v.* United States, 6 Port. (Ala.) 166 (1837); Crocket *v.* Young, 9 Miss. 241 (1843). He may indorse paper in a private bank after banking hours. Bissell *v.* First Nat. Bank, 69 Pa. St. 415 (1871).

[5] Wakefield Bank *v.* Truesdell, 55 Barb. 602 (1864).

[6] Merchants' Bank *v.* State Bank, 10 Wall. 604 (1870); Cooke *v.* State Nat. Bank, 52 N. Y. 96 (1873). A *bona fide* holder of a certificate of indebtedness issued by him is protected. Citizens', etc. Bank *v.* Blakesley, 42 Ohio St. 645 (1885).

[7] A bank is liable for the embezzlement by a cashier of a special deposit of bonds. First Nat. Bank *v.* Dunbar, 118 Ill. 625 (1886). See also Caldwell *v.* National Mohawk Bank, 64 Barb. 333 (1869), and § 681, *supra*. He may sell assets to pay a debt, and may guarantee the priority of a mortgage. Peninsular Bank *v.* Hanmer, 14 Mich. 208 (1866). He may employ an attorney. Root *v.* Olcott, 42 Hun, 536 (1886); aff'd, 115 N. Y. 635; Potter *v.* New York Inf. Asylum, 44 Hun, 367 (1887); Western Bank *v.* Gilstrap, 45 Mo. 419 (1870), where the other officers were absent; Mumford *v.* Hawkins, 5 Denio, 355 (1848). The president and cashier are presumed to have authority to compromise a debt. Chemical Nat. Bank *v.* Kohner, 85 N. Y. 189 (1881). Where an agreement is signed by the president and cashier of a bank concerning a matter which is within the regular business of the bank, the authority of these officers to execute the contract is presumed. Nat. Bank Commerce *v.* Atkinson, 54 Pac. Rep. 8 (Kan. 1898). The president and cashier of a bank have inherent power to sell or mortgage land owned by the bank. Steinke *v.* Yetzer, 108 Iowa, 512 (1899). The cashier may transfer stock held in pledge. Matthews *v.* Massachusetts Nat. Bank, 1 Holmes, 396 (1874); s. c., 16 Fed. Cas. 1113. A *bona fide* holder may enforce accommodation paper indorsed by him. City Bank *v.* Perkins, 29 N. Y. 554 (1864); Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312 (1859); Faneuil Hall Bank *v.* Bank of Brighton, 82 Mass. 534 (1860).

[8] In no case has the term "ordinary business" "been judicially allowed to comprehend a contract made by a cashier, without an express delegation of

act which is not in the regular course of business.[1] A bank may be a *bona fide* pledgee of stock from its cashier, even though such stock is in the name of a third person and is indorsed by the latter.[2] A bank may borrow money, but it is so unusual that the loaner must inquire into the authority of the officer or agent acting for the bank which borrows the money. Special authority or ratification by the board of directors must be shown.[3] A bank has no power to buy stock in an insurance company, and the cashier of the bank has no authority to take stock in payment of a debt.[4] Where a director of a bank delivers bonds to the cashier as security for a debt, and the cashier pledges them to the bank to secure his own debt, the court will hold that the bank holds the bonds as security for the creditor's debt and not for the cashier's debt.[5] The cashier of a bank, in answering an inquiry as to the responsibility of a third person, need not disclose the fact that the bank has a mortgage on the property of such person.[6] A cashier has no right to agree that a note discounted by another bank for a company in which he is personally interested shall be charged up to his bank in case of non-payment.[7] Although a cashier does an act in excess of his powers, yet if the board of directors ratify it or accept its benefits the corporation is bound.[8]

power from a board of directors to do so, which involves the payment of money, unless it be such as has been loaned in the usual and customary way. Nor has it ever been decided that a cashier could purchase or sell the property or create an agency of any kind for a bank which he had not been authorized to make by those to whom had been confided the power to manage its business, both ordinary and extraordinary." U. S. *v.* City Bank of Columbus, 21 How. 356 (1858).

[1] He cannot bind the bank by indorsing the bank's name as an accommodation indorser to his own note. West St. Louis Sav. Bank *v.* Shawnee County Bank, 95 U. S. 557 (1877). A cashier may indorse bank paper to any one except himself. Preston *v.* Cutter, 64 N. H. 461 (1888). A cashier has no power to make the bank a surety on a replevin bond for the accommodation of a third person. Sturdevant *v.* Farmers', etc. Bank, 87 N. W. Rep. 156 (Neb. 1901). The mere fact that the cashier of the bank acts as intermediary in the purchase and sale of stock in the bank does not make the bank liable for his conversion of a certificate of stock. Preston *v.* Marquette County, etc. Bank, 81 N. W. Rep. 920 (Mich. 1900).

[2] Brady *v.* Mount Morris Bank, 65 N. Y. App. Div. 212 (1901).

[3] Western Nat. Bank *v.* Armstrong, 152 U. S. 346 (1893). A cashier having power to borrow money for the bank has power to pledge bank securities as collateral. Sloan *v.* Kansas City, etc. Bank, 158 Mo. 431 (1900).

[4] Bank of Commerce *v.* Hart, 37 Neb. 197 (1893).

[5] Detroit, etc. Co. *v.* Third, etc. Bank, 111 Mich. 407 (1897).

[6] First Nat. Bank *v.* Marshall, etc. Bank, 83 Fed. Rep. 725 (1897).

[7] Ft. Dearborn Nat. Bank *v.* Seymour, 71 Minn. 81 (1898).

[8] Although the officers of a bank have no power to borrow money from the bank without special authority from the board of directors, yet if for a long time they have been accustomed to do so, this is the same as though ex-

§ 719. *General manager, superintendent, and general agent— Their power to contract for the corporation.*— The general manager of a corporation has no power to make and deliver the promissory note of the company;[1] nor to indorse the company's name on

press authority had been given. Armstrong *v.* Chemical Nat. Bank, 83 Fed. Rep. 556 (1897); aff'd, 176 U. S. 618 (1900). Even though an officer of a bank is not authorized to obtain a loan for the bank from its correspondent bank, yet if he does so and the bank uses the money, it is liable to repay the same. Aldrich *v.* Chemical, etc. Bank, 176 U. S. 618 (1900); Martin *v.* Webb, 110 U. S. 7 (1884), where the cashier had canceled a deed of trust; Payne *v.* Commercial Bank, 14 Miss. 24 (1846); Bank of Pennsylvania *v.* Reed, 1 Watts & S. (Pa.) 101 (1841); Ryan *v.* Dunlop, 17 Ill. 40 (1855), where he satisfied a mortgage; Kelsey *v.* National Bank, 69 Pa. St. 426 (1871), where he offered a reward with the knowledge and acquiescence of the directors; Medomak Bank *v.* Curtis, 24 Me. 36 (1844), where the bank claimed the benefit of a contract; U. S. Bank *v.* Dandridge, 12 Wheat. 64 (1827), where a cashier's bond in possession of a bank was held to have been accepted by the bank, though no vote accepting it was to be found in its records; Bank of Lyons *v.* Demmon, Hill & D. Supp. (N. Y.) 398 (1844), where the president and secretary sold stock and agreed to purchase it if the vendee desired. He cannot assign non-negotiable paper. Barrick *v.* Austin, 21 Barb. 241 (1855). As to the power of the cashier and president together to pledge paper for an antecedent debt, see Tennessee *v.* Davis, 50 How. Pr. 447 (1874). As to the power of the cashier to take payment in other notes, etc., see Sandy River Bank *v.* Merchants', etc. Bank, 1 Biss. 146 (1857); s. c., 21 Fed. Cas. 356. A cashier has no power to agree with an indorser of a note to a bank that he shall not be liable. Thompson *v.* McKee, 5 Dak. 172 (1888); Bank of Metropolis *v.* Jones, 8 Pet. 12 (1834); Bank of U. S. *v.* Dunn, 6 Pet. 51 (1832). A person taking a note from the cashier on the latter's personal debt cannot hold the bank liable on the latter's indorsement of the note as cashier. West St. Louis Sav. Bank *v.* Shawnee, etc. Bank, 3 Dill. 403 (1874); s. c., 29 Fed. Cas. 831; s. c., 95 U. S. 557. A cashier cannot assign corporate notes to a depositor in payment of a deposit. Schneitman *v.* Noble, 75 Iowa, 120, (1888). He cannot render the charter forfeitable by taking payment on subscriptions in an illegal manner. State *v.* Commercial Bank, 14 Miss. 218 (1846). A bank may be bound by a release of its cashier upon a note signed by the cashier and several others, where the cashier pays his part of the note and erases his name from the note, and such facts become known to the board of directors. First Nat. Bank *v.* Shook, 100 Tenn. 436 (1898).

[1] New York, etc. Mine *v.* Negaunee Bank, 39 Mich. 644 (1878), in which case the note was held not enforceable, although the general manager had often drawn drafts on the company. See *Re* Cunningham, L. R. 36 Ch. D. 532. Where a corporation and a firm are practically one and the same concern, and the same man signs for both, his signature of the corporate name to the firm obligation is binding on the corporation. National Bank, etc. *v.* John, etc. Sons, 33 S. W. Rep. 415 (Ky. 1895). A general manager is presumed to have authority to sign a corporate note. Citizens' Nat. Bank *v.* Wintler, 14 Wash. 558 (1896). The president and general manager has no implied power to issue notes. The fact that he has done so before is immaterial, where all of the directors, excepting one, were ignorant of such acts. Elwell *v.* Puget Sound, etc. R. R., 7 Wash. 487 (1893).

commercial paper,[1] except possibly in payment of debts;[2] nor to change the terms of a sealed contract of the corporation;[3] but he may give a note in payment of wages due;[4] and he may accept a draft.[5] There is grave doubt as to whether he may borrow money and give a lien or chattel mortgage therefor.[6] A gas company can-

The general manager of a telegraph company has no implied authority to make a note for it and in its name. Helena Nat. Bank *v.* Rocky, etc. Tel. Co., 20 Mont. 379 (1898). Where the manager for several years has been accustomed to sign notes for the company, the company is bound by such notes. Cadillac, etc. Bank *v.* Cadillac, etc. Co., 88 N. W. Rep. 67 (Mich. 1901).

[1] Accommodation acceptances, accepted in the corporate name by the manager of the corporation without the knowledge of the directors, are not enforceable, though the manager had at times drawn notes to meet expenses. Merchants' Nat. Bank *v.* Detroit, etc. Works, 68 Mich. 620 (1888). The power of a manager to borrow money for the company by giving his own note and indorsing the company's name to it is a question for the jury. The books of the company are evidence to prove that the company received the money. The jury may decide that his authority might be "either authority or subsequent ratification, and that it could be evidenced by general course of business as well as by resolution." Huntington *v.* Attrill, 118 N. Y. 365 (1890). A general manager has no power to guarantee in the corporate name the payment of a third person's note. Dobson *v.* More, 164 Ill. 110 (1896). A general manager has no inherent power to indorse the commercial paper coming to the company. The by-laws are admissible on the subject. Railway Equip. etc. Co. *v.* Lincoln Nat. Bank, 82 Hun, 8 (1894). But he may accept a draft if he is accustomed so to do. Munn *v.* Commission Co., 15 Johns. 44 (1818). And the general agent of a bank may indorse. Merchants' Bank *v.* Central Bank, 1 Ga. 418 (1846). Where there is no treasurer, the general manager or a director may sign the corporate name to negotiable paper for collection. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 561 (1891). Where the power to indorse notes is given by the by-laws to the president and vice-president, a general manager does not have that power, although he has drawn checks and previously indorsed two notes, but without the knowledge of the board of directors. Davis *v.* Rockingham Investment Co., 89 Va. 290 (1892). The general manager of a corporation organized to buy and sell products has no power to have it do business gratuitously as an accommodation to a third party, the directors never having authorized the same. Clark, etc. Co. *v.* Parker, etc. Co., 91 N. W. Rep. 134 (Mich. 1902).

[2] McKieran *v.* Lenzen, 56 Cal. 61 (1880); Seeley *v.* San Jose, 59 Cal. 22 (1881).

[3] Boynton *v.* Lynn, etc. Co., 124 Mass. 197 (1878).

[4] Bates *v.* Keith, etc. Co., 48 Mass. 224 (1843).

[5] Hascall *v.* Life, etc. Assoc., 5 Hun, 151 (1875); aff'd, 66 N. Y. 616.

[6] The general agent and treasurer may borrow money and give a chattel mortgage as security. Fay *v.* Noble, 66 Mass. 1 (1853). The general manager has no power to mortgage the property. First Nat. Bank *v.* Kirkby, 32 S. Rep. 881 (Fla. 1901). The superintendent of a mine cannot borrow money for the company. Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 1 Colo. 531 (1872). Where a superintendent borrows money for himself, giving a lien on corporate property as security, the parties loaning the money with knowledge of these facts cannot hold the company liable.

not be held liable for letters written by its general manager for publication attacking a former general manager, unless it be shown that such letters were authorized by the corporation itself. A general manager has no such inherent authority.[1] But where the president and manager and attorney of the company illegally cause the arrest of an employee for embezzling corporate funds, the corporation may be held liable for malicious prosecution.[2] A newspaper corporation may be liable on the contract of its managing editor chartering a boat to collect war news, and agreeing to pay the value of the boat in case it is lost.[3] A general manager or general agent has power at common law to direct and contract in regard to the usual running business of the corporation.[4] A general manager has power to borrow money to meet corporate bills in due course of business.[5] The president and general manager of an insolvent corporation has no power to give a preference;[6] nor can he transfer all its assets to one creditor in payment of his claim, even though the by-laws gave him entire charge of the business, subject to the approval of the board of directors.[7] A

Planters', etc. Co. *v.* Olmstead, 78 Ga. 586 (1887). The well considered case of Whitwell *v.* Warner, 20 Vt. 425 (1848), holds that the general manager cannot give a lien to secure the price of goods which he purchases; but it is held that if the company uses the goods, even without knowledge of the lien, the vendors may pursue the goods or the proceeds realized therefrom. In Leonard *v.* Burlington, etc. Assoc., 55 Iowa, 594 (1881), it is held that he may borrow money, and the company is liable if it has used the money. A superintendent's mortgage was upheld in Poole *v.* West, etc. Assoc., 30 Fed. Rep. 513 (1887).

1 Washington Gas L. Co. *v.* Lansden, 172 U. S. 534 (1899).

2 Schwarting *v.* Van Wie, etc. Co., 69 N. Y. App. Div. 282 (1902). A general superintendent who causes the arrest of a person to whom stolen goods have been sold, for which goods the corporation had offered a reward, does not thereby render the corporation liable for false imprisonment. Lubliner *v.* Tiffany & Co., 54 N. Y. App. Div. 326 (1900).

3 Sun, etc. Assoc. *v.* Moore, 183 U. S. 642 (1902).

4 Kansas City *v.* Cullinan, 68 Pac. Rep. 1099 (Kan. 1902); 93 N. W. Rep. 1088.

5 Rosemond *v.* Northwestern, etc. Co., 62 Minn. 374 (1895). Even though a manager has no power to borrow money for the company, yet, if he does so and the company uses it, the company must repay it. Topeka, etc. Co. *v.* March, 61 Pac. Rep. 876 (Kan. 1900).

6 Dooley *v.* Pease, 79 Fed. Rep. 860 (1897).

7 Hadden *v.* Linville, 86 Md. 210 (1897). A general manager of an insolvent corporation has no power to turn over all the property to one creditor as a preference. Hadden *v.* Dooley, 92 Fed. Rep. 274 (1899). Where the stockholders do not hold meetings, and allow a person to manage the corporation, an assignment by him for the benefit of its creditors will be upheld, and a transfer of all the assets to a person in trust to sell and pay the debts is such an assignment and is not a mortgage. Conely *v.* Collins, 119 Mich. 519 (1899). The general manager and treasurer has no power to turn over the whole property to a corporate creditor, even though he ran all the business of the company. First Nat. Bank, etc. *v.* Asheville, etc. Co., 116 N. C. 827 (1895).

transfer of a lease of property by the general manager who has exercised all the powers of the company is valid, even though there is no vote of the stockholders, where such lease does not constitute all the assets of the corporation and the transaction was fair in itself.[1] A general manager may give a mortgage where he has the power to sell the property and carry on the entire business.[2] Where the duties and powers of a general manager are not defined they may be proved by parol evidence.[3]

It has been held that he may waive demand and notice of a note indorsed by the company;[4] may also employ an attorney;[5] may render the company liable for overpayment of a check by mistake of the bank;[6] may contract for the use of a patent;[7] may render the company liable for an illegal use of the word "patented;"[8] and may enter into various contracts which pertain to the regular course of his business.[9] Where the president is also general

[1] Pennsylvania, etc. Co. *v.* Pure-Oil Co., 195 Pa. St. 388 (1900).

[2] Thayer *v.* Nehalem Mill Co., 31 Oreg. 437 (1897).

[3] Clarke *v.* Lexington Stoveworks, 72 S. W. Rep. 286 (Ky. 1903).

[4] Whitney *v.* South, etc. Co., 39 Me. 316 (1855).

[5] St. Louis, etc. R. R. *v.* Grove, 39 Kan. 731 (1888); Frost *v.* Domestic, etc. Co., 133 Mass. 563 (1882); Southgate *v.* Atlantic, etc. R. R., 61 Mo. 89 (1875). A general manager may employ an attorney. Gulf, etc. Ry. *v.* James, 73 Tex. 12 (1889). The general manager may execute an appeal bond. Sarmiento *v.* Davis, etc. Co., 105 Mich. 300 (1895).

[6] Kansas, etc. Co. *v.* Central Bank, 34 Kan. 635 (1886).

[7] Eureka Co. *v.* Bailey Co., 11 Wall. 488 (1870).

[8] Tompkins *v.* Butterfield, 25 Fed. Rep. 556 (1885).

[9] Where the manager, in order to continue a profitable contract which he has with the corporation, keeps up a deadlock in the board of directors, due to there being a vacancy, he is bound to prefer the interests of the company or else to terminate his employment and rely on his contract. Kane *v.* Schuylkill, 199 Pa. St. 198 (1901). Where the general manager attempts to obtain proxies for the purpose of ousting the existing management, and uses methods calculated to deceive the persons giving the proxies, he is guilty of a breach of trust and his contract with the company may be canceled. Townsley *v.* Bankers', etc. Co., 56 N. Y. App. Div. 232 (1900). The president, treasurer, and general manager of a plumbing company may employ a person to repair certain buildings on which the company has an option. Paphro, etc. Co. *v.* Baty, 69 N. H. 453 (1899). The general manager of a mining corporation has no inherent authority to grant a right of way for a tramway. Butte, etc. Min. Co. *v.* Montana, etc. Co., 21 Mont. 539 (1898). The general manager cannot render the corporation liable for his own debts. Barnhardt *v.* Star Mills, 123 N. C. 428 (1898). A general manager may buy land which is necessary or useful to the corporation in conducting its business. New, etc. Co. *v.* Shuck, 50 S. W. Rep. 681 (Ky. 1899). A general manager may employ a superintendent. Sandberg *v.* Victor, etc. Co., 24 Utah, 1 (1901). Where a firm is turned into a corporation the latter may assume a contract of the former, for the purchase of lumber, by adopting it through its manager. Pratt *v.* Oshkosh Match Co., 89 Wis. 406 (1895). The president

manager and has entire charge of the business of a corporation, he may bind it by his contract to pay for promoting expenses,[1] and where the president is general manager and is authorized to carry on the business, he may agree to pay a salary as well as a commis-

and general manager may agree that the stage company will be co-owner of a stage line with another. Calvert *v.* Idaho Stage Co., 25 Oreg. 412 (1894). A local manager of a branch store is a general manager to the extent of having power to take a lease of a store for five years. Phillips, etc. Co. *v.* Whitney, 109 Ala. 645 (1896). The general agent of a cattle-feeding company has power to buy feed. Powder River, etc. Co. *v.* Lamb, 38 Neb. 339 (1893). Although the company owes a bank money secured by mortgage, the manager and secretary may deposit the company's money and agree that it may be drawn out free from the mortgage. Merchants', etc. Bank *v.* Hervey Plow Co., 45 La. Ann. 1214 (1893). Where the general manager of a corporation owning a mine and reduction mill causes laborers to work in the company's mine and mill, and also to open a mine of his own, all without the knowledge of the company or the employees, who supposed they were working for the company, the company is liable for their wages. Oro, etc. Co. *v.* Kaiser, 4 Colo. App. 219 (1893). A general manager authorized to pay commissions on receipts from sales may agree to pay commissions on sales irrespective of the receipts. American, etc. Co. *v.* Maurer, 10 Atl. Rep. 762 (Pa. 1887). A contract for a corporation by its general superintendent to give right of way to another railroad may become binding by acquiescence. Alabama, etc. R. R. *v.* South, etc. R. R., 84 Ala. 570 (1887). The president and manager of a milling company cannot purchase flour. Getty *v.* Barnes, etc. Co., 40 Kan. 281 1888). As to insurance agents, see Insurance Co. *v.* McCain, 96 U. S. 84 (1877). A treasurer of a corporation not authorized to sell any part of its property, but who was its sole managing agent, may pass a valid title of personal property to a vendee as against the claim of one who levied upon it under judgment. Phillips *v.* Campbell, 43 N. Y. 271 (1870). A general manager has implied power to make a time contract of employment. Stahlberger *v.* New Hartford Leather Co., 92 Hun, 245 (1895). A general manager has no power to engage an employee for five years. Camacho *v.* Hamilton, etc. Co., 2 N. Y. App. Div. 369 (1896). An executive officer having power to employ persons does not thereby have power to employ a person for life. Carney *v.* New York L. Ins. Co., 19 N. Y. App. Div. 160 (1897); aff'd, 162 N. Y. 453. The managing agent may employ a person, but not for a long time in the future. Smith *v.* Co-operative, etc. Assoc., 12 Daly, 304 (1884). He cannot employ a broker. Allegheny, etc. Co. *v.* Moore, 95 Pa. St. 412 (1880). The general manager of a mining company has no inherent power to contract for it for machinery. Victoria, etc. Co. *v.* Fraser, 2 Colo. App. 14 (1892). The general manager of a live-stock company has implied power to sell a part of such stock. Hamm *v.* Drew, 83 Tex. 77 (1892). Long acquiescence in a person's assuming to act for the company is the same as expressly authorizing his action. Craig Medicine Co. *v.* Merchants' Bank, 59 Hun, 561 (1891). A general manager has no power to deed the company's real estate, and a purchaser other than a *bona fide* one from the vendee cannot retain the title. Allowance, however, will be made for improvements. Especially is the deed invalid where the grantee was a director. Schetter *v.* Southern, etc. Co., 19 Oreg. 192 (1890). The president and

[1] Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430 (1894).

sion on sales made.[1] The by-laws may give to the general manager power to carry on the business of the company.[2] Although a general manager exceeds his authority in agreeing to an arbitration, yet, if the company does not repudiate his agreement promptly, it is bound.[3] Even though a by-law confers upon the general manager, among other powers, the "general and exclusive charge and management of the business of the company," the by-law is not void as a whole, and until the general manager illegally exercises power the courts will not interfere.[4] A managing *director* may, by a by-law, be given the powers of the board. An outside party need not inquire as to whether his appointment was validly made, and may assume that such director has the powers which the board might delegate to him.[5] A "business manager" is not known in the law, and hence a note to which he affixes the name of the cor-

general manager of a lumber company may engage a lawyer for the season. Ceeder *v.* Loud, etc. Co., 86 Mich. 541 (1891). Where the president carries on the negotiations in regard to a contract, and also the modifications of that contract, and is the manager and in control, and as manager assents to the modifications, the company is bound thereby. Nichols *v.* Scranton Steel Co., 137 N. Y. 471 (1893). A general manager has no power to sell rights for a particular state, and a power of attorney which has been revoked is insufficient to be relied upon. Johnson *v.* Alabama, etc. Co., 90 Ala. 505 (1890). Where the by-laws give the general manager power to sell, he has power to sell the product for a certain length of time in the future. Robert, etc. Min. Co. *v.* Omaha, etc. Co., 16 Colo. 118 (1891). For a discussion of what constitutes the appointment of a resident general agent by a corporation, see Rathbun *v.* Snow, 123 N. Y. 343 (1890). Where a superintendent negotiates sales and the president fixes the price, the corporation is responsible for the superintendent's representations. Decker *v.* Gutta Percha, etc. Co., 61 Hun, 516 (1891).

[1] Pettibone *v.* Lake View, etc. Co., 134 Cal. 227 (1901).

[2] Burden *v.* Burden, 8 N. Y. App. Div. 160 (1896); aff'd, 159 N. Y. 287 (1899). A general manager authorized to "take full charge of the company's business, and to enter into such negotiations and contracts as he thinks best for the company's interest," may appoint a local agent and empower him to hire a barge. Tennessee River Transp. Co. *v.* Kavanaugh, 101 Ala. 1 (1893).

[3] Central Trust Co. *v.* Ashville Land Co., 72 Fed. Rep. 361 (1896). Where a corporation allows its manager to largely control its business, it is liable on a contract made by him in the name of the company and in the line of its business. Carrigan *v.* Port Crescent Imp. Co., 6 Wash. 590 (1893). So also as to its president and secretary. Duggan *v.* Pacific Boom Co., 6 Wash. 593 (1893). Where a party who buys a mine does not object to a lease thereof made by the superintendent without authority, but on the contrary allows the lessee to proceed and receives the rent, he thereby ratifies the lease. Bicknell *v.* Austin Min. Co., 62 Fed. Rep. 432 (1894).

[4] Burden *v.* Burden, 159 N. Y. 287 (1899).

[5] Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93. Even though the by-laws give a managing director wide powers as to the commercial business of the company, this does not give him any powers as to the transfer of stock. George Whitechurch Ltd. *v.* Cavanagh, [1902] A. C. 117. *Cf.* Orvis *v.* Warner, etc. Co., 75 N. Y. App. Div. 463 (1902).

poration is not enforceable against it, unless proof is given of his authority.[1]

A railroad superintendent may employ a physician in cases of accident,[2] and may offer rewards for the conviction of persons obstructing the tracks.[3] A general freight agent may agree to give rebates.[4] It has been held that a superintendent has not the powers of a general manager.[5] The superintendent may, of course, be

[1] Topeka, etc. Co. *v.* Remington, etc. Co., 57 Pac. Rep. 504 (Kan. 1899).

[2] Pacific R. R. *v.* Thomas, 19 Kan. 257 (1877); Toledo, etc. Ry. *v.* Rodrigues, 47 Ill. 188 (1868); Atlantic, etc. R. R. *v.* Reiser, 18 Kan. 458 (1877). *Contra,* Stephenson *v.* New York, etc. R. R., 2 Duer, 341 (1853); Shriver *v.* Stevens, 12 Pa. St. 258 (1849), holding that the agent of a stage line cannot. A yardmaster cannot employ a physician for the company. Marquette, etc. R. R. *v.* Taft, 28 Mich. 289 (1873). Nor an engineer. Cooper *v.* New York, etc. R. R., 6 Hun, 276 (1875). Nor a station agent. Tucker *v.* St. Louis, etc. R. R., 54 Mo. 177 (1873); Cox *v.* Midland, etc. R. R., 3 Exch. 268 (1849). Unless the superintendent ratifies it by silence upon being notified thereof. Cairo, etc. R. R. *v.* Mahoney, 82 Ill. 73 (1876); Toledo, etc. R. R. *v.* Prince, 50 Ill. 26 (1869). The general manager cannot render the company liable for medical services rendered on an occasion of a private brawl. Dale *v.* Donaldson Lumber Co., 48 Ark. 188 (1887); Wood, Railw. Law, pp. 439-444. The general manager of a mining company cannot bind the company by employing a doctor for an injured employee. Spelman *v.* Gold, etc. Co., 26 Mont. 76 (1901). The general manager of a coal company has no power to employ a physician in case of an accident. New, etc. Co. *v.* Shaley, 58 N. E. Rep. 87 (Ind. 1900). A general manager has power to render the company liable for hospital services renered to a sick employee. Mt. Wilson, etc. Co. *v.* Burbidge, 11 Colo. App. 487 (1898).

[3] Central, etc. Co. *v.* Cheatham, 85 Ala. 292 (1888).

[4] Kansas Pac. Ry. *v.* Bayles, 19 Colo. 348 (1894). Even though a railroad agent has no power to advertise, yet if he does so and the bills are submitted to the general passenger agent, who has power and does not object. the company may be bound. McMahan *v.* Canadian, etc. Ry., 40 Oreg. 148 (1901).

[5] Adriance *v.* Roome, 52 Barb. 399 (1868), holding that the superintendent cannot borrow money and agree to make payment in iron. Where it is customary for a railroad so to do, the superintendent may bind the company by his agreement that the company will give a life job to a person who has been injured by the railroad, and it is for the jury to say whether such promise was made. Jackson *v.* Illinois, etc. R. R., 76 Miss. 607 (1899). Where the president has power to execute a bill of sale, but instead of doing so allows the superintendent to execute it, it may be a question for a jury as to whether the sale was binding on the corporation. Trent *v.* Sherlock, 26 Mont. 85 (1901), modifying 24 Mont. 255. The superintendent of a mining company has no power to pledge the company's property to secure a debt. Trent *v.* Sherlock, 24 Mont. 255 (1900); S. C., 26 Mont. 85. The authority of a corporate agent to manage the affairs of a company cannot be proved by a question to a witness in the absence of the vote of the directors or proof that the resolution cannot be found. St. Regis, etc. Co. *v.* Hotchkiss, 45 Atl. Rep. 11 (Conn. 1900). A superintendent has no inherent power to indorse checks of the company. Jackson, etc. Co. *v.* Commercial Nat. Bank, 65 N. E. Rep. 136 (Ill. 1902).

given express power to contract.[1] If the company ratifies the contract or accepts its benefits the contract becomes binding.[2]

§ 720. *Subordinate agents — Their power to contract.*— It is a general rule that a corporate agent, like the agent of an individual, can make only such contracts as he is expressly authorized to make, or such contracts as pertain to the duties which the corporation imposes upon him. It is a rule, however, that the corporation may ratify and confirm a contract which an unauthorized agent has made in its name, and this ratification may be by express vote of the directors, or it may be implied by an acceptance of the benefits to the corporation. The subordinate agents of a corporation may be of great variety: tellers, engineers, stewards, station agents, local agents, freight agents, roadmasters, clerks, attorneys, and miscellaneous agents. Various decisions on their powers are given in the notes.[3] These decisions show that a corporation is bound by its

[1] Where the by-laws give the president and superintendent power to make a contract, they have power to release that contract. Directors knowing of the release must act promptly if they intend to question its validity. Indianapolis, etc. Co. *v.* St. Louis, etc. R. R., 26 Fed. Rep. 140 (1886); aff'd, 120 U. S. 256. A general power authorizes the purchase of a house and the giving of a mortgage. Shaver *v.* Bear, etc. Co., 10 Cal. 396 (1858).

[2] Kickland *v.* Menasha, etc. Co., 68 Wis. 34 (1887), where the superintendent and a director took a deed and agreed to pay an extra price; Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841), where he gave a mortgage and the company received the money; Lyndeborough, etc. Co. *v.* Massachusetts, etc. Co., 111 Mass. 315 (1873), where he bought glass and the directors acquiesced; Seeley *v.* San Jose, etc. Co., 59 Cal. 22 (1881), where he and the president gave a note; Goodwin *v.* Union, etc. Co., 34 N. H. 378 (1857), where he and the president employed workmen; Starr *v.* Gregory, etc. Co., 6 Mont. 485 (1887), where he accepted a mill; Union, etc. Co. *v.* Rocky Mountain Nat. Bank, 2 Colo. 565 (1875); affirmed, 96 U. S. 640, where a loan of the bank's money was made by him and the president. Ratification cannot be by the same persons who assume power to contract. Tracy *v.* Guthrie, etc. Soc., 47 Iowa, 27 (1877); 120 Fed. Rep. 624.

[3] An inquiry, by a purchaser of stock, of corporate officers, as to whether it was full-paid stock must be made of officers having authority to speak for the corporation. Browning *v.* Hinkle, 48 Minn. 544 (1892). The financial agent may give notes in accordance with a corporate contract. Case Mfg. Co. *v.* Soxman, 138 U. S. 431 (1891); Wilson *v.* Kings, etc. Ry., 114 N. Y. 487 (1889). The cashier and clerk of a lumber company cannot agree to give a customer a carload of lumber in case certain other lumber is not satisfactory. Delta Lumber Co. *v.* Williams, 73 Mich. 86 (1888). The local manager of a branch bank renders it liable for his embezzlement of depositor's funds which he induces the depositor to give to him to pay a lien of the bank on the property. Thompson *v.* Bell, 26 Eng. L. & Eq. 536 (1854). The receiving teller of a savings bank has no power to bind the bank not to pay out money deposited in one name, except upon the order of three other persons. The bank is protected in paying on the check of a person in whose name the deposit is made. Riley *v.* Albany Sav. Bank, 36 Hun, 513 (1885).

agents' acts only when a partnership would be bound under similar circumstances. There are no arbitrary rules as to the mode of

A teller's certification of a check in bad faith does not bind the bank. Mussey *v.* Eagle Bank, 50 Mass. 306 (1845); unless it is in the hands of a *bona fide* indorsee. Farmers', etc. Bank *v.* Butchers', etc. Bank, 16 N. Y. 125 (1857); Farmers', etc. Bank *v.* Butchers', etc. Bank, 14 N. Y. 624 (1856). As to certification of check, see also Meads *v.* Merchants' Bank, 25 N. Y. 143 (1862); Cooke *v.* State, etc. Bank, 52 N. Y. 96 (1873); in the latter case the certification being by the cashier. Where a depositor sends deposits by the bank's book-keeper without the bank-book, the bank is not liable for the book-keeper's fraud. Manhattan Co. *v.* Lydig, 4 Johns. 377 (1809). A teller may receive a special deposit of valuables. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82 (1880). It may be a question for the jury as to whether the foreman of the works of a foreign corporation may employ workmen on long time. Tunison *v.* Detroit, etc. Co., 73 Mich. 452 (1889). Where a bank owning railroad bonds allows its agent to exchange them for stock in a reorganized company, it is bound. Deposit Bank *v.* Barrett, 13 S. W. Rep. 337 (Ky. 1890). A caterer may hold a club responsible for food, etc., furnished to its guests under the authorized contract of the house committee. Deller *v.* Staten Island, etc. Club, 9 N. Y. Supp. 876 (1890).

A corporation is not liable for the malice of its agent in publishing a libel, unless the corporation authorized the libel or ratified it or did something from which such authority or ratification may be implied. Warner *v.* Missouri, etc. Ry., 112 Fed. Rep. 114 (1901). A corporation is bound by its adoption or acquiescence in the acts of an unauthorized agent the same as an individual is. German, etc. Bank *v.* First, etc. Bank, 59 Neb. 7 (1899). An agent of a corporation may sign its name to a demand of payment of money due, and may serve the same without showing written authority to make such demand. It is sufficient that the company accepted and ratified his action. Flaherty *v.* Atlantic, etc. Co., 58 N. J. Eq. 467 (1899). A collecting agent has no power to bind the corporation by assuming a mortgage on the property which he takes in payment of a debt. Bristol Sav. Bank *v.* Judd, 89 N. W. Rep. 93 (Iowa, 1902). A corporation sued for a trespass cannot compel the plaintiff to specify what officers committed the trespass. Commonwealth *v.* Nunn, 67 Pac. Rep. 342 (Colo. 1902). The attorney of a railroad company has no power to agree that a person injured by the railroad will in settlement of his claim be employed for life by the railroad. Nephew *v.* Michigan, etc. Ry., 128 Mich. 599 (1901). The general counsel of the corporation has no authority to file papers in another state whereby the corporation is made a domestic corporation in that state. Mutual, etc. Assoc. *v.* Thompson, 125 N. C. 435 (1899). In South Dakota by statute a corporation is bound by an unauthorized contract of an agent where the corporation accepts the benefit thereof. Dederick *v.* Ormsby, etc. Co., 12 S. Dak. 59 (1899).

The following decisions are concerning railroad agents: The engineer of a railroad company may have authority to modify a construction contract or enter into a new contract. Henderson Bridge Co. *v.* McGrath, 134 U. S. 260 (1890). The civil engineer of a railroad cannot employ a station agent. Willis *v.* Toledo, etc. Ry., 72 Mich. 160 (1888). The engineers of a railroad company cannot bind it to an agreement to pay the construction contractors extra pay. Woodruff *v.* Rochester, etc. R. R., 108 N. Y. 39 (1888). The construction engi-

making a corporate contract. A contract may be inferred from corporate acts and customs without a vote or formal act.[1] It is not

neer of a railroad has no power to vary the construction contract. Campbell *v.* Cincinnati Southern Ry., 6 S. W. Rep. 337 (Ky. 1888). A person whom the railroad holds out as the general freight agent of the company may bind it by his contracts relative to freight. Baker *v.* Kansas City, etc. R. R., 91 Mo. 152 (1887). A roadmaster of a railway has power to purchase such material as he uses, and the company is liable therefor where the material has been used. Walker *v.* Wilmington, etc. R. R., 26 S. C. 80 (1887). A station agent may contract that goods will be delivered at a certain time. Blodgett *v.* Abbott, 72 Wis. 516 (1888). See also Wood, Railw. Law, pp. 444–454.

The following decisions concern miscellaneous agents and powers: An agent with power to give and indorse notes may waive notice of protest, etc. Whitney *v.* South, etc. Co., 39 Me. 316 (1855). A resident agent of a mining company has no implied authority to borrow money on account of the corporation to pay arrears of wages due the workmen in the mines. Hawtayne *v.* Bourne, 7 M. & W. 595 (1841). An agent attending to the daily routine of the business of a corporation cannot create a general lien upon its property to secure a creditor, unless by the approval of the board of directors. Whitwell *v.* Warner, 20 Vt. 425 (1848). An agent employed to promote the interests of a corporation in every way has no authority to purchase land for it. Bocock *v.* Alleghany, etc. Co., 82 Va. 913 (1887). Where a corporation agent buys land for the company at a certain price, and agrees that the company will pay also the vendor one-half of its profits upon sale of said land, the company is bound by this latter parol agreement. Kickland *v.* Menasha, etc. Co., 68 Wis. 34 (1887). Persons expending money for a corporation under the direction of authorized corporate officers may hold the corporation liable. Topeka, etc. Assoc. *v.* Martin, 39 Kan. 750 (1888). An agent of a lumber company cannot pay debts due the company by boarding them out. St. John, etc. Co. *v.* Cornwell, 52 Kan. 712 (1894). A sewing-machine company's agent to sell machines has no power to trade the company's horse, but ratification suffices. Singer Mfg. Co. *v.* Belgart, 84 Ala. 519 (1888). Acts of local insurance agents appointed by the general agent of a foreign insurance company are binding on such company, such acts being within the express powers given by the general agent therein to solicit or take insurance. Kuney *v.* Amazon Ins. Co., 36 Hun, 66 (1885). In Rice *v.* Peninsular Club, 52 Mich. 87 (1883), Cooley, J., said: "A party dealing with the agent of a corporation must

[1] Bank of Columbia *v.* Patterson, 7 Cranch, 299, 306 (1813); Randall *v.* Van Vechten, 19 Johns. 60, 65 (1821); Haight *v.* Sahler, 30 Barb. 218 (1859); Canal Bridge *v.* Gordon, 18 Mass. 297 (1823); Dunn *v.* St. Andrew's Ch., 14 Johns. 118 (1817); Mendham *v.* Losey, 2 N. J. L. 252 (1808); Saddle River *v.* Colfax, 6 N. J. L. 115 (1821); Antipæda Bapt. Ch. *v.* Mulford, 8 N. J. L. 182 (1825); Powell *v.* Newburgh, 19 Johns. 284 (1821); Chestnut Hill Turnp. *v.* Rutter, 4 Serg. & R. 6 (1818); American Ins. Co. *v.* Oakley, 9 Paige, 496 (1842); Fister *v.* La Rue, 15 Barb. 323 (1853), where a contract was inferred from the acts of the corporate officers; Bulkley *v.* Derby Fishing Co., 2 Conn. 252 (1817); Witte *v.* Derby Fishing Co., 2 Conn. 260 (1817); Petrie *v.* Wright, 6 Sm. & M. (Miss.) 647 (1846); Lime Rock Bank *v.* Macomber, 29 Me. 564 (1849); Bank of Metropolis *v.* Guttschlick, 14 Pet. 19 (1840) (contract inferred from acts of officers); New York, etc. R. R. *v.* New York, 1 Hilt. 587 (1858); Wood, Railw. Law, pp. 454–457.

necessary that such assent and acceptance be under seal or in writing or be spread upon the records.[1] The acceptance of the con-

at his peril ascertain what authority the agent possesses, and is not at liberty to charge the corporation by relying upon the agent's assumption of authority." The club is not liable for the steward's purchases. The powers of an agent appointed for a special purpose cease when the object of his appointment is accomplished. Seton *v.* Slade, 7 Ves. 265, 276 (1802). A subordinate agent cannot employ an attorney for the company. Maupin *v.* Virginia, etc. Co., 78 Mo. 24 (1883). Nor can he make the corporation liable for the debt of another. Rahm *v.* King, etc. Co., 16 Kan. 277 (1876). Nor make a note for the company. Benedict *v.* Lansing, 5 Denio, 283 (1848). If the purchaser of corporate bonds knows that the agent is selling for his own purposes he is not protected. Chew *v.* Henrietta, etc. Co., 2 Fed. Rep. 5 (1880). Secret instructions to a general insurance agent do not bind a person dealing with him. Insurance Co. *v.* McCain, 96 U. S. 84 (1877). So also as to a cashier. Merchants' Bank *v.* State Bank, 10 Wall. 604, 650 (1870). A grantor to a corporation cannot deny the authority of the corporate agent to accept the deed. Case *v.* Benedict, 63 Mass. 540 (1852). An agent who is accustomed to contract for the company may bind it. Christian University *v.* Jordan, 29 Mo. 68 (1859); Mead *v.* Keeler, 24 Barb. 20 (1857). Acceptance of services known to officers binds the company. Lee *v.* Pittsburgh, etc. Co., 56 How. Pr. 375 (1877). But the use of a building has been held not to constitute an acceptance of debts incurred in building it. Ruby *v.* Abyssinian Soc., 15 Me. 306 (1839). Use of goods with knowledge is acceptance. Smith *v.* Hull Glass Co.. 11 C. B. 897, 925 (1852); s. c., 8 C. B. 668 (1849). Even if the agent gave a note which is not binding. Emerson *v.* Providence, etc. Co., 12 Mass. 237 (1815). Acceptance is presumed where a written statement is placed before a directors' meeting. State Bank *v.* Comegys, 12 Ala. 772 (1848). Satisfaction by subsequent officers is good. Chouteau *v.* Allen, 70 Mo. 290 (1879). If an agent with authority to give a note embezzles the funds the company is liable. Bird *v.* Daggett, 97 Mass. 494 (1867). A suit on a note is a ratification of its execution. Planters' Bank *v.* Sharp, 12 Miss. 75 (1844). An actuary of a bank, who is accustomed so to do, may give the note of the bank, especially where the directors acquiesce. Creswell *v.* Lanahan, 101 U. S. 347 (1879). As to insurance agents, see Perkins *v.* Washington Ins. Co., 4 Cow. 645 (1825). Knowledge of the president of drafts by an agent, and acquiescence therein, binds the company. Gold Min. Co. *v.* National Bank, 96 U. S. 640 (1877). See § 727, *infra*, on notice; also Lindley, Companies, p. 159, etc. An agent's authority to act for a corporation is not terminated by the fact that the members of the board of directors or other body which appointed have gone out of office by the expiration of their terms or by removal. Anderson *v.* Longden, 1 Wheat. 85 (1816); Brown *v.* Somerset, 11 Mass. 221 (1814); Northampton Bank *v.* Pepoon, 11 Mass. 294 (1814); Dedham Bank *v.* Chickering, 20 Mass. 335 (1825); Exeter Bank *v.* Rodgers, 7 N. H. 21, 33 (1834); Thompson *v.* Young, 2 Ohio, 334 (1825). It has been held

[1] Dedham Bank *v.* Chickering, 20 Mass. 335 (1825); Union Bank *v.* Ridgeley, 1 Har. & G. (Md.) 324 (1827); Burgess *v.* Pue, 2 Gill (Md.), 11 (1844); Apthorp *v.* North, 14 Mass. 167 (1817); Smith *v.* Bank of Scotland, 1 Dow, P. C. 272 (1841); Monumoi Great Beach *v.* Rogers, 1 Mass. 159 (1804); Amherst Bank *v.* Root, 43 Mass. 522, 533 (1841); Western R. R. *v.* Babcock, 47 Mass. 346 (1843), and the many cases *supra*. See also § 714, *supra*.

sideration of an unauthorized contract by the corporation, however, without knowledge of the terms of the contract or of the account upon which it is paid, is not in itself a ratification of the contract.[1] It is elementary that a corporation may ratify and adopt the unauthorized acts of an agent.[2]

B. THE FORM OF CORPORATE CONTRACTS — THE CORPORATE SEAL IS NECESSARY ONLY WHEN THE SAME INSTRUMENT BY AN INDIVIDUAL MUST BE UNDER SEAL — FORMS OF THE BODY OF THE CONTRACT; ALSO THE METHOD OF SIGNING AND SEALING — LIABILITY OF OFFICERS AND AGENTS ON CORPORATE CONTRACTS WHICH ARE INFORMALLY EXECUTED.

§ 721. *The corporate seal need not be attached to a corporate contract unless a similar contract, when made by an individual, would require a seal.*— This is now the well-established rule, although formerly it was supposed that a corporation could not enter into a

that a mortgage of corporate property which is illegal for want of authority may be rendered valid by subsequent ratification by acts of the legislature. White Water, etc. Canal Co. *v.* Vallette, 21 How. 414 (1858); Shepley *v.* Atlantic, etc. R. R., 55 Me. 395 (1868); Richards *v.* Merrimack, etc. R. R., 44 N. H. 127 (1862), where an act authorizing the trustees of a mortgage to sell the mortgaged property was held to be a ratification; Shaw *v.* Norfolk County R. R., 71 Mass. 162 (1855); Whitney *v.* Union Trust Co., 65 N. Y. 576 (1875), where bonds signed by the treasurer instead of the secretary were held ratified by a subsequent act referring to them as "now a valid lien on said property." Power to act as agent of the corporation may be conferred by a general resolution. Elwell *v.* Dodge, 33 Barb. 336 (1861).

[1] Pennsylvania Co. *v.* Dandridge, 8 Gill & J. (Md.) 248 (1836); Christian University *v.* Jordan, 29 Mo. 68 (1859); Hilliard *v.* Goold, 34 N. H. 230 (1856), and cases *supra.*

[2] Essex Turnp. Co. *v.* Collins, 8 Mass. 292 (1811); Hayden *v.* Middlesex Turnp. Co., 10 Mass. 403 (1813); White *v.* Westport Cotton Mfg. Co., 18 Mass. 220 (1822); Bulkley *v.* Derby Fishing Co., 2 Conn. 252 (1817); Peterson *v.* New York, 17 N. Y. 449 (1858); Canal Bridge *v.* Gordon, 18 Mass. 297 (1823); Baker *v.* Cotter, 45 Me. 236 (1858); Bennett *v.* Maryland F. Ins. Co., 14 Blatchf. 422 (1878); s. c., 3 Fed. Cas. 229; Church *v.* Sterling, 16 Conn. 388 (1844); Pennsylvania Bank *v.* Reed, 1 Watts & S. (Pa.) 101 (1841); Hayward *v.* Pilgrim Soc., 38 Mass. 270 (1838); Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205 (1841); Planters' Bank *v.* Sharp, 4 Sm. & M. (Miss.) 75 (1844); Burrill *v.* Nahant Bank, 43 Mass. 167 (1841); Fox *v.* Northern Liberties, 3 Watts & S. (Pa.) 103 (1841); New Hope, etc. Co. *v.* Phenix Bank, 3 Comst. 156 (1850); Alabama, etc. R. R. *v.* Kidd, 29 Ala. 221 (1856); Everett *v.* U. S., 6 Port. (Ala.) 166 (1837); Medomak Bank *v.* Curtis, 24 Me. 38 (1844); Whitwell *v.* Warner, 20 Vt. 425 (1848); Trott *v.* Warren, 11 Me. 227 (1834); Detroit *v.* Jackson, 1 Doug. (Mich.) 106 (1842); Merchants' Bank *v.* Central Bank, 1 Ga. 428 (1846); Hoyt *v.* Bridgewater Copper Co., 6 N. J. Eq. 253 (1847); Durar *v.* Hudson, etc. Ins. Co., 24 N. J. L. 171 (1853); Moss *v.* Rossie Lead Co., 5 Hill, 137 (1843); Brown *v.* Winnissimmet Co., 93 Mass. 326 (1865); Sherman *v.* Fitch, 98 Mass. 59 (1867); Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315 (1873); Moss *v.* Averell, 6 Seld. 449

contract except by attaching the corporate seal to a written statement of that contract.[1]

It is settled law that it is not necessary to use a seal in appointing agents or entering into ordinary contracts for the corpora-

(1853); Olcott v. Tioga R. R., 27 N. Y. 546 (1863); Shaver v. Bear River, etc. Co., 10 Cal. 396 (1858).

[1] A corporate contract need not be in writing nor under the corporate seal. Leinkauf v. Calman, 110 N. Y. 50 (1888). A corporation need not necessarily have or use a seal in making its contracts. Muscatine Water Co. v. Muscatine Lumber Co., 85 Iowa, 112 (1892). "The English rule that a corporation cannot expressly bind itself except by deed, unless the act establishing it authorizes it to contract in another mode, has been broken in upon, and, indeed, entirely overturned, as a general proposition, throughout the United States; and it is here well settled that the acts of a corporation, evidenced by vote, written or unwritten, are as completely binding upon it, and are as complete authority to its agents, as the most solemn acts done under the corporate seal; that it may as well be bound by express promises through its authorized agents as by deed; and that promises may as well be implied from the acts of its agents as if it had been an individual;" citing many cases. Davenport v. Peoria, etc. Co., 17 Iowa, 276 (1864). See also Bank of U. S. v. Dandridge, 12 Wheat. 64 (1827); Gottfried v. Miller, 104 U. S. 521 (1881); Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280 (1844); Hoag v. Lamont, 60 N. Y. 96 (1875); McCullough v. Talladega Ins. Co., 46 Ala. 376 (1871); Auerbach v. Le Sueur Mill Co., 28 Minn. 291 (1881); Racine, etc. R. R. v. Farmers' Loan & T. Co., 49 Ill. 331 (1868); Bulkley v. Briggs, 30 Mo. 452 (1860); New England F. & M. Ins. Co. v. Robinson, 25 Ind. 535 (1865); Hamilton v. Lycoming Ins. Co., 5 Pa. St. 339 (1847); Muir v. Louisville, etc. Canal Co., 8 Dana (Ky.), 161 (1839); Henning v. U. S. Ins. Co., 47 Mo. 425 (1871); Salem Bank v. Gloucester, 17 Mass. 1 (1820); Gloucester Bank v. Salem Bank, 17 Mass. 33 (1820); Foster v. Essex Bank, 17 Mass. 479 (1821); Smith v. Lowell Meeting-house, 25 Mass. 178 (1829); Limerick Academy v. Davis, 11 Mass. 113 (1814); Farmington Academy v. Allen, 14 Mass. 172 (1817); Amherst Academy v. Cowels, 23 Mass. 427 (1828); Kennedy v. Baltimore Ins. Co., 3 Har. & J. (Md.) 367 (1813); Stone v. Berkshire, etc. Soc., 14 Vt. 86 (1842); Episcopal, etc. Soc. v. Needham, etc. Church, 18 Mass. 372 (1823); Banks v. Poitiaux, 3 Rand. (Va.) 136 (1825); Bank of Columbia v. Patterson, 7 Cranch, 299 (1813); Randall v. Van Vechten, 19 Johns. 60 (1821); Gooday v. Colchester Ry., 17 Beav. 132 (1852); Magill v. Kauffman, 4 Serg. & R. 317 (1818); Dunn v. St. Andrew's Church, 14 Johns. 118 (1817); Waller v. Bank of Kentucky, 3 J. J. Marsh. (Ky.) 201 (1830); Western, etc. Co. v. First Nat. Bank, 47 Pac. Rep. 721 (N. M. 1897); Grubbs v. National, etc. Ins. Co., 94 Va. 589 (1897). Crawford v. Longstreet, 43 N. J. L. 325 (1881), held that, to bind a corporation under a lease for years, execution under its corporate seal is not necessary. See also, in general, Moss v. Averell, 10 N. Y. 449 (1853). The corporate seal to a note is superfluous. St. James's Parish v. Newburyport, etc. R. R., 141 Mass. 500 (1886). On this point, see also § 761, *infra*. The word "seal," following the name of a corporation on an insurance policy, does not prevent the suit being in assumpsit. Grubbs v. National, etc. Ins. Co., 94 Va. 589 (1897). *Contra*, Benoist v. Carondelet, 8 Mo. 250 (1843); Clark v. Farmers', etc. Co., 15 Wend. 256 (1836). The seal may be considered to be the company's signature. Levering v. Mayor, etc., 7 Humph. (Tenn.) 553 (1847). See also § 722, *infra*; Despatch Line v. Bellamy Mfg. Co., 12 N. H. 205 (1841), a chattel mortgage.

tion.[1] The supreme court of Illinois says, "the rule now is that a corporation may bind itself, in a matter within its charter powers, by a writing not under seal to the same extent as an individual

The officers' seal to the contract may be disregarded. Bank, etc. v. Guttschlick, 14 Pet. 19 (1840); Eureka Co. v. Bailey Co., 11 Wall. 488 (1870); Dubois v. Delaware, etc. Co., 4 Wend. 285 (1830).

[1] Pennsylvania R. R. v. Vandiver, 42 Pa. St. 365, 369 (1862); Bank of Columbia v. Patterson, 7 Cranch. 299 (1813): Lathrop v. Commercial Bank, 8 Dana (Ky.), 114 (1839); Buncombe Turnp. Co. v. McCarson, 1 Dev. & B. 310 (1835), holding that an appointment need not be under the corporate seal; Bates v. Bank of Alabama, 2 Ala. 452 (1841), where the appointment of an agent was by vote of the corporation; Maine Stage Co. v. Longley, 14 Me. 444 (1837), holding that the fact of agency may be proved by parol. See also Union Mfg. Co. v. Pitkin, 14 Conn. 174 (1841); State Bank v. Bell, 5 Blackf. (Ind.) 127 (1839); Brookville Ins. Co. v. Records, 5 Blackf (Ind.) 170 (1839); Bridgeton v. Bennett, 23 Me. 420 (1844), retaining an attorney proved by his statement; Randall v. Van Vechten, 19 Johns. 60 (1821); Antipæda Bapt. Ch. v. Mulford, 8 N. J. L. 182 (1825); Perkins v. Washington Ins. Co., 4 Cow. 645 (1825); Lathrop v. Scioto Bank, 8 Dana (Ky.), 115 (1839); New Haven Sav. Bank v. Davis, 8 Conn. 191 (1830), vote of directors without evidence under seal; Bank of Columbia v. Patterson, 7 Cranch, 299 (1813); Andover Turnp. Co. v. Hay, 7 Mass. 102 (1810); Hayden v. Middlesex Turnp. Co., 10 Mass. 397 (1813); Essex Turnp. v. Collins, 8 Mass. 292 (1811); Wright v. Lanckton, 36 Mass. 288 (1837); Bancroft v. Wilmington, etc., 5 Houst. (Del.) 577 (1876); Dunn v. St. Andrew's Church, 14 Johns. 118 (1817); Union Bank v. Ridgley, 1 Har. & G. (Md.) 324 (1827); Kennedy v. Baltimore Ins. Co., 3 Har. & J. (Md.) 367 (1813); Garrison v. Coombs, 7 J. J. Marsh. (Ky.) 85 (1831); Legrand v. Hampden-Sidney College, 5 Munf. (Va.) 324 (1817); Bates v. Alabama Bank, 2 Ala. 451 (1841); Stamford Bank v. Benedict, 15 Conn. 437, 445 (1843); Detroit v. Jackson, 1 Doug. (Mich.) 106 (1843); St. Andrew's Bay Land Co. v. Mitchell, 4 Fla. 192 (1851); Topping v. Bickford, 86 Mass. 120 (1862). A contract of employment by a corporation need not be under seal. Speirs v. Union, etc. Co., 174 Mass. 175 (1899). Parol evidence may prove the creation of a debt by the company. Borland v. Haven, 37 Fed. Rep. 394 (1888). An appeal bond given by a corporation may be signed without the corporate seal. Campbell v. Pope, 96 Mo. 468 (1888). Corporations may enter into contracts through agents duly authorized, and such contracts may be by writing not under seal or by parol, as though made by natural persons. See § 714, *supra;* also American Ins. Co. v. Oakley, 9 Paige, 496 (1842); Watson v. Bennett, 12 Barb. 196 (1851); Hamilton v. Lycoming Ins. Co., 5 Pa. St. 344 (1847); Union Bank v. Ridgley, 1 Har. & G. (Md.) 324, 413 (1827); Hayden v. Middlesex Turnp. Co., 10 Mass. 401 (1813); Shotwell v. McKown, 5 N. J. L. 828 (1820); and an agent is not personally liable on a note signed by him as agent. Merrick v. Burlington, etc. P. R. Co., 11 Iowa, 74 (1860), a verbal contract made by an agent; Buckley v. Briggs, 30 Mo. 452 (1860); Dunn v. St. Andrew's Church, 14 Johns. 118 (1817). In England a contrary rule has been upheld. Homersham v. Wolverhampton Waterworks, 6 Exch. 137 (1851); Diggle v. London Ry., 5 Exch. 442 (1850); Copper Miners v. Fox, 16 Q. B. 229 (1851); Clark v. Cuckfield Union, 11 Eng. L. & Eq. 442 (1852), citing and reviewing other authorities. In England, by statute 8 & 9 Vict., c. 16, sec. 97, directors may contract by parol on behalf of a corporation where private persons may make

may."[1] The corporate seal must be used in deeds and other instruments which would require a seal if they were the deeds or instruments of individuals.[2] A corporate deed twenty-five years old, reciting that it is under seal, is presumed to have been under seal, though none is present.[3] A corporate deed, signed "J., President," is not sufficiently signed. A corporate seal is also necessary.[4] A mortgage may be valid although the corporate seal is not attached thereto.[5]

Hence the law is that a corporation may become bound by a contract which is executed in any of the following ways: by a written instrument sealed with the corporate seal, and either with or without the corporate name signed thereto;[6] by an unsealed written instrument signed with the corporate name; by a written record of a resolution of its directors;[7] by an unwritten resolution of its directors;[8] by the oral agreements of its authorized agents;[9] or by

a valid parol contract. See also Pauling *v.* London, etc. Ry., 8 Exch. 868 (1853). *Cf.* Crampton *v.* Varna Ry., L. R. 7 Ch. 562 (1872). After a contract for necessary work or goods is executed by the other party, and accepted by the corporation, it must pay for the same notwithstanding the irregularity. Clark *v.* Cuckfield Union, 11 Eng. L. & Eq. 442 (1852); Doe *v.* Tainere, 12 Q. B. 1011 (1848). *Cf.* Lindley, Companies, p. 220, etc.

[1] Green Co. *v.* Blodgett, 159 Ill. 169 (1895).

[2] See § 722, *infra.* A deed of a corporation not under seal is not a deed and is void. Danville Seminary *v.* Mott, 136 Ill. 289 (1891). The corporate seal must be used in the conveyance of corporate real estate in Texas. Shropshire *v.* Behrens, 77 Tex. 275 (1890). The corporate seal must be attached to a deed in order to make it a deed. Allen *v.* Brown, 6 Kan. App. 704 (1897). A deed by a corporation must have the corporate seal attached. Precious, etc. Soc. *v.* Elsythe, 102 Tenn. 40 (1899). In *quo warranto* against a turnpike company the burden of proof is on the company to prove its title, and deeds from other companies without seals and not acknowledged as corporate deeds are insufficient. Lyons, etc. Co. *v.* People, 68 Pac. Rep. 275 (Colo. 1902). A power of attorney by a corporation to an agent to execute a deed of land must be under the seal of the corporation or must be accompanied by proof that the agent was authorized to sign for the corporation. Dodge *v.* American, etc. Co., 109 Ga. 394 (1899). A statute to the effect that private seals need not be used applies to the seal of a private corporation. Murray *v.* Beal, 23 Utah, 548 (1901).

[3] Catlett *v.* Starr, 70 Tex. 485 (1888).

[4] Garrett *v.* Belmont Land Co., 94 Tenn. 459 (1895).

[5] First Nat. Bank *v.* G. V. B. Min. Co., 89 Fed. Rep. 439 (1898). See also § 723, *infra.* Even though a corporation does not attach its seal to a mortgage, yet the mortgage is valid, unless it is shown that the corporation had a seal and that the board of directors did not authorize its omission. Turner *v.* Kingston, etc. Co., 59 S. W. Rep. 410 (Tenn. 1900); aff'd, 106 Tenn. 1. See also § 810, *infra;* 72 S. W. Rep. 759.

[6] See § 722, *infra.*

[7] See § 714, *supra.*

[8] See § 714, *supra.*

[9] See §§ 716–720, *supra,* relative to the inherent powers of the president and various other corporate agents to contract. A parol contract with a corpo-

ratifying, acquiescing in, or accepting the benefits of contracts made in its name by unauthorized agents.[1]

§ 722. *Method of drafting, signing, sealing, and acknowledging a corporate deed or contract.*— A deed or contract of a corporation should be drawn so that the name of the corporation appears in the body of the instrument, and not the name of the officer or agent who signs, seals, or acknowledges it. The name of the corporation should be signed to the instrument, and this should be followed by the word "by" and by the signature of the officer or person, who is executing the instrument in behalf of the corporation.[2]

The courts will hold any device or form to be the corporate seal, if there was an intent to bind the corporation, and if the device was intended for the corporate seal.[3] The corporate seal must be attached to a deed and should be attached to a mortgage.[4]

ration may be proved although the director with whom it was made is dead. South Baltimore Co. *v.* Muhlback, 69 Md. 395 (1888).

[1] See §§ 716–720, *supra.*

[2] Clark *v.* Farmers', etc. Co., 15 Wend. 256 (1836); Stinchfield *v.* Little, 1 Me. 231 (1821); New Haven Sav. Bank *v.* Davis. 8 Conn. 191 (1830); Hatch *v.* Barr, 1 Ohio, 390 (1824); Brinley *v.* Mann, 56 Mass. 337 (1848); Kinzie *v.* Chicago, 3 Ill. 187 (1839), in which it is also held that the mode of executing an instrument by a corporation "is to affix the seal with a declaration that it is the seal of the corporation, and to verify the act by the signature of the president and secretary of the corporation." Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862). "The appropriate form of verifying any written obligation to be the act of the corporation is by affixing the signatures of the president and secretary and the corporate seal." Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 552 (1899).

[3] Where a lease recites that it is given under the corporate seal, "in the absence of evidence to the contrary, the scroll or rectangle containing the word 'seal' will be deemed to be the proper and common seal of the company. A seal is not necessarily of any particular form or figure. . . . Whether a mark or character shall be held to be a seal depends upon the intention of the executant as shown by the paper." Jacksonville, etc. Nav. Co. *v.* Hooper, 160 U. S. 514 (1896). "As to private corporations, where authority is shown to execute a contract under seal, the fact that a seal is attached with intent to seal on behalf of the corporation is enough though some other seal than the ordinary common seal of the company should be used." District of Columbia *v.* Camden, etc. Works, 181 U. S. 453, 460 (1901). A mortgage signed by an individual, followed by the word "president," and by an individual, followed by the word "secretary," is nevertheless a mortgage of the corporation if the seal is attached and the instrument recites that the corporation has caused it to be signed by the president and secretary. Rawlings *v.* New Memphis, etc. Co., 60 S. W. Rep. 206 (Tenn. 1900). The company's name may be signed by stamp *per* an officer who signs his name after the "per." Cadillac, etc. Bank *v.* Cadillac, etc. Co., 88 N. W. Rep. 67 (Mich. 1901). The use by the board of directors of a *fac-simile* of the regular corporation's seal may be legal. State *v.* Manhattan, etc. Co., 149 Mo. 181 (1899). Where the attestation

[4] See § 721, *supra.*

It is no longer necessary that the impression of a corporate seal shall be made upon wax or other adhesive substance — an impression

clause is complete, a simple "(L. S.)" will be considered the seal of the corporation for that occasion. G. V. B. Min. Co. *v.* First Nat. Bank, etc., 95 Fed. Rep. 23 (1899). Where the instrument recites that it is under seal it will be presumed to be a sealed instrument, especially where a seal follows the name of the officer who signs it. So held as regards the statute of limitations. Rusling *v.* Union, etc. Co., 5 N. Y. App. Div. 448 (1896); aff'd, 158 N. Y. 737; Christie *v.* Gage, 2 Thomp. & C. 344 (1873), where the private seals of trustees of a church were held to be the corporate seal to a deed of its property. To same effect, Johnston *v* Crawley, 25 Ga. 316 (1858); Porter *v.* Androscoggin R. R., 37 Me. 349 (1853); Taylor *v.* Heggie, 83 N. C. 244 (1880). *Cf.* Saxton *v.* Texas, etc. R. R., 4 N. M. 201 (1888); South Baptist Church *v.* Clapp, 18 Barb. 35 (1853); Tenney *v.* Lumber Co., 43 N. H. 350 (1861). See also Ransom *v.* Stonington, etc. Bank, 13 N. J. Eq. 212 (1860); Milldam Foundery *v.* Hovey, 38 Mass. 417 (1839); Stebbins *v.* Merritt, 64 Mass. 27 (1852); Sherman *v.* Fitch, 98 Mass. 59 (1867); McDaniels *v.* Flower, etc. Co., 22 Vt. 274 (1850); Benbow *v.* Cook, 115 N. C. 324 (1894); Woodman *v.* York, etc. R. R., 50 Me. 549 (1861), where an imprint in red ink upon bonds was held valid; Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant, Ch. (U. C.) 551 (1871), where simple wafer seals used by corporations in executing a deed were held sufficient in the absence of evidence that they were not their proper corporate seals; Hamilton *v.* Dennis, 12 Grant, Ch. (U. C.) 325 (1866), in which a ribbon woven through slits in the paper, so as to appear at intervals opposite the signatures, was held sufficient; Bates *v.* New York Central R. R., 92 Mass. 251 (1865), where, however, it was held that a *fac-simile* printed in ink when the blank instrument was printed is a mere scroll and not a valid seal. The *fac-simile* of the seal of a corporation printed on a blank form is not the corporate seal. McCarthy *v.* Metropolitan L. Ins. Co., 162 Mass. 254 (1894). After a decree of foreclosure, it is too late to claim that a seal printed on the mortgage was not good. Haven *v.* Grand Junction, etc. Co., 94 Mass. 337 (1866). *Cf.* Royal Bank *v.* Junction, etc. R. R., 100 Mass. 444 (1868), in which a seal printed upon bonds by direction of the officers of a corporation after they had been otherwise executed, and which purported to bear the corporate seal, was held valid. *Contra*, Mitchell *v.* Union, etc. Co., 45 Me. 104 (1858). The corporation may have several seals. Bank of Middlebury *v.* Rutland, etc. R. R., 30 Vt. 159 (1858). An official may, while out of the state, cause a new seal to be made and attach it to bonds of the corporation out of the state. Lynde *v.* Winnebago County, 16 Wall. 6 (1872). A blank wafer will do for a seal. Brinley *v.* Mann, 56 Mass. 337 (1848). A scroll has been held good. Kansas City *v.* Hannibal, etc. R. R., 77 Mo. 180 (1882). A scroll may be a sufficient seal even though the corporation has a regular seal. Thayer *v.* Nehalem Mill Co., 31 Oreg. 437 (1897). *Contra*, Hendee *v.* Pinkerton, 96 Mass. 381 (1867). A scroll will do for the corporate seal on an appeal bond. Sarmiento *v.* Davis, etc. Co., 105 Mich. 300 (1895). The word "seal," following the name of a president, is not a sufficient corporate seal in a deed. Caldwell *v.* Morganton Mfg. Co., 28 S. E. Rep. 475 (N. C. 1897). The use of a seal may be a sufficient adoption of it as the corporate seal. Blood *v.* La Serena, etc. Co., 113 Cal. 221 (1896). Any seal is presumed to be the corporate seal, the signature of the agent executing the instrument being proved. Pennsylvania Nat. Gas Co. *v.* Cook, 123 Pa. St. 170 (1889). Where a deed is exe-

upon the paper itself being held sufficient.[1] It is not necessary that express authority, or authority under seal, be given to an officer or agent to affix the corporate seal to an instrument; such powers may be inferred from the general powers of the officer or agent, the usual course of business, and similar circumstances.[2]

The mere affixing of the corporate seal is of itself sufficient execution of a contract or deed, when properly affixed by a person duly authorized. No writing or further signature whatsoever is necessary.[3]

cuted by the president and secretary under their private seals, there is a flaw in the title to the land. McCroskey *v.* Ladd, 28 Pac. Rep. 216 (Cal. 1891).

[1] Hendee *v.* Pinkerton, 96 Mass. 381 (1867), holding that a distinct and visible impression of a corporate seal upon and into the substance of the paper is sufficient and valid; Pillow *v.* Roberts, 13 How. 472 (1851); Allen *v.* Sullivan, etc. R. R., 32 N. H. 446 (1855); Corrigan *v.* Trenton, etc. Co., 5 N. J. Eq. 52 (1845). But see, *contra*, Farmers', etc. Bank *v.* Haight, 3 Hill, 493 (1842).

[2] Union Gold Min. Co. *v.* Bank, 2 Colo. 226 (1873); Merchants' Bank *v.* Goddin, 76 Va. 503 (1882); Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833); Berks, etc. R. R. *v.* Myers, 6 Serg. & R. (Pa.) 12 (1820), holding that the question of authority to affix a corporate seal is for the jury; Haven *v.* Adams, 86 Mass. 80 (1862); Gordon *v.* Preston, 1 Watts (Pa.), 385 (1833), saying that power to affix a seal carries with it the power to acknowledge the execution of the instrument. See, however, Hoyt *v.* Thompson, 5 N. Y. 320 (1851), holding that the usual duties and powers of the president and cashier of a bank are not such as will justify them in affixing its corporate seal without express authority from the directors. A corporate officer may execute a mortgage for it without being authorized under the corporate seal. A mere resolution suffices. Hopkins *v.* Gallatin, etc. Co., 4 Humph. (Tenn.) 403 (1843); Fitch *v.* Lewiston, etc. Co., 80 Me. 34 (1888); New Haven Sav. Bank *v.* Davis, 8 Conn. 191 (1830); Howe *v.* Keiler, 27 Conn. 538 (1858); Hutchins *v.* Byrnes, 75 Mass. 367 (1857); Beckwith *v.* Windsor, 14 Conn. 594 (1842). Members of the board of directors may affix the corporate seal to a mortgage and acknowledge the execution. Gordon *v.* Preston, 1 Watts (Pa.), 385 (1833). An employee may be directed to affix the seal. Royal Bank *v.* Grand, etc. R. R., 100 Mass. 445 (1868), where it was affixed by the printer.

[3] Union Bridge Co. *v.* Troy, etc. R. R., 7 Lans. 240 (1872); Clark *v.* Farmers', etc. Co., 15 Wend. 256 (1836). Affixing the corporate seal is the regular mode of executing a corporate mortgage. Savannah, etc. R. R. *v.* Lancaster, 62 Ala. 555 (1878); Whitney *v.* Union Trust Co., 65 N. Y. 576 (1875), where authority was given to the secretary to sign an instrument, and it was held that signature by the treasurer did not render it invalid, since the seal of the corporation was sufficient execution; McDaniels *v.* Flower, etc. Co., 22 Vt. 274 (1850); Bason *v.* King's Mountain Min. Co., 90 N. C. 417 (1884), holding that a deed concluding "in witness whereof the said corporation has caused this indenture to be signed by the president and attested by its secretary, and its common seal to be affixed," signed "G. C. W., President," with the seal affixed, is a valid common-law deed; Shewalter *v.* Pirner, 55 Mo. 218 (1874); Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543 (1869); Union Bridge Co. *v.* Troy, etc. R. R., 7 Lans. 240 (1872), saying, "*it seems*, a corporate seal being properly affixed, no signature is necessary;" Lovett *v.* Steam Saw-mill Assoc., 6

When proof is given that an instrument was signed by the corporate officers, and that the seal attached is the corporate seal, the courts will presume that the seal was affixed by proper authority, and that the execution was duly authorized,[1] but this presumption

Paige, 54, 60 (1836); Bank of Vergennes *v.* Warren, 7 Hill, 91 (1845); Campbell *v.* James, 17 Blatchf. 42 (1879); s. c., 4 Fed. Cas. 1168; rev'd on other grounds, 104 U. S. 357 (1881); Lamson, etc. Co. *v.* Russell, 112 Mass. 387 (1873); Levering *v.* Mayor, 7 Humph. (Tenn.) 553 (1847); Memphis *v.* Adams, 9 Heisk. (Tenn.) 518 (1872). Where three directors, as a committee, are authorized to make a lease, and the lease is signed by two, and the corporate seal is affixed by them, it is sufficient, the third acquiescing. Union Bridge Co. *v.* Troy, etc. R. R., 7 Lans. 240 (1872). *Mandamus* to an officer to attach the corporate seal will be denied if there is any doubt as to the legal rights of the parties. People *v.* Blackhurst, 11 N. Y. Supp. 675 (1890). At common law a corporation signed a contract by attaching its seal thereto. Globe Acc. Ins. Co. *v.* Reid, 19 Ind. App. 203 (1897). See also § 761, *infra.* But see Isham *v.* Bennington, etc. Co., 19 Vt. 230 (1847), holding that affixing a corporate seal will not excuse default in signing a deed when signing is necessary by statute. A deed of corporate real estate signed by an agent individually does not convey title, even though the seal of the corporation is affixed. Hutchins *v.* Barre, etc. Co., 52 Atl. Rep. 70 (Vt. 1901).

[1] Underhill *v.* Santa Barbara, etc. Co., 93 Cal. 300 (1892); McDonald *v.* Chisholm, 131 Ill. 273 (1890); Sherman, etc. Co. *v.* Morris, 43 Kan. 282 (1890); Mullanphy Sav. Bank *v.* Schott, 135 Ill. 635 (1891); Union Pac. Ry. *v.* Chicago, etc. Ry., 51 Fed. Rep. 309 (1892); Bowers *v.* Hechtman, 45 Minn. 238 (1891); Boyce *v.* Montauk, etc. Co., 37 W. Va. 73 (1892); Gorder *v.* Plattsmouth Canning Co., 36 Neb. 548 (1893); Reed *v.* Bradley, 17 Ill. 321 (1856); Blackshire *v.* Iowa, etc. Co., 39 Iowa, 624 (1874); Southern Cal. Colony Assoc. *v.* Bustamente, 52 Cal. 192 (1877); Wood *v.* Whelen, 93 Ill. 153 (1879); Mickey *v.* Stratton, 5 Sawyer, 475 (1879); Thorington *v.* Gould, 59 Ala. 461 (1877); Morris *v.* Keil, 20 Minn. 531 (1874); Abbott, Tr. Ev. 35; Canandarqua Academy *v.* McKechnie, 19 Hun, 62 (1879); 90 N. Y. 628; Union Gold Min. Co. *v.* Bank, 2 Colo. 226 (1873); Mill-dam Foundery *v.* Hovey, 38 Mass. 417, 428 (1839); Malone *v.* Crescent, etc. Co., 77 Cal. 38 (1888); Johnson *v.* Bush, 3 Barb. Ch. 207 (1848); Leggett *v.* New Jersey M. & B. Co., 1 N. J. Eq. 541 (1832); Parker *v.* Washoe Mfg. Co., 49 N. J. L. 465 (1887); Hoyt *v.* Thompson, 5 N. Y. 320 (1851); Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833); Chicago, etc. R. R. *v.* Lewis, 53 Iowa, 101 (1880); Morse *v.* Beale, 68 Iowa, 463 (1886); Bliss *v.* Kaweah, etc. Co., 65 Cal. 502 (1884); Goodnow *v.* Oakey, 68 Iowa, 25 (1885); Evans *v.* Lee, 11 Nev. 194 (1876); Cincinnati, etc. R. R. *v.* Harter, 26 Ohio St. 426 (1875); Whitney *v.* Union, etc. Co., 64 N. Y. 576 (1875); President, etc. *v.* Myers, 6 Serg. & R. (Pa.) 12 (1820); Adams *v.* Creditors, 14 La. 454 (1840); Darnell *v.* Dickens, 4 Yerg. (Tenn.) 7 (1833); Burrill *v.* Nahant Bank, 43 Mass. 163 (1840); Flint *v.* Clinton, etc. Co., 12 N. H. 434 (1841); Indianapolis, etc. R. R. *v.* Morganstown, 103 Ill. 149 (1882); Solomon's Lodge *v.* Montmoclin, 58 Ga. 548 (1877); St. Louis *v.* Risley, 28 Mo. 415 (1859); St. Johns *v.* Steinmetz, 18 Pa. St. 273 (1852); Lovett *v.* Steam, etc. Assoc., 6 Paige, 54 (1836); Bank of Vergennes *v.* Warren, 7 Hill, 91 (1845); New England, etc. Co. *v.* Gilbert, etc. R. R., 91 N. Y. 153 (1883). If the corporate name is signed by the president to the contract and the corporate seal affixed by the secretary, this raises a presumption that the contract was legally authorized. Little, etc. Co. *v.* Federal, etc. Ry.,

may be overthrown by proof that the seal was affixed without proper authority.[1] The corporation, by ratification and otherwise,

194 Pa. St. 144 (1899). Proof that the seal attached to a lease is the seal of the corporation raises a presumption that it had been attached with authority. West Side, etc. Co. *v.* Connecticut, etc. Co., 186 Ill. 156 (1900). Where a contract is executed under the corporate seal and signed by the vice-president and secretary, and is within the powers of the corporation, it is presumed that they were authorized to so sign. Neosho, etc. Co. *v.* Hannum, 10 Kan. App. 499 (1900). Where the seal is attached to a promissory note of a corporation it raises a presumption that the note is legally authorized. Bullen *v.* Milwaukee, etc. Co., 109 Wis. 41 (1901). An assignment of a cause of action by a corporation is presumed to have been authorized if it is executed by the president and attested by the secretary with the corporate seal affixed. Texas, etc. Ry. *v.* Davis, 54 S. W. Rep. 381 (Tex. 1899). Where the name of the corporation as grantor in a deed is signed by a person as treasurer and the seal is attached, it is presumed that the corporation authorized the execution of the deed. Carr *v.* Georgia, etc. Co., 108 Ga. 757 (1899). On an appeal the corporate seal will be presumed to have been on a deed of the corporation, and hence that the deed was duly executed. Almand *v.* Equitable, etc. Co.,

[1] Koehler *v.* Black River, etc. Co., 2 Black, 715 (1862); Parker *v.* Washoe Mfg. Co., 49 N. J. L. 465 (1888), holding also that the testimony of a single officer that he had no knowledge of any authority having been given by the corporation to execute the instrument in suit was not sufficient to overcome the presumption of proper execution raised by the fact that the corporate seal was affixed to it. Union Gold Min. Co. *v.* Bank, 2 Colo. 226 (1873). The execution of a corporate deed, apparently perfect on its face, may be overthrown by proof that the board of directors never authorized it; that the president signed it before the description was filled in; and that the description was to be other than that which was written in. Vica, etc. R. R. *v.* Mansfield, 84 Cal. 560 (1890). Where the seal of a company has been duly affixed to a mortgage by the secretary, the mortgagee need not inquire whether the secretary was duly authorized to affix it, or whether a quorum of the directors was present at the meeting and authorized the mortgage, the court upholding the mortgage, although a quorum was not present when it was authorized. County, etc. Bank *v.* Rudry Merthyr, etc. Co., [1895] 1 Ch. 629. See also §§ 725, 808, *infra.* Where there is no statute or by-law requiring a private corporation to keep a minute-book, it seems that the certificate of the secretary under the corporate seal that a resolution was passed cannot be questioned by any one claiming under or through the corporation. Prentiss, etc. Co. *v.* Godchaux, 66 Fed. Rep. 234 (1894). Where it is proven that the proper agents of a corporation signed a deed, and the seal attached to the deed is presumed to be the corporate seal, such presumption is not overcome by proof that no vote of the directors was had authorizing the execution of the deed. Ruffner *v.* Welton, etc. Co., 36 W. Va. 244 (1892). Although the proper signatures and seal attached to corporate contracts, deeds, and mortgages raises a presumption of authority on the part of the officers to sign, yet the want of authority may be shown. Leggett *v.* New Jersey, etc. Co., 1 N. J. Eq. 541 (1832). Where it is shown that the seal was attached at the request of the president and not by authority of the board of directors, the presumption raised by its appearance is removed. Quackenboss *v.* Globe, etc. Co., 77 N. Y. App. Div. 168 (1902).

may easily cure a defect as to the sealing.[1] The execution and delivery of an instrument by a corporation as a corporation raises the presumption that the company was regularly incorporated.[2]

113 Ga. 983 (1901). A deed which apparently has been executed by a corporation and has been signed and acknowledged by its president and secretary and its seal attached is presumed to have been duly authorized. Ellison *v.* Branstrator, 153 Ind. 146 (1899). An admission that the corporate instrument was duly executed is fatal to a defense that the persons executing it had no authority to do so, and also to the defense that the seal was not the corporate seal. Woronieki *v.* Pairskiego, 50 Atl. Rep. 562 (Conn. 1901). Where it is proved that a note was signed by the proper officers of a corporation and its seal attached, this raises a presumption that the officers had authority to sign and that the note was duly executed. Mills *v.* Boyle, etc. Co., 64 Pac. Rep. 122 (Cal. 1901). A chattel mortgage of a corporation signed by its officers and with its seal attached is presumed to have been duly authorized. Sargent *v.* Chapman, 12 Colo. App. 529 (1899). A bond executed under the corporate seal and duly acknowledged by the president is presumed to have been authorized, even though no resolutions are found in certain minutes of the board of directors. Mutual Life Ins. Co. *v.* Yates Co. Nat. Bank, 35 N. Y. App. Div. 218 (1898).

The seal is not proof *per se*. The signature of the officer must be proved. Southern, etc. Assoc. *v.* Bustamente, 52 Cal. 192 (1877). The presence of the seal raises the presumption that the contract was duly authorized. Andres *v.* Fry, 45 Pac. Rep. 534 (Cal. 1896). The action of the board authorizing a deed need not be proved where the deed recites that it was executed by order of the board of directors. Caldwell *v.* Morganton Mfg. Co., 28 S. E. Rep. 475 (N. C. 1897). The seal of a corporation, like the seal of an individual, must be proved in establishing the assignment of a mortgage. Jackson *v.* Pratt, 10 Johns. 381 (1813). That the seal is the company's seal must be proved. Den *v.* Vreelandt, 7 N. J. L. 352 (1800); Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313 (1821). "A corporate deed can be proved only by proving that the seal affixed is the seal of the corporation, or that it was affixed as the corporate seal by an officer of the corporation or other person thereunto duly authorized." Osborne *v.* Tunis, 25 N. J. L. 633, 658 (1856). A mortgage with the corporate seal attached is presumed to have been regularly sealed. It is not invalidated by proof that the directors passed no resolution authorizing the use of the seal. Fidelity, etc. Co. *v.* Shenandoah, etc. R. R., 32 W. Va. 244 (1889). The signature of the president and the seal of the corporation does not prove the deed. It is necessary to prove that it was executed by the president. Walsh *v.* Barton, 24 Ohio St. 28,

[1] Wood *v.* Whelen, 93 Ill. 153 (1879), where a mortgage executed by corporation officers under its seal without proper authority was held to be adopted by a simple resolution without again affixing the seal. See also § 810, *infra*, and Royal Bank *v.* Grand Junction R. R., 100 Mass. 444 (1868); St. James's Parish *v.* Newburyport, etc. R. R., 141 Mass. 500 (1886), in which the facts that two directors had examined corporate notes under seal and pronounced them genuine, and that the treasurer had paid interest upon them, were held to constitute a ratification. A court of equity may compel a corporation to affix its seal. Missouri River, etc. R. R. *v.* Miami County, 12 Kan. 483 (1874). *Mandamus* sometimes lies. Rex *v.* Vice-Chancellor, 3 Burr. 1647 (1765).

[2] See § 637; also West Side, etc. Co. *v.* Connecticut, etc. Co., 186 Ill. 156 (1900).

A defect in the acknowledgment of a corporate instrument is overlooked by the courts if there is sufficient to indicate an intent to acknowledge.[1] The acknowledgment is made by one of the officers who executed it.[2]

41 (1873). The execution and recording of a deed by a corporation is *prima facie* evidence of delivery and acceptance. Stokes *v.* Detrick, 75 Md. 256 (1892). The presence of the seal is *prima facie* evidence that the corporation duly authorized the contract. Berks, etc. Turnp. Co. *v.* Myers, 6 Serg. & R. (Pa.) 16 (1820); Parkinson *v.* Parker, 85 Pa. St. 313 (1877); and that it was affixed by competent authority. St. John's Church *v.* Steinmetz, 18 Pa. St. 273 (1852); Solomon's Lodge *v.* Montmoclin, 58 Ga. 547 (1877); Morris *v.* Keil, 20 Minn. 531 (1874); Conine *v.* Junction, etc. R. R., 3 Houst. (Del.) 288 (1866). Where a contract is signed by the second vice-president and assistant secretary, and has the seal attached, it is presumed to have been properly executed. Gutzeil *v.* Pennie, 95 Cal. 598 (1892). Where a corporate deed is not under seal, proof must be given that the corporation authorized the deed. Barney *v.* Pforr, 117 Cal. 56 (1897). In Maine it has been held that the presence of the corporate seal on an instrument does not raise a presumption that the corporation entered into the contract. Morrison *v.* Wilder Gas Co., 91 Me. 492 (1898). The court evidently overlooked the fact that originally a corporation signed a deed or contract by affixing its seal without any written signature whatsoever, and that consequently, upon proof that such seal was the corporate seal, the presumption arose that it was properly affixed, just as proof of the signature of the maker of a promissory note raises a presumption that the maker signed the note and was bound by it.

[1] An acknowledgment is "the act of one who has executed a deed in going before some competent officer or court and declaring it to be his act or deed." Hence, even though the notary's certificate may be insufficient it may be shown that the corporate officer, authorized to execute the deed, did actually acknowledge such execution, the statute not requiring the certificate of acknowledgment to appear upon the document. Linderman *v.* Hastings, etc. Co., 38 N. Y. App. Div. 488 (1899). A defective acknowledgment does not affect a deed as between the parties. Marvin *v.* Anderson, 111 Wis. 387 (1901).

[2] The officer or agent who, in behalf of the corporation, affixes the common seal to an instrument is, in the absence of any statutory provision, deemed the agent executing it. He also stands in the relation of a subscribing witness to the execution of the deed by the corporation, and is the proper party to be examined or to make affidavit to prove that the seal affixed by him was the corporate seal, and that it was affixed by authority of the board of directors. Bowers *v.* Hechtman, 45 Minn. 238 (1891). The deed of a corporation is capable of being acknowledged. Proving the execution is not the only way of preparing it for record. Hopper *v.* Lovejoy, 47 N. J. Eq. 573 (1891). Authority to execute gives authority to acknowledge the instrument. Wright *v.* Lee, 2 S. D. 596 (1892). The deed is good though there is no attestation as to seal. Smith *v.* Smith, 62 Ill. 492 (1872). If the president signs the deed he is the proper person to acknowledge it. Lovett *v.* Steam, etc. Assoc., 6 Paige, 54 (1836). The acknowledgment may be taken out of the state. Hodder *v.* Kentucky, etc. Ry., 7 Fed. Rep. 793 (1881). Where a deed of the corporation is acknowledged by individuals, instead of being proved by the officers, the recording of such deed is of no effect. Bernhardt *v.* Brown, 122 N. C. 587 (1898).

An acknowledgment by a corporation should show the identity of the corporation and of the officers executing the instrument, and their acknowledgment or deposition that they had executed it, and that they had been duly authorized to execute it. At common law there is no particular form for the acknowledgment of an instrument by a corporation.[1] An affidavit proving the signature of the president and the affixing of the corporate seal is a sufficient

An acknowledgment similar in form to that of an individual suffices. Hoopes *v.* Auburn, etc. Co., 37 Hun, 568 (1885); aff'd, 109 N. Y. 635. *Cf.* Howe, etc. Co. *v.* Avery, 16 Hun, 555 (1879). See also Kelly *v.* Calhoun, 95 U. S. 710 (1877); Frostburg, etc. Assoc. *v.* Bruce, 51 Md. 508 (1879); Muller *v.* Boone, 63 Tex. 91 (1885); Eppright *v.* Nickerson, 78 Mo. 482 (1883); City of Kansas *v.* Hannibal, etc. R. R., 77 Mo. 180 (1882); Tenney *v.* Lumber Co., 43 N. H. 350 (1861). A notary's certificate to the effect that the persons signing are known to him to be president and secretary is sufficient under the statutes of South Dakota. Holt *v.* Met. Trust Co. etc., 11 S. Dak. 456 (1899). Under the Texas statute it is sufficient that the officer acknowledge that he executed the deed. Zimpleman *v.* Stamps, 21 Tex. Civ. App. 129 (1899). Even though the acknowledgment by an Arkansas corporation of a mortgage on land in Arkansas is in the usual common-law form, but not in accordance with the statute of Arkansas, yet any defect may be cured by statute. Steers *v.* Kinsey, 68 Ark. 360 (1900). In West Virginia a certificate of acknowledgment of a deed by a corporation which fails to show that the officer executing it was sworn and deposed to the facts required by statute is insufficient, and a record of the deed is not notice. Abney *v.* Ohio, etc. Co., 45 W. Va. 446 (1898). A deed may conclude with the words: "In testimony whereof the common seal of said company is hereunto affixed." Bason *v.* King's Mountain Min. Co., 90 N. C. 417 (1884). As already stated, if the seal is attached, this raises the presumption that the party executing it was authorized so to do, and hence to that extent it need not be acknowledged. Bennett *v.* Knowles, 66 Minn. 4 (1896). Proof by a witness whose name does not appear on the paper as a witness is insufficient. Dodge *v.* American, etc. Co., 109 Ga. 394 (1899).

An approved form of attestation is:

"In witness whereof the said party of the first part has caused its corporate seal to be affixed hereunto by its secretary, and its name to be subscribed hereto by its president" [or other corporate officers, as the case may be], the day and year aforesaid.

[Seal.] [Signatures.]

A form of proof of the deed of a corporation by the secretary is as follows:

STATE OF NEW YORK, }
County of New York. } ss.

On this —— day of ——, in the year A. D. 19—, before me personally came —— ——, the secretary of ——, with whom I am personally acquainted, who, being by me duly sworn, did depose and say: that he resided in ——, ——, and was the secretary of ——, the corporation described in and which executed the foregoing deed; that he knew the corporate seal of said ——; that the seal affixed to the foregoing deed was such corporate seal, and was so affixed by order of the board of directors of the said ——, and that he attested to the same by subscribing his name to said deed as secretary of said company by the like order. And the said —— —— further said that he was acquainted with —— —— and knew him to be the president of the said ——; that the signature of the said —— —— subscribed to the said deed was in the genuine handwriting of said —— ——, and was thereunto subscribed by like order of the board of directors of the said ——, and in the presence of him, the said —— ——.

—— ——, Notary Public.

[1] Pruyne *v.* Adams, etc. Co., 92 Hun, 214 (1895); aff'd, 155 N. Y. 629, upholding an acknowledgment by the secretary.

acknowledgment.[1] A mortgage should not be acknowledged before a notary public who is a stockholder in and officer of the mortgagee.[2]

§ 723. *Corporate instruments made out in the name of an officer or agent instead of in the name of the corporation may be enforced by or against the corporation.*— This is now the well-established rule.[3] Thus, where a contract is made by the president in his in-

[1] General, etc. Co. *v.* Transit, etc. Co., 57 N. J. Eq. 460 (1898).

[2] Kothe *v.* Krag, etc. Co., 20 Ind. App. 293 (1898). The fact that the acknowledgment is taken before a notary who was also the vice-president of the company does not necessarily invalidate the acknowledgment. Florida, etc. Exchange *v.* Rivers, 36 Fla. 575 (1886). An acknowledgment by a corporation taken before a notary who is a stockholder is of no effect in Texas. Bexar, etc. Assoc. *v.* Heady, 21 Tex. Civ. App. 154 (1899). The assistant cashier, who is also a stockholder and director, cannot take the acknowledgment of a mortgagor to the bank. Wilson *v.* Griess, 90 N. W. Rep. 866 (Neb. 1902).

[3] Where the president loans corporate funds and takes notes in his own name, the corporation is considered to be the payee. New England, etc. Co. *v.* Gay, 33 Fed. Rep. 636 (1888); Elwell *v.* Dodge, 33 Barb. 336 (1861). The indorsement of a note by signing the corporate name, without adding by whom the name is signed, is good. Second Nat. Bank *v.* Martin, 82 Iowa, 442 (1891). A lease running to the company is good though only its officers' names were signed. Clark *v.* Gordon, 121 Mass. 330 (1876); Carrol *v.* St. Johns, etc., 125 Mass. 565 (1878). A sealed instrument to pay money, signed by an individual's name, followed by the words "President of the New York Banking Co.," is enforceable against it. Boisgerard *v.* New York Banking Co., 2 Sandf. 23 (1844). A bond running to the treasurer may be sued on by the company. New York, etc. Soc. *v.* Varick, 13 Johns. 38 (1816). So also as to a note running to a cashier. Baldwin *v.* Bank, etc., 1 Wall. 234 (1863); Commercial Bank *v.* French, 38 Mass. 486 (1839). Or to a manager. Société, etc. *v.* Mackintosh, 5 Utah, 568 (1888). The company is liable on an order for goods though the order is signed by an officer as such officer. Rogers, etc. Co. *v.* Union, etc. Co., 134 Mass. 31 (1883). The case of Farmers', etc. Bank *v.* Haight, 3 Hill, 493 (1842), holds a corporation not liable on a note informally made out. See also Steele *v.* Oswego, etc. Co., 15 Wend. 266 (1836). Suit lies against a bank on its check signed by its cashier in his own name. Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326 (1820). See also Edwards *v.* Cameron's, etc. Co., 11 Eng. L. & Eq. 565 (1852), where directors signed a note; Olcott *v.* Tioga R. R., 27 N. Y. 546 (1863); Bank of Brit. N. A. *v.* Hooper, 71 Mass. 567 (1856); Morrill *v.* Segar Co., 32 Hun, 543 (1884), where the secretary signed a contract; Van Leuven *v.* First Nat. Bank, 54 N. Y. 671 (1873), where the president signed; Bank of Genesee *v.* Patchin Bank, 19 N. Y. 312 (1859); s. c., 13 N. Y. 309 (1855); Many *v.* Beekman, etc. Co., 9 Paige, 188 (1841). But see De Witt *v.* Walton, 9 N. Y. 570 (1854). A cashier may transfer a note by signing his own name as cashier. McIntyre *v.* Preston, 10 Ill. 48 (1848). See also § 724, notes, *infra*. A note payable to and indorsed by "E. S. Hubbell, agent for Buffalo Colliery Company," is collectible against the company where it is shown that he was authorized by the company by its mode of doing business. Lake Shore Nat. Bank *v.* Butler Colliery Co., 51 Hun, 63 (1889). A corpo-

dividual name, but for the corporation, and the corporation knows of the contract, and acts upon it, and partially performs it, the cor-

ration is liable on a note signed "R., President S. & T. Co. R. R. Co.; R., Personally." McCormick *v.* Stockton, etc. R. R., 130 Cal. 100 (1900). A note signed "Iowa National Bank, by William Dagget. V. P.," is properly signed and is not a personal obligation, even though in correspondence the word "we" is used by such vice-president. Thilmany *v.* Iowa, etc. Co., 108 Iowa, 357 (1899). In foreclosing a vendor's lien a note given by the corporation may be shown to be a corporate note, although signed "T. R. Wagner, Secy. & Genl. Manager of the Shelby Lime & Cement Works." Wagner *v.* Brinkerhoff, 123 Ala. 516 (1899). It may be shown by parol evidence that a note signed "R. J. B., President." was a corporate note. Second, etc. Bank *v.* Midland, etc. Co., 155 Ind. 581 (1900). Even though the name of the corporation only is signed to a note without the signature of the officer following the corporate name, yet the note is a valid obligation of the corporation. Youngs *v.* Perry, 42 N. Y. App. Div. 247 (1899). Where a corporation buys land in the name of its agent as trustee it is liable for the price thereof. Hurst *v.* Am. Assoc., 49 S. W. Rep. 800 (Ky. 1899). A due-bill signed by an individual may be shown to have been intended as a due-bill of the company, be being the president. Richmond, etc. R. R. *v.* Snead, 19 Gratt. (Va.) 354 (1869). An instrument for the payment of money running from a person "as manager and president" is enforceable against the corporation, although signed by the person as an individual. Jones *v.* Woolley, 2 Idaho, 790 (1891). A check signed by an individual with the corporate seal and the name of the secretary attached is not enforceable against the company, it having no benefit thereof. Serrell *v.* Derbyshire, etc. Ry., 9 C. B. 811 (1850). Where notes are made by an individual the payee cannot introduce evidence that they were in behalf of the corporation, the suit being on the notes. Sparks *v.* Dispatch Transfer Co., 104 Mo. 531 (1891). An accommodation note running to "F. Medhurst, commercial director," given to him by a friend, cannot be enforced by the corporation, Medhurst having defaulted and defrauded the company. Société, etc. *v.* Mackintosh, 7 Utah, 35 (1890). The corporation is not liable on a note as follows: "For value received, we, the subscribers, jointly and severally, promise to pay the plaintiffs or order, for the Boston Glass Manufactory, $3,500, on demand," and signed by individuals as individuals. Bradlee *v.* Boston, etc. Mfy., 33 Mass. 347 (1835). A grant to "the governors, president, and fellows of King's College, at Windsor, in the province of Nova Scotia," is *prima facie* a grant to the corporation. King's College *v.* McDonald, 2 Tham. 106 (Can. 1843). A deed to the "trustees of the First Baptist Church" passes title to the corporation. Keith, etc. Co. *v.* Bingham, 97 Mo. 196 (1888). A bill of sale to an individual, "president of" a corporation, "his executors, administrators, and assigns," does not convey title to the corporation. Florida, etc. Co. *v.* Usina, 111 Ga. 697 (1900). A company may be bound by a contract although the contract is signed in the name of an individual. Jones *v.* Williams, 139 Mo. 1 (1897). A contract drawn and signed by "S., general agent," may be shown by parol to be a corporate contract. Lewis *v.* Mutual L. Ins. Co., 8 Colo. App. 368 (1896). The agreement of J. Gould, as trustee for the Missouri Pacific Railroad, that the latter will do a certain thing upon an extension being made, does not bind the latter. Hill *v.* Gould, 129 Mo. 106 (1895). Where a note is signed by the officers individually, but is really a corporate note, the officers who pay and take up

poration is bound.[1] A mortgage made in the president's name, signed by him, and sealed with his own seal, is not a legal mortgage although authorized by the corporation. It operates, however, as an equitable mortgage as regards subsequent mortgagees with notice.[2] Although a contract under seal is executed by the corporate officers in their individual names, it may be proved by parol

the note may enforce it against the corporation. *Re* Pendleton Hardware, etc. Co., 24 Oreg. 330 (1893). A note signed "National Forge and Iron Co., Mark Swarts, President," may be shown to be the joint note of the company and president. Swarts *v.* Cohen, 11 Ind. App. 20 (1894), classifying many authorities. See also § 810, *infra.*

[1] Cotting *v.* Grant Street Elec. Ry., 65 Fed. Rep. 545 (1895).

[2] Miller *v.* Rutland, etc. R. R., 36 Vt. 452 (1863). See Hatch *v.* Barr, 1 Ohio, 390 (1823), and § 721, *supra*, and § 810, *infra.* A corporate chattel mortgage is good if it runs in the corporate name, even though the president signs only his own name. Sherman *v.* Fitch, 98 Mass. 59 (1867); Hamilton *v.* McLaughlin, 145 Mass. 20 (1887). If so drawn it is immaterial as to who signs or seals. Wiley *v.* Board of Education, 11 Minn. 371 (1866), involving a bond. If the statute authorizes the trustees to convey, their personal deed suffices. De Zeng *v.* Beekman, 2 Hill, 489 (1842). Where the president has title in his name he may convey as president. Vilas *v.* Reynolds, 6 Wis. 214 (1858). A deed made before incorporation, to be delivered to the corporation after incorporation, is good. Spring, etc. Bank *v.* Hurlings, etc. Co., 32 W. Va. 357 (1889). Although the body of the deed reads, "the president, directors, etc., of," followed by the name of the corporation as grantor, the deed should be construed as the deed of the corporation. Shaffer *v.* Hahn, 111 N. C. 1 (1892). The contract is signed sufficiently to satisfy the statute of frauds where the name of the corporation appears in the body of the instrument. Tingley *v.* Bellingham, etc. Co., 5 Wash. St. 644 (1893). Where a mortgage purports to be by a corporation, but is signed by the president, treasurer, and secretary personally, with their official titles following their names, and is acknowledged the same as they would acknowledge a personal mortgage, and the corporate seal is not attached, the mortgage is at most only an equitable mortgage, and in order to be foreclosed must be alleged to be such. Brown *v.* Farmers' Supply Co., 23 Oreg. 541 (1893). The signature to a corporate mortgage omitting one word of the name is nevertheless good, and although signed "Chas. P. Law, President of the Santa," etc., is sufficient where the corporate seal is affixed. Underhill *v.* Santa Barbara, etc. Co., 93 Cal. 300 (1892). A deed of corporate land properly drawn in the body of the deed, sealed with the corporate seal, and properly acknowledged, but signed "M. Brayman, President C. & F. R. R. Co.," etc., is nevertheless good. Chouteau *v.* Allen, 70 Mo. 290 (1879). *Cf.* Taylor *v.* Agricultural, etc. Assoc., 68 Ala. 229 (1880). A corporate mortgage signed by the officers with their own names, followed by their titles and scrolls for seals, is good. Johnston *v.* Crawley, 25 Ga. 316 (1858). A mortgage signed by certain individuals as trustees of a church is not on its face a mortgage by the church. Shackleton *v.* Allen, etc. Church, 25 Mont. 421 (1901). Even though a mortgage is signed "Mary L. Byrd, President of the Kingston Lumber & Mfg. Co.," it is a valid mortgage. Turner *v.* Kingston, etc. Co., 59 S. W. Rep. 410 (Tenn. 1900); aff'd, 106 Tenn. 1.

that it was a corporation contract, and that the corporation, having adopted and ratified it and attempted to carry it out, is liable on it.[1] In Massachusetts, however, it is held that where a contract *under seal* is made, not by the corporation, but by its agent individually, the corporation cannot be sued thereon by the other party, unless it is estopped by some subsequent act or writing.[2]

Questions relative to the power of certain officers to sign notes and contracts are considered elsewhere.[3]

§ 724. *Liability of officers and agents on corporate securities which are not properly drawn, signed, or sealed in the corporate name.*— It frequently happens that the person, with whom a corporate contract has been made, attempts to hold personally liable the officer or agent of the corporation, on the ground that such officer or agent used his own name in the body of the contract, or signed it as principal instead of using the corporate name. But the courts have quite uniformly defeated such attempts to hold the officer or agent liable. If the instrument or contract indicates that the officer or agent is acting only as agent, and if the name of the corporation appears on the instrument, the officer or agent is not liable thereon.[4]

[1] Williams *v.* Uncompahgre Canal Co., 13 Colo. 469 (1889). The corporation is bound where the president signs his name followed by the word "president," and the secretary signs his name followed by the word "secretary," the corporate seal having been also impressed upon the document in the body thereof. Union, etc. Co. *v.* Robinson, 79 Fed. Rep. 420 (1897). Where the lease in its body is to a corporation, the corporation is bound, even though it is signed "E. J. Crandall [Seal], President." Consolidated Coal Co. etc. *v.* Peers, 150 Ill. 344 (1894). A sealed contract to sell land running to the president cannot be enforced by the corporation. Buffalo, etc. Inst. *v.* Bitter, 87 N. Y. 250 (1881). It is liable on a deed to the manager. Pickering's Claim, L. R. 6 Ch. 525 (1871). An assignment of a lease running in its body from "George F. Baker, Treasurer," etc., of the company, and assign in the same way, is not a corporate assignment. Norris *v.* Dains, 52 Ohio St. 215 (1894). A mortgage is not enforceable against a corporation where it is drawn as a personal obligation and signed by an individual "as president." Clark *v.* Hodge, 116 N. C. 761 (1895). An assignment of a mortgage and a note belonging to a corporation by its president and secretary as follows: "We, the undersigned, D. R. T., president, and C. S. B., secretary, have transferred . . . and on the part of said company have hereunto attached our names and affixed our seals," signing their names and affixing their private seals, is presumptively a corporate transfer. Lay *v.* Austin, 25 Fla. 933 (1890).

[2] Congress, etc. Co. *v.* Worcester, etc. Co., 65 N. E. Rep. 792 (Mass. 1903).

[3] See §§ 715–720, *supra*.

[4] Quoted and approved in Morrison *v.* Baechtold, 93 Md. 319, 329 (1901). A note stamped with the corporate seal, followed by the words "John Roach, Treasurer," is the company's note alone. Miller *v.* Roach, 150 Mass. 140 (1889). A note, "We promise to pay," and signed "San Pedro Mining and Milling Company, T. Kraus, President," cannot be enforced against Kraus personally. Liebscher *v.* Kraus, 74 Wis. 387 (1889). A note reading "We promise," etc., and signed "Warrick Glass Works, J. Price

Especially is this the rule as between the original parties to the contract. It also is the rule as to parties taking with notice. The

Warrick, President," is conclusively held to be the note of the corporation alone. Reeve *v.* First Nat. Bank, 54 N. J. L. 208 (1892). It is a question of fact whether a note is that of the corporation or of an individual where in the body it is made by the corporation, but the signature is that of a person as "Gen. Supt." Frankland *v.* Johnson, 147 Ill. 520 (1893). A treasurer is not liable on a note signed as follows: "The Sanitary Milk-Supply Co., T. A. Huston, Trs." Gleason *v.* Sanitary, etc. Co., 93 Me. 544 (1900). A note reading "We promise to pay," and signed by the corporation and also by the officers as officers, does not render the latter liable personally. Wilson *v.* Fite, 46 S. W. Rep. 1056 (Tenn. 1897). The following indorsement on negotiable paper, "Estate of Wheeler, Wing, Executor," does not bind such executor individually, even though it does not bind the estate. Grafton Nat. Bank *v.* Wing, 172 Mass. 513 (1899). A note signed by an individual maker, with the word "President" following the signature, is at law a personal note, and the word "President," etc., is disregarded. The defendant, however, may by cross-complaint cause the note to be reformed on the ground of a mistake, and thus relieve himself from liability and render the corporation liable. Prescott *v.* Hixon, 22 Ind. App. 139 (1899). Where the body of a note does not refer to the company, and it is signed by individuals with the words "President," etc., following their names, they are liable personally on the note, but the defendants may file a cross-bill to have the note reformed so as to relieve them from personal liability. Lawrence County Bank *v.* Arndt, 69 Ark. 406 (1901). A guaranty signed by an individual in his own name, followed by the letters "Pt.," may be shown to be the obligation of the corporation only, provided the corporation might execute a guaranty and authorized the president to execute it. Small *v.* Elliott, 12 S. D. 570 (1900). A note signed by individuals as officers is *prima facie* their individual note, but it may be shown, as between the original parties, that it was really the note of a corporation. Bush *v.* Gilmore, 45 N. Y. App. Div. 89 (1899). Where the name of an individual is the same as that of a corporation of which he is president, parol evidence may show that the signature to an instrument was the signature of the company and not of the individual. Hall *v.* Ochs, 34 N. Y. App. Div. 103 (1898). A note signed with the company's name per officers does not bind them personally, although the body of the note reads "We promise to pay." Williams *v.* Harris, 198 Ill. 501 (1902). Where the unissued stock of a corporation (upon its reorganization on the expiration of its charter) is issued to the president as trustee to sell from time to time, and to turn over the proceeds of the sales to the company, the fact that he gives the company a note for the same signed by him as "Trustee for Bank" does not render him liable on such note upon the bank becoming insolvent. Neptune *v.* Paxton, 15 Ind. App. 284 (1896). Where the directors sign a corporate note on the back with the words added "board of directors," it may be shown by parol evidence that they signed it as directors, and are not liable personally. Kline *v.* Bank of Tescott, 50 Kan. 91 (1892). A note signed "G. A. Colby, President Pac. Peat Coal Co., D. K. Tripp, Sec. *pro tem.*," is on its face a corporate note. Farmers', etc. Bank *v.* Colby, 64 Cal. 352 (1883); Mott *v.* Hicks, 1 Cow. 513 (1823); Bellinger *v.* Bentley, 1 Hun, 562 (1874); Hascall *v.* Life Assoc., 5 Hun, 151 (1875); aff'd, 66 N. Y. 616;

adding of a title does not necessarily constitute such notice.[1] Thus, where a note is signed by two persons with the words "president" and "treasurer" following their names, they are liable individually,

Morrill *v.* Segar Co., 32 Hun. 543 (1884), the court saying: "The rule now is that, where the instrument raises on its face a question as to the personal liability of the party signing it, parol evidence is admissible to show the intention of the parties;" Babcock *v.* Beman, 11 N. Y. 200 (1854); Whitney *v.* Wyman, 101 U. S. 392 (1879); Whitford *v.* Laidler, 94 N. Y. 145 (1883), where even a lease made out to an officer as such was held not enforceable against him; Holt *v.* Winfield Bank, 25 Fed. Rep. 812 (1885), where an attempt was made to hold a president liable on an *ultra vires* subscription; Haight *v.* Sahler, 30 Barb. 218 (1859), where also the contract was sealed; Pitman *v.* Kintner, 5 Blackf. (Ind.) 250 (1839); Stanton *v.* Camp, 4 Barb. 274 (1848); Draper *v.* Mass. etc. Co., 87 Mass. 338 (1862); Sharpe *v.* Belles, 61 Pa. St. 69 (1869); Hopkins *v.* Mehaffy, 11 Serg. & R. (Pa.) 126 (1824), where also a seal was used, the body of the instrument being in the company's name. To same effect, Abbey *v.* Chase, 60 Mass. 54 (1850), and Ellis *v.* Pulsifer, 86 Mass. 165 (1862); McHenry *v.* Duffield, 7 Blackf. (Ind.) 41 (1843), where a due-bill was signed by a committee; Passmore *v.* Mott, 2 Binn. (Pa.) 201 (1809), where a secretary signed a ticket; Hovey *v.* Magill, 2 Conn. 680 (1818); McWhorter *v.* Lewis, 4 Ala. 198 (1842); Means *v.* Swormstedt, 32 Ind. 87 (1869); Mann *v.* Chandler, 9 Mass. 335 (1812); Carpenter *v.* Farnsworth, 106 Mass. 561 (1871). An officer is not liable personally on a note payable to him as "Sec. and Treas.," and indorsed by him likewise. Falk *v.* Moebs, 127 U. S. 597 (1888). A promissory note: "We promise to pay," etc., signed "Houston Flour-mills Co., D. P. Shepherd, President," is enforceable against the company only. Latham *v.* Houston Flour Mills, 68 Tex. 127 (1887); Jefts *v.* York, 58 Mass. 371 (1849); s. c., 64 Mass. 392 (1852); Okell *v.* Charles, 34 L. T. Rep. 822 (1876). It may be a question of fact as to whether a treasurer, in buying, bought stock for himself or the company. Haynes *v.* Hunnewell, 42 Me. 276 (1856). See also Randall *v.* Van Vechten, 19 Johns. 60 (1821), holding a committee not liable on a sealed instrument; Stearns *v.* Allen, 25 Hun, 558 (1881). *Cf.* De Witt *v.* Walton, 9 N. Y. 571 (1853). In support of the text see also Dubois *v.* Delaware, etc. Co., 4 Wend. 285 (1830); Olcott *v.* Tioga, etc. R. R., 27 N. Y. 546 (1863). See also Lindley, Companies (5th ed.), p. 231, etc.; Green's Brice, Ultra Vires, p. 754. The denial of the directors' liability on a note signed by them as directors is raised by answer, not by demurrer. McKensey *v.* Edwards, 88 Ky. 272 (1889). A note drawn by the directors as directors of the company, and sealed with the seal of the company, is not enforceable against the directors individually. Aggs *v.* Nicholson, 1 H. & N. 165 (1856). The president is not liable on bonds which he signed as president and which the corporation had power to issue. McMasters *v.* Reed, 1 Grant, Cas. (Pa.) 36 (1854); Wilson *v.* Fite, 46 S. W. Rep. 1056 (Tenn. 1897).

[1] Where a note reads, "We promise to pay," etc., and is signed "D. M. Co. J. K., President," the president alone is liable. Mathews *v.* Dubuque Mattress Co., 87 Iowa, 246 (1893). A note signed in the company's name, followed by the words "B. L. Brownell, Pres.," binds him personally. Heffner *v.* Brownell, 70 Iowa, 591 (1887). So also of a note signed "C. F. Clark, Trustee Omega Lodge." Coburn *v.* Omega Lodge, 71 Iowa, 581 (1887). The trustees of an association who signed a note as trustees are personally liable thereon. McKenney *v.* Bowie, 94 Me. 397 (1900). A

unless the plaintiff had notice that the note was a corporate note. The fact that the plaintiff had brought another suit on another similar note against the corporation after the note in this case had been

note signed by individual names, followed by the words "Board of Business Managers," is enforceable against them personally, although it was intended as a note of a corporation. Richmond, etc. Works *v.* Moragne, 119 Ala. 80 (1898). A note signed by a corporation and several stockholders is binding on all of them, even though the words "as stockholders" follow the individual names. Savings Bank, etc. *v.* Central Co., 122 Cal. 28 (1898). Where an unincorporated association becomes incorporated, a person who does not know of that fact may hold the trustees personally liable on a note signed by them, although the word "trustees" precedes their signature. Vliet *v.* Simanton, 63 N. J. L. 458 (1899). Where a note is signed by the president and secretary in their individual names, except that they add the words "President" and "Secretary" respectively, there being nothing on the face of the note to show that it is a company note, they are liable personally on the note. They will not be allowed to show that it was the intention of all parties to bind the company only, or that the money went to the company only, or that the company authorized the note; nor can they file a cross-bill to relieve themselves from the note. San Bernardino, etc. Bank *v.* Andreson, 32 Pac. Rep. 168 (Cal. 1893). In the case of Hackemack *v.* Wiebrock, 172 Ill. 98 (1898), the court held that the signers were individually liable on a note which recited, "We promise to pay," and was signed "Henry Hackemack, Pres., Raythe Nagel, Secy.," to a person who took the note supposing that they were personally liable. A note, "We promise to pay," etc., signed "E. H. Close, Treas., John Clark, Pres't," without referring to the corporation, may be enforced against Close and Clark personally, although in the border of the note the company's name appears. Merchants' Nat. Bank *v.* Clark, 64 Hun, 175 (1892); affirmed in 139 N. Y. 314 (1893). A treasurer is liable personally on a note signed personally by him, although the signature is followed by the word "Treasurer." Medberry *v.* Short, 15 N. Y. Week. Dig. 227 (1882); Tippets *v.* Walker, 4 Mass. 595 (1808). A note in the form "I promise to pay," and signed by "E., Pres. & Treas. C. Co.," has been held to be the note of E. and not of the corporation. Davis *v.* England, 141 Mass. 587 (1886); Stinchfield *v.* Little, 1 Me. 231 (1821), where a deed was to the agent; Bruce *v.* Lord, 1 Hilt. 247 (1856), holding the agent *prima facie* liable on a draft; Mare *v.* Charles, 5 El. & B. 978 (1856); Dayton *v.* Warne, 43 N. J. L. 659 (1881), involving a bond; Sawyer *v.* Winnegance Mill Co., 26 Me. 122 (1846), holding the company not bound by an agreement to arbitrate; Seaver *v.* Coburn, 64 Mass. 324 (1852), involving a lease; Drake *v.* Flewellen, 33 Ala. 106 (1858), holding the secretary *prima facie* liable; Dutton *v.* Marsh, L. R. 6 Q. B. 361 (1871), where the note was, "We, the directors of the Isle of Man Slate & Flag Co., Limited, do promise to pay J. D. £1,600." The company's seal was affixed; Tucker, etc. Co. *v.* Fairbanks, 98 Mass. 101 (1867); Barker *v.* Mechanics', etc. Co., 3 Wend. 94 (1829); Taft *v.* Brewster, 9 Johns. 334 (1812), involving a bond; Brockway *v.* Allen, 17 Wend. 40 (1837). Where a draft was drawn on an individual name, followed by the words "President Rosendale M'ng Co., New York," and accepted by him by the same signature, he is liable personally on it. Moss *v.* Livingston, 4 N. Y. 208 (1850); Hills *v.* Bannister, 8 Cow. 31 (1827). Persons signing and sealing a bond in their own names and under their own seals are individually bound,

issued does not prove such notice.[1] A *bona fide* purchaser of a promissory note which does not disclose any corporate obligation, and is signed by the officers with their title attached, may enforce such note against the officers as individuals, if the holder has no notice of the fact that it was a corporate obligation. The fact that the name of the corporation is on the margin does not constitute notice.[2] The liability of officers for signing the company's name to notes and contracts without authority is considered elsewhere.[3]

§ 725. *Requirements by charter or by-laws that contracts shall be made by certain officers or with certain formalities — Right of party contracting with corporation to rely on proper corporate action having been taken.*— It has been held that, where the charter prescribes that corporate contracts shall be signed by certain officers, a contract that is signed by only a part of them is not enforceable, even in *bona fide* hands.[4] But the harshness and the inconvenience

even though they intended to bind the corporation, and in the body of the instruments they are described as trustees. Cullen *v.* Nickerson, 10 Up. Can. C. P. Rep. 549 (1861). *Prima facie* a person is liable personally who signs a note as follows: "J. W. Parrott, President of Long Branch Hotel and Cottage Co." Terhune *v.* Parrott, 59 N. J. L. 16 (1896). A corporate agent who signs the corporate name to a note without authority is liable personally thereon. Frankland *v.* Johnson, 147 Ill. 520 (1893). An officer making a corporation note without authority is personally liable thereon. Miller *v.* Reynolds, 92 Hun, 400 (1895). Where a note reads, "We promise to pay," etc., and is signed "William T. Wallis, President, Geo. T. Smith, Treasurer," they are liable personally to a *bona fide* holder. First Nat. Bank *v.* Stuetzer, 80 Hun, 435 (1894). See also Keokuk Falls Imp. Co. *v.* Kingsland, etc. Co., 5 Okla. 32 (1896). The president executing an ordinary guaranty in the name of the corporation without authority is personally liable thereon. Nelligan *v.* Campbell, 20 N. Y. Supp. 234 (1892). The incorporators may be liable on a note indorsed in the name of the corporation prior to the certificate of incorporation being filed with the secretary of state in Missouri, but the allegations must be clear as to the exact dates. Ryland *v.* Hollinger, 117 Fed. Rep. 216 (1902). A note, reciting in its body that the corporation and the undersigned promise to pay, is binding on the latter individually, they actually having signed. Nunnemacher *v.* Poss, 92 N. W. Rep. 375 (Wis. 1902). Where a corporation as lessee assigns the lease to trustees, the corporation is not liable for negligence in connection with the property, but the trustees are the parties to be sued. Falardeau *v.* Boston, etc. Assoc., 65 N. E. Rep. 797 (Mass. 1903). On this subject of liability see also §§ 245, 503*c*, *supra*, on the liability of trustees; § 705, *supra*, on the liability of promoters; § 508, *supra*, on the liability of officers of unincorporated associations; and § 888, *infra*, on the liability of committeemen.

[1] First Nat. Bank *v.* Wallis, 150 N. Y. 455 (1896).

[2] Casco Nat. Bank *v.* Clark, 139 N. Y. 307 (1893); Merchants' Nat. Bank *v.* Clark, 139 N. Y. 314 (1893).

[3] See §§ 682 and 715–720, *supra*.

[4] Safford *v.* Wyckoff, 4 Hill, 442 (1842); Head *v.* Providence Ins. Co., 2 Cranch, 127 (1804); Badger *v.* American Ins. Co., 103 Mass. 244 (1869); Dawes *v.* North River Ins. Co., 7 Cow. 462 (1827); Hill *v.* Manchester, etc. Water-works Co., 2

of this rule have caused it to be widely departed from and practically abandoned.[1]

Nev. & M. 573 (1833): s. c., 5 B. & Ad. 866; Corn Exchange Bank *v.* Cumberland Coal Co., 1 Bosw. 436 (1857). Where the charter says five shall constitute a quorum of directors, a mortgage executed under the authority of a directors' meeting when only four are present is void. Holcomb *v.* Bridge Co., 9 N. J. Eq. 457 (1853). A corporate deed not countersigned by the secretary as required by statute is void as against a subsequent levy of execution. Galloway *v.* Hamilton, 68 Wis. 651 (1887). Where the articles prohibit a purchase on credit, a vendor who knew it cannot recover. Hotchin *v.* Kent, 8 Mich. 526 (1860). Where the charter prescribes who may be the corporate agents for particular purposes, the provision is a limitation upon the power of the corporation, and it cannot appoint other agents for such purposes. Washington Turnpike *v.* Cullen, 8 Serg. & R. (Pa.) 517, 521 (1822). And see U. S. Bank *v.* Dandridge, 12 Wheat. 64, 113 (1827); Royalton *v.* Royalton Turnp. Co., 14 Vt. 311 (1842); Union Turnpike *v.* Jenkins, 1 Caines, 381, 391 (1803); Beatty *v.* Marine Ins. Co., 2 Johns. 109 (1807); Commonwealth *v.* St. Mary's Church, 6 Serg. & R. (Pa.) 508 (1821); Conro *v.* Port Henry Iron Co., 12 Barb. 27 (1851); *Re* General, etc. Co., 38 L. J. (Ch.) 320 (1869), where the general manager signed instead of two directors and the secretary. Time notes are void where the charter forbids all except demand notes. Root *v.* Godard, 3 McLean, 102 (1842); s. c., 20 Fed. Cas. 1159; Root *v.* Wallace, 4 McLean, 8 (1845); s. c., 20 Fed. Cas. 1167. The president cannot discount paper where the charter requires the board to pass on it. Manderson *v.* Commercial Bank, 28 Pa. St. 379 (1857). See also British Assur. Co. *v.* Brown, 12 C. B. 723 (1852); but here the contract, being unilateral, was held not to be within the statute; Edwards *v.* Cameron's, etc. Co., 11 Eng. L. & Eq. 565 (1852) — an acceptance of a bill; Halford *v.* Cameron's, etc. Ry., 16 Q. B. 442 (1851); Andrews, etc. Co. *v.* Youngstown, etc. Co., 39 Fed. Rep. 353 (1889).

[1] The custom of the corporation may have that effect. Barnes *v.* Ontario Bank, 19 N. Y. 152 (1859); Bulkley *v.* Derby Fishing Co., 2 Conn. 252 (1817); Kilgore *v.* Bulkley, 14 Conn. 362 (1841); Kenner *v.* Lexington, etc. Mfg. Co., 91 N. C. 421 (1884), holding also that the provision must be pleaded; Witte *v.* Derby Fishing Co., 2 Conn. 260 (1817). If the corporation ratifies or receives the benefits of the contract, the contract is valid. Whitney *v.* Union Trust Co., 65 N. Y. 576 (1875); Curtis *v.* Leavitt, 15 N. Y. 9 (1857); Merchants' Bank *v.* Central Bank, 1 Ga. 418 (1846). Where the statute requires corporate contracts to be executed in a certain way, a contract not so executed cannot be enforced, although probably a *quantum meruit* would lie. Curtis *v.* Piedmont, etc. Co., 109 N. C. 401 (1891). A *bona fide* purchaser of bonds is protected against the defense that they were issued illegally and in violation of statutory provisions, the issue itself having been authorized. Webb *v.* Herne Bay, L. R. 5 Q. B. 642 (1870). A substantial compliance with a statutory provision that bills of exchange must be accepted by the corporation in a certain way is sufficient. Halford *v.* Cameron's, etc. Ry., 16 Q. B. 442 (1851). In regard to the method in which New York religious corporations contract for the services of the minister, see Landers *v.* Frank, etc. Church, 97 N. Y. 119 (1884). A statute requiring that no contract shall be binding upon a corporation unless made in writing is held to refer wholly to contracts executory. Foulke *v.* San Diego, etc. Ry., 51 Cal. 365 (1876); Reuter *v.* Electric Tel. Co., 6 El. & B. 341 (1856). In this case an agree-

"Acts done by a corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs

ment of the chairman was held to have been ratified by the corporation, though the deed of settlement required the signatures of three directors to contracts of the kind in controversy. Bargate *v.* Shortridge, 5 H. L. Cas. 297 (1855). Although the statute says that deeds of a corporation shall be signed by the president, yet signature by the vice-president is sufficient. Ballard *v.* Carmichael, 83 Tex. 355 (1892). Although the statutes require contracts of corporations involving a liability of over $100 to be in writing, and under the corporate seal, or signed by a corporate officer, yet a person performing work for the company may sue on a *quantum meruit.* Roberts *v.* Deming, etc. Co., 111 N. C. 432 (1892). A charter provision as to certain officers signing documents may be disregarded. *Re* Norwich, etc. Co., 22 Beav. 143 (1856), where three directors did not sign as required. The provision in Pennsylvania that certain corporations shall not make certain contracts except in writing signed by two directors does not apply to contracts made out of the state, and is waived if the corporation sues on the contract; and it does not apply to a contract executed on one side. Park, etc. Co. *v.* Kelly Axe Mfg. Co., 49 Fed. Rep. 618 (1892). Where the charter provides that property shall be purchased by five trustees, a purchase-money mortgage executed by the president and secretary, not sealed with the corporate seal and not authorized by the corporation, is void. McElroy *v.* Nucleus Assoc., 131 Pa. St. 393 (1890). A corporate lease not *mala prohibita* nor *mala in se*, but informal in that all the statutory formalities were not complied with, supports an action for past-due rent. Mayor, etc. *v.* Wylie, 43 Hun, 547 (1887). But where a statute prohibited transfers of securities over $1,000 in value by the cashier, unless the directors had previously authorized, a director taking such securities without there being a previous authorization takes nothing by the transfer and cannot recover back what he paid therefor, the corporation being in a receiver's hands. Gillet *v.* Phillips, 13 N. Y. 114 (1855). *Cf.* Atkinson *v.* Rochester, etc. Co., 114 N.Y. 168 (1889). A statute providing that the president and two other members of a corporation shall sign deeds does not exclude the common-law method. Bason *v.* King's Mountain Min. Co., 90 N. C. 417 (1884). A statute requiring corporate contracts for over $100 to be in writing does not apply to executed contracts. Clowe *v.* Imperial, etc. Co., 114 N. C. 304 (1894). Where the charter prohibits the directors making a contract for over $250, unless a stockholders' meeting authorizes the same, a contract for $2,000 without such authorization is void. Georgetown, etc. Co. *v.* Central, etc. Co., 34 S. W. Rep. 435 (Ky. 1896). A provision in the charter that contracts beyond a certain amount must be executed in a certain way, or else ratified by the board of directors, is satisfied if all of the directors assent to the contract. New York, etc. Co. *v.* Metropolitan Inv. Co., 10 N. Y. App. Div. 342 (1896). Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him. Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889). A statute providing that contracts signed by the president shall bind the company does not prevent the company being bound by an oral contract. St. Joseph, etc. Co. *v.* Globe, etc. Co., 59 N. E. Rep. 995 (Ind. 1901). Where the president has authority to make contracts, a secret agreement between him and the stockholders that he would not make certain contracts is not binding on a stranger dealing with

of the latter."[1] A mortgagee is not bound to inquire into the observance of the rules and regulations of the company relative to the

the corporation. Heinze v. South, etc. Co., 109 Wis. 99 (1901). A deed of corporate land made by the president under his own name and seal is good when the statute said "the deed of the president." Warner v. Mower, 11 Vt. 385 (1839). But see Isham v. Bennington, 19 Vt. 230 (1847), where the deed was signed by the president and failed to recite a resolution authorizing it, and was held void. A statute authorizing a corporation to convey real estate by an agent appointed for the purpose does not exclude other means of conveyance, as by its officers. Morris v. Keil, 20 Minn. 531 (1874), where the deed was by a foreign corporation. And in general the ordinary contracts of the company may be made without observing this statutory provision as to what officers shall contract. Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326 (1820); Prince of Wales Ass. Co. v. Harding, El., Bl. & E. 183 (1857); Rockwell v. Elkhorn Bank, 13 Wis. 653 (1861); Merrick v. Burlington Plank-Road, 11 Iowa, 74 (1860); Dana v. Bank of St. Paul, 4 Minn. 385 (1860); De Groff v. American Linen T. Co., 21 N. Y. 124 (1860); Creswell v. Lanahan, 101 U. S. 347 (1879); Kelley v. Mayor of Brooklyn, 4 Hill, 263 (1843); Moreland v. State Bank, 1 Ill. 263 (1828); South Carolina Bank v. Hammond, 1 Rich. L. (S. C.) 281 (1845); Boisgerard v. N. Y. etc. Co., 2 Sandf. Ch. 23 (1844). See also Merritt v. Lambert, Hoffm. Ch. 166 (1840), where title to land was taken in the president's name instead of the company's. *Cf.* Farmers' Loan, etc. Co. v. Carroll, 5 Barb. 613 (1849). See also Fountaine v. Carmarthen Ry., L. R. 5 Eq. 316 (1868), where no previous authorization by the stockholders was obtained; Agar v. Athenæum, etc. Soc., 3 C. B. (N. S.) 725 (1858), where a seal was required but was omitted; Lindley, Companies, p. 160.

[1] Demings v. Supreme Lodge, 131 N. Y. 522 (1892). See also Campbell v. Argenta, etc. Co., 51 Fed. Rep. 1 (1892). A *bona fide* purchaser of a negotiable corporation bond is protected in assuming that the acts of the corporation and relating to its management in the issue of the bonds have been complied with. Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548 (1883); Connecticut, etc. Ins. Co. v. Cleveland, etc. R. R., 41 Barb. 9 (1863), where the defense was set up that the stockholders had not voted on the matter, as required by statute. The court held that the regular execution of the corporate powers was conclusively presumed in favor of *bona fide* holders. Purchasers are not affected by informalities in the notice of and the conducting of meetings. Fontaine v. Carmarthen Ry., L. R. 5 Eq. 316 (1868). It has been held that a purchaser of corporate securities may safely assume that all charter requirements in regard to votes relative to the securities have been complied with. Royal British Bank v. Turquand, 6 El. & B. 327 (1856); Colonial Bank v. Willan, L. R. 5 P. C. 417 (1874); London, etc. Ry. v. M'Michael, 5 Exch. 855 (1850), where the company sued for subscriptions; Zabriskie v. Cleveland, etc. R. R., 23 How. 381 (1859), where the stockholders acquiesced. See also Bank of U. S. v. Dandridge, 12 Wheat. 64 (1827). But compare the cases under the New York statute requiring the written consent of stockholders before a mortgage can be made by certain corporations. § 779, *infra*. See also § 808, *infra*. Where directors have power to bind the company, "but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed." *Re*

call of meetings.[1] Where the seal of the company has been affixed to a mortgage by the secretary, the mortgagee need not inquire whether a quorum of the directors was present at the meeting and authorized the mortgage, nor whether the secretary was duly authorized to affix the seal, the court upholding the mortgage, although a quorum was not present when it was authorized.[2]

The supreme court of the United States lays down the rule as follows: "One who takes from a railroad or business corporation in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary in the name and under the seal of the corporation, and disclosing upon its face no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."[3]

These rules, however, do not apply to usurpations of authority by

Land Credit Co., L. R. 4 Ch. 460 (1869), where bills of exchange had been issued and the directors knew it and acquiesced. Where the statute requires the consent of the court to a mortgage, the mortgage cannot be foreclosed if such consent was not obtained. Dudley *v.* Congregation of St. Francis, N. Y. L. J., Sept. 2, 1891; s. c., 138 N. Y. 451 (1893).

[1] Ashley Wire Co. *v.* Illinois Steel Co., 164 Ill. 149 (1896). Where a mortgage is approved by all the stock except two shares, it is good as an equitable mortgage, even though the meeting of stockholders authorizing it was not called by advertisement as required by statute. Central Trust Co. *v.* Bridges, 57 Fed. Rep. 753 (1893). Even though the statutory notice of a stockholder's meeting is not given, a mortgage authorized by the board of directors elected at such a meeting is legal, where the corporation receives the benefit therefrom, without any stockholder objecting. Atlantic, etc. Co. *v.* The Vigilancia, 73 Fed. Rep. 452 (1896). Although the statute requires three directors, who shall be stockholders, and one assigns his stock, and the other two authorize and execute a corporate mortgage at a meeting held without notice to the other, yet the mortgagee, having no knowledge of these facts, is protected. Kuser *v.* Wright, 52 N. J. Eq. 825 (1895), rev'g Wright *v.* First Nat. Bank, 52 N. J. Eq. 392 (1894).

[2] County, etc. Bank *v.* Rudry Merthyr, etc. Co., [1895] 1 Ch. 629. A mortgagee is chargeable with knowledge of the fact that the statute required three directors, and that the company only had two directors when the mortgage was authorized. Wright *v.* First Nat. Bank, 52 N. J. Eq. 392 (1894). It is no defense to a mortgage that the directors authorizing it were irregularly elected, the stockholders having acquiesced. Savage *v.* Miller, 36 Atl. Rep. 578 (N. J. 1897). A mortgagee need not inquire whether a resolution of the directors authorizing a mortgage, and recited therein, has been actually passed by them. Manhattan Hardware Co. *v.* Roland, 128 Pa. St. 119 (1889). Where a mortgage on its face has been regularly executed it is not necessary in a foreclosure suit to prove a resolution of the board of directors authorizing it, proof of delivery and the payment of consideration to the corporation having been given. Reed *v.* Helois, etc. Co., 53 Atl. Rep. 1057 (N. J. 1903). See also § 768, *infra*, and § 712, *supra*.

[3] Louisville, etc. Ry. *v.* Louisville Trust

corporate officers. As already explained, the authority of the president, secretary and treasurer and other officers to make contracts for the corporation is exceedingly limited.[1] They must have special authority from the board of directors. Hence the mere fact that they have signed the corporate name to a contract and affixed the corporate seal does not make the instrument binding on the corporation. It raises a presumption,[2] but this presumption may be overthrown. Consequently it is difficult to lay down definite rules as to when a corporation is and when it is not bound by a contract which apparently has been regularly executed by the corporation through its proper officers. The tendency is to hold the corporation liable, inasmuch as it selects its own officers and should be to a certain extent responsible for their acts in signing the corporate name and attaching the corporate seal to contracts. Where the charter provides that certain contracts may be made only after an act has been performed by the company, a third person may rely on the company's representation that the act has been done.[3] A by-law requir-

Co., 174 U. S. 552, 573 (1899), the court saying also that the records of the corporation and its board of directors are private records which a person dealing with the corporation is not bound to inspect as he would be bound in case of a public record.

A *bona fide* purchaser of corporate bonds is entitled "to presume that all necessary preliminaries not required to be a matter of public record have been properly performed," and hence is it no defense that the directors met out of the state when they authorized the mortgage securing the issue. Schultze *v.* Van Doren, 53 Atl. Rep. 815 (N. J. 1902). Where the board of directors have power to borrow money and issue debentures, and a debenture is issued in due form on its face, a *bona fide* holder thereof is protected, although the company had not been fully organized and no directors had been appointed and no resolutions passed by them. Duck *v.* Tower, etc. Co., [1901] 2 K. B. 314. Where a person loans money to a corporation and pays it over to the secretary and takes the note of the company executed by the president and secretary, the note is good, even though they took the money and used it to pay for stock in another corporation. Allen *v.* West Point, etc. Co., 31 S. Rep. 462 (Ala. 1902). Where the secretary and treasurer and a director have been allowed to transact the business of the company and they borrow money for the company and give the company's bond and mortgage therefor, and produce a certified copy of a resolution passed by the board of directors, the lender may rely on such certified copy, even though it afterwards turns out to have been unauthorized. Hutchison *v.* Rock Hill, etc. Co., 43 S. E. Rep. 295 (S. C. 1902).

[1] See §§ 712–720, *supra*.

[2] See § 722, *supra*.

[3] Hackensack Water Co. *v.* De Kay, 36 N. J. Eq. 548 (1883), where bonds were to be issued only after a certain amount of the capital stock had been paid in; Royal British Bank *v.* Turquand, 5 El. & B. 248 (1855), where a resolution was to precede all contracts. See also *Ex parte* American, etc. Co., 3 De G., J. & S. 147 (1865), and Prince of Wales Ass. Co. *v.* Harding, El., Bl. & E. 183 (1857). See also Akin *v.* Blanchard, 32 Barb. 527 (1860); Kingsley *v.* New England, etc. Ins. Co., 62 Mass. 393 (1851); Union, etc.

ing that contracts be made only by certain officers, or that certain formalities shall be observed, is of little avail as against outside parties. Persons contracting with the corporation are not bound to know of the by-law, and the courts are reluctant to invalidate a contract by reason of it.[1]

Ins. Co. *v.* White, 106 Ill. 67 (1883); Irvine *v.* Union Bank of Australia, L. R. 2 App. Cas. 366 (1877).

[1] Fay *v.* Noble, 66 Mass. 1 (1853); Ten Broeck *v.* Winn, etc. Co., 20 Mo. App. 19 (1885); Walker *v.* Wilmington, etc. R. R., 26 S. C. 80 (1887); Bank *v.* Cresson, 12 Serg. & R. (Pa.) 306 (1825); Manville *v.* Belden, etc. Co., 17 Fed. Rep. 425 (1883); Morrill *v.* Segar, etc. Co., 32 Hun, 543 (1884); Samuel *v.* Holladay, 1 Woolw. 400 (1869); s. c., 21 Fed. Cas. 306; Mechanics' Bank *v.* Smith, 19 Johns. 115 (1821). A person contracting with a corporation is not bound to know that a by-law requires that corporate contracts of a certain kind shall be approved by the board of directors. Barnes *v.* Black Diamond Coal Co., 101 Tenn. 354 (1898). A person contracting with a corporation is not bound to take notice of a by-law requiring the approval of the president. Allison *v.* Tennessee, etc. Co., 46 S. W. Rep. 348 (Tenn. 1897). A corporation which indorses a note and obtains the money thereon cannot defend against the indorsement on the ground that it was not made strictly in accordance with its by-laws. First Nat. Bank, etc. *v.* Eureka, etc. Co., 123 N. C. 24 (1898). A by-law requiring certain corporate instruments to be approved by the stockholders before being executed does not apply to an assignment for the benefit of creditors. Goetz *v.* Knie, 103 Wis. 366 (1899). Even though the by-laws require the president and treasurer to sign notes, yet if the president and secretary have been accustomed to sign such notes, the notes so signed are valid and may be enforced. Produce, etc. Co. *v.* Bieberbach, 176 Mass. 577 (1900). A person contracting with a corporation is not bound to know that a by-law requires that corporate contracts of a certain kind shall be approved by the board of directors. Barnes *v.* Black Diamond Coal Co., 101 Tenn. 354 (1898). A person who receives in good faith a note of the corporation is not bound to know that a by-law required the approval of two members of the executive committee to such note. Lyndon Sav. Bank *v.* International Co., 54 Atl. Rep. 191 (Vt. 1903). A by-law limiting the authority of an officer is not notice to a purchaser from such officer. Domestic, etc. Assoc. *v.* Guadiano, 195 Ill. 222 (1902). A company is bound by the customary contracts of its general freight agent, though he does not obtain the approval of the president as required by the by-laws. Medbury *v.* New York, etc. R. R., 26 Barb. 564 (1858). *Contra,* Susquehanna Ins. Co. *v.* Perrin, 7 Watts & S. (Pa.) 348 (1844). A by-law that contracts for over a year can be made by the directors only does not bind a person who, without knowledge thereof, makes a longer contract with the general manager. Moyer *v.* East Shore Term. Co., 41 S. C. 300 (1894). The treasurer cannot make a corporate note good by his sole signature where the by-laws require the signature of the president also. *Re* Millward - Cliff Cracker Co., 161 Pa. St. 157 (1894). A by-law requiring contracts to be signed by a certain officer does not invalidate a contract signed by another officer if the party contracting had no knowledge of the by-law. Smith *v.* Martin, etc. Co., 19 N. Y. Supp. 285 (1892). If the company receives the money on a note with knowledge, it cannot set up that the note was not signed by the treasurer as required by the by-laws.

A limitation by by-law that no corporate liability shall be incurred unless expressly authorized by the directors does not invalidate corporate contracts made by agents acting "within the apparent scope of the agency."[1]

A by-law requiring the signature of the secretary to notes issued by the corporation does not bind a person taking a note without actual knowledge of the by-law, especially where it has been long

Grant *v.* Treadwell Co., 1 N. Y. App. Div. 367 (1896). The failure of the treasurer to sign a note as required by the by-laws does not avoid the note in *bona fide* hands. National Spraker Bank *v.* Treadwell Co., 80 Hun, 363 (1894). The general manager may sell a part of the product, even though a by-law requires the consent of the president. Cone *v.* Empire Plaid Mills, 12 N. Y. App. Div. 314 (1896). Although the by-laws require the secretary to sign notes, yet, if the treasurer is accustomed to sign them, notes signed by him are good. Milbank *v.* De Riesthal, 82 Hun, 537 (1894). So also as to notes signed by the president only when the by-laws require the treasurer to sign also. Grant *v.* Treadwell Co., 82 Hun, 591 (1894). A person contracting with a corporation is not bound to know that a by-law prohibits the officers from borrowing money except by order of the board of directors. Arapahoe, etc. Co. *v.* Stevens, 13 Colo. 534 (1889). A by-law that all notes shall be made to the order of the company may be disregarded. Stewart *v.* St. Louis, etc. R. R., 41 Fed. Rep. 736 (1887). Secret instructions limiting the apparent power of a general manager to contract do not affect strangers. Benesch *v.* John Hancock, etc. Co., 11 N. Y. Supp. 348 (1890). Officers intrusted with the management of the corporate business are general agents, and private restrictions imposed by the corporation are immaterial against third persons acting on the faith of the agency. Grafius *v.* Land Co., 3 Phila. 447 (1859). Where the by-laws provided that no contract of the corporation involving a liability of over $500 shall be voted unless signed by the president and treasurer and sealed with the corporate seal, a lease to the corporation on a rental of over $500, and signed by the president alone, was held to be void. In this case it seems that no proof of even an apparent authority of the president was given. Bohm *v.* Loewer's, etc. Co., 9 N. Y. Supp. 514 (1890); Johnston *v.* Milwaukee, etc. Co., 46 Neb. 480 (1895). A by-law limiting the debts of the company is waived where such excess of debt is reported to the stockholders and acquiesced in by them. The by-law does not bind strangers who do not know of it. Underhill *v.* Santa Barbara, etc. Co., 93 Cal. 300 (1892). The question of the regularity of the action of corporate agents and officers in making contracts, and more especially of waiving provisions in contracts in violation of the rules, has frequently arisen in insurance policies where provisions have been waived orally or without the consent of specified officers. Carrugi *v.* Atlantic, etc. Co., 40 Ga. 135 (1869). An insurance policy is good although not sealed and without a clause exempting the stockholder from liability as required by the by-laws. *Re* Athenæum, etc. Soc., 4 K. & J. 549 (1858). The same question has also arisen in regard to the contracts of municipal corporations.

[1] Rathbun *v.* Snow, 123 N. Y. 343 (1890). A by-law prohibiting any officer from creating any liability, except by direct authority of the board of directors, is not binding on a person who deals with the officers without notice of such by-law. Lake Street, etc. R. R. *v.* Carmichael, 184 Ill. 348 (1900).

in disuse.[1] A party contracting with a corporation is not bound to know of restrictions in the by-laws as to the method of authorizing and executing contracts, nor is he bound to take notice that a quorum of the directors was not present when the act was authorized.[2]

A constitutional and statutory provision that debts shall be incurred only upon a vote of the stockholders does not apply to ordinary business debts.[3]

The subject of statutory or by-law requirements that the stockholders shall assent to the issue of obligations is considered elsewhere.[4]

C. ADMISSIONS OF AND NOTICE TO THE VARIOUS OFFICERS AND AGENTS OF A CORPORATION.

§ 726. *Admissions and declarations of a director, president, cashier, general manager, treasurer, agent, or stockholder as regards the corporation.*— This subject is closely identified with the questions discussed in preceding sections. If a particular officer or agent has power to represent or contract for a corporation, he may in most cases bind the company by his admissions or declarations in regard thereto. But his power to do so must be shown.

The law is clear that the admissions of a stockholder do not bind the corporation.[5] The board of directors acting as a board

[1] Martin *v.* Niagara, etc. Co., 122 N. Y. 165 (1890).

[2] County, etc. Bank *v.* Rudry Merthyr, etc. Co., [1895] 1 Ch. 629. See also § 808, *infra.*

[3] Manhattan Hardware Co. *v.* Phalen, 128 Pa. St. 110 (1889).

[4] See § 808, *infra.* Even though a statute authorizing one railroad corporation to guarantee the bonds of another corporation provides that such guaranty shall be made only upon a petition of a majority in interest of the stockholders of the former, yet if the guaranty is actually executed by order of the board of directors without any such petition, a *bona fide* purchaser of the bonds may enforce such guaranty, but a purchaser with notice cannot enforce such guaranty. Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 552 (1899), the court saying: "The distinction between the doing by the corporation of an act beyond the scope of the powers granted to it by law, on the one side, and an irregularity in the exercise of the granted powers, on the other, is well established, and has been constantly recognized by this court."

[5] Polleys *v.* Ocean Ins. Co., 14 Me. 141 (1837); Mitchell *v.* Rome R. R., 17 Ga. 574, 586 (1855); Fairfield, etc. Co. *v.* Thorp, 13 Conn. 173 (1839); *Re* Kip, 1 Paige, 601 (1829); Soper *v.* Buffalo, etc. R. R., 19 Barb. 310 (1855); Hartford Bank *v.* Hart, 3 Day (Conn.), 491, 495 (1807); Morrell *v.* Dixfield, 30 Me. 157 (1849); City Bank *v.* Bateman, 7 Har. & J. (Md.) 104 (1826); Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317, 321 (1818); Stewart *v.* Huntington Bank, 11 Serg. & R. (Pa.) 267, 269 (1824); Hosack *v.* College of Physicians, 5 Wend. 547 (1830); N. Y. Code Civ. Pro., § 839; Angell & A. Corp., §§ 309, 657-660; 1 Phill. Ev. 487, note 134, saying, "the admissions of corporators or quasi-corporators in the

may bind the company by admissions and declarations, but a single director cannot do so except as a special agent of the company.[1] Neither do the admissions or declarations of the president bind the company unless he has extra powers given to him; [2] nor ordinarily

United States are received or rejected upon much the same principle as governs in respect to admissions of agents." The frequently cited case of Hartford Bank *v.* Hart, 3 Day (Conn.), 491, 495 (1807), where it was offered to prove that the president and directors of a bank knew when they discounted a note that the indorsement was forged, and to prove this by the confessions of said president and directors, held, that the evidence was inadmissible.

[1] Magill *v.* Kauffman, 4 Serg. & R. (Pa.) 317 (1818), holding that while acts and declarations of trustees and agents of the congregation, in their official capacities, are evidence against those whom they represent, yet their statements made not in the transaction of the business of their principal are not evidence. "A fact once admitted by a corporation through its officer, duly and properly acting within the scope of his authority, is evidence against it, and cannot be withdrawn to the prejudice of any one who, in reliance upon it, has changed his situation in respect to the matter affected thereby. In such a case the doctrine of estoppel applies to a corporation as well as to an individual." O'Leary *v.* Board of Education, 93 N. Y. 1 (1883). Admissions of a director who is also a member of the discount board of a bank do not bind the corporation unless he was a duly authorized agent. East River Bank *v.* Hoyt, 41 Barb. 441 (1864). A declaration of a director that a certain person is a corporate agent does not bind the company. Florida, etc. R. R. *v.* Varnedoe, 81 Ga. 175 (1888); Stewart *v.* Huntington Bank, 11 Serg. & R. (Pa.) 267 (1824), where certain declarations of bank officers as to the disposition to be made of certain collaterals were held not evidence against the bank. Reports to stockholders and directors do not bind the company by reason of that fact. Hall *v.* Mobile, etc. R. R., 58 Ala. 10 (1877). The company is not bound by a director's declaration that an attorney would be paid. Hillyer *v.* Overman, etc. Co., 6 Nev. 51 (1870). Nor as to the purpose of a fund. Grayville, etc. R. R. *v.* Burnes, 92 Ill. 302 (1879). See also, in general, Peek *v.* Detroit, etc. Works, 29 Mich. 313 (1874); and § 712, *supra*.

[2] The admissions of the president of the construction company which is operating the road are not admissible against the railroad company which is sued for an accident. Chattanooga, etc. R. R. *v.* Liddell, 85 Ga. 482 (1890). His admissions cannot create a liability. Spyker *v.* Spence, 8 Ala. 333 (1845); Henry, etc. Co. *v.* Northern Bank, 63 Ala. 527 (1879). Admissions of the president of a bank that it did not own a note which was assigned to it are not admissible. Tuthill, etc. Co. *v.* Shaver, etc. Co., 35 Fed. Rep. 644 (1888). See also City Bank *v.* Bateman, 7 Har. & J. (Md.) 104 (1826), where a declaration by the president of a bank to an inferior officer, that certain money which had been brought into the bank by one of the directors was the money of the plaintiff, was held not admissible. But his admissions may prove its actual indebtedness. Hoag *v.* Lamont, 60 N. Y. 96 (1875). And as an active agent his admissions may bind the company. Northrup *v.* Mississippi Val. Ins. Co., 47 Mo. 435 (1871); Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28 (1848). So also, where the company itself first uses his admissions as evidence. Western Union Tel. Co. *v.* Baltimore, etc. Tel. Co., 26 Fed. Rep. 55 (1885), the court saying: "A corporation can only speak through its officers and agents; and their declarations made in the course of their em-

those of the secretary and treasurer;[1] nor those of a cashier, except as to matters in the ordinary course of his duties.[2]

The power of a superintendent to bind the company by his admissions and declarations depends on whether they pertain to his work and duties.[3] The president and managing agent of a corporation have authority to make admissions in regard to the ful-

ployment, and relating to the immediate transaction in which they are engaged, are always competent against the corporation." The president's admissions of what is due a laborer are not good in enforcing a stockholder's statutory liability, unless he was acting as agent of the company. Truesdell *v.* Chumar, 75 Hun, 416 (1894). The statement of the president as to an accident, he not being present, is not admissible. Lombard, etc. Ry. *v.* Christian, 124 Pa. St. 114 (1889); Ricketts *v.* Birmingham St. Ry., 85 Ala. 600 (1889). Under the Alabama statute, evidence of a person interested in the suit as to a conversation between him and the deceased president of a corporation is inadmissible. Tabler *v.* Sheffield, etc. Co., 87 Ala. 305 (1889). See also § 716, *supra.*

[1] Alexander *v.* Cauldwell, 83 N. Y. 480 (1881); Tripp *v.* New, etc. Co., 137 Mass. 499 (1884), where the treasurer said that a condition had been performed; Kalamazoo, etc. Co. *v.* McAlister, 36 Mich. 327 (1877), where he stated a matter relative to a salary. Admissions or declarations of a secretary as to the amount due the corporation on a mortgage are not admissible unless it is shown that he was specially authorized to make them. Johnston *v.* Elizabeth, etc. Assoc., 104 Pa. St. 394 (1883). A statement by the treasurer in reference to a bond which he had nothing to do with, such statement not being made in connection with the business of the company, is not admissible as an admission. Hardwick, etc. Co. *v.* Drenan, 72 Vt. 438 (1900). A declaration by the treasurer not made in connection with his duties is not admissible. Stanton *v.* Baird, etc. Co., 32 S. Rep. 299 (Ala. 1902). The secretary and assistant treasurer of a corporation has no authority to bind the corporation by an account rendered by him to a creditor of the corporation. Harvey *v.* West Side, etc. Co., 13 Hun, 392 (1878). The assignee of a contractor's claim against a company cannot enforce it on the ground that at the time of assignment the secretary of the company represented that it would be paid. Barnett *v.* South London, etc. Ry., L. R. 18 Q. B. D. 815 (1887). In a suit of ejectment against a corporation, evidence that a corporate officer had tried to buy the land of plaintiff is not admissible as an admission by the corporation. Mobile, etc. R. R. *v.* Cogsbill, 85 Ala. 456 (1888). See also § 717, *supra.*

[2] He cannot admit that the signature of the person to whom a certificate of deposit is issued is genuine, Merchants' Bank *v.* Marine Bank, 3 Gill (Md.), 96 (1845); nor that a new company is liable for the debts of an old one, Wyman *v.* Hallowell, etc. Bank, 14 Mass. 58 (1817): nor make representations as to an indorser's responsibility, Mapes *v.* Second Nat. Bank, 80 Pa. St. 163 (1875). But he may admit to a surety that a note has been paid. Cochecho Nat. Bank *v.* Haskell, 51 N. H. 116 (1871).

[3] The admissions of a superintendent that a reward offered by his company is to go to a certain person is not binding. Blain *v.* Pacific Exp. Co., 69 Tex. 74 (1887); nor his representations as to the cost of mining. Hanover, etc. Co. *v.* Ashland, etc. Co., 84 Pa. St. 279 (1877). But he may admit the amount of damages caused by a nuisance. McGinness *v.* Adriatic Mills, 116 Mass. 177 (1874). He may make admissions as to an assault made by an employee. Malecek *v.* Tower, etc. Ry., 57 Mo. 17 (1874).

fillment of contracts.[1] The above rules apply also to other agents of the corporation.[2] "The declarations of an agent or officer of a corporation are not admissible, except when made as a part of the *res gestæ*, or in the performance of his duties as agent or officer."[3] It is of course elementary law that an agent's admissions made subsequently to the transaction are not admissible.[4]

The admissions and representations made by an agent of a corporation, acting within the scope of his authority and concerning matters intrusted to him, are binding upon the corporation.[5] There are a large number of cases on this subject, and the question of

[1] Bullock *v.* Consumers' Lumber Co., 31 Pac. Rep. 367 (Cal. 1892).

[2] Their admissions in regard to who paid for water in a ditch are evidence as to ownership thereof. Imboden *v.* Etowah, etc. Co., 70 Ga. 86 (1883). So, also, of a conductor as to a trunk, Morse *v.* Connecticut, etc. R. R., 72 Mass. 450 (1856); of a freight agent relative to the delivery of freight, Lane *v.* Boston, etc. R. R., 112 Mass. 455 (1873); and of a bridge-tender as to the proper way to pass through, Toll, etc. Co. *v.* Betsworth, 30 Conn. 380 (1862); but not of a road-master as to trees that were cut down, Coyle *v.* Ball, etc. R. R., 11 W. Va. 94 (1877); nor as to an accident after it had happened, McDermott *v.* Hannibal, etc. R. R., 73 Mo. 516 (1881); nor of trainmen, Adams *v.* Hannibal, etc. R. R., 74 Mo. 553 (1881); nor of an engineer that a brakeman would be paid, Stiles *v.* Western R. R., 49 Mass. 44 (1844); nor of a telegraph operator, Sweatland *v.* Illinois, etc. Tel. Co., 27 Iowa, 433 (1869); nor of an engineer as to an accident, Robinson *v.* Fitchburg, etc. R. R., 73 Mass. 92 (1856). The admissions of a contractor may bind the company. Morris, etc. R. R. *v.* Green, 15 N. J. Eq. 469 (1862). Declarations of agents made and known by the officers bind the corporation. Toll-bridge Co. *v.* Betsworth, 30 Conn. 380 (1862); 120 Fed. Rep. 925.

[3] Cosgray *v.* New England P. Co., 22 N. Y. App. Div. 455 (1897).

[4] Thallhimer *v.* Brinckerhoff, 4 Wend. 394 (1830); Packet Co. *v.* Clough, 20 Wall. 528 (1874); Waldele *v.* New York C. etc. R. R., 95 N. Y. 274 (1884).

[5] Fairfield, etc. Co. *v.* Thorp, 13 Conn. 173 (1839); Stewart *v.* Huntington Bank, 11 Serg. & R. (Pa.) 267 (1824); Hayward *v.* Pilgrim Soc., 38 Mass. 270 (1838); Sterling *v.* Marietta Co., 11 Serg. & R. (Pa.) 179 (1824); Westmoreland Bank *v.* Klingensmith, 7 Watts (Pa.), 523 (1838); Harrisburg Bank *v.* Tyler, 3 Watts & S. (Pa.) 377 (1842); Farmers' Bank *v.* McKee, 2 Pa. St. 321 (1845); Hackney *v.* Allegheny Ins. Co., 4 Pa. St. 185 (1846); Spalding *v.* Susquehanna County Bank, 9 Pa. St. 28 (1848); Crump *v.* U. S. Min. Co., 7 Gratt. (Va.) 352 (1851); Baptist Church *v.* Brooklyn Ins. Co., 18 Barb. 69 (1854); Devendorf *v.* Beardsley, 23 Barb. 656 (1857); Troy Ins. Co. *v.* Carpenter, 4 Wis. 20 (1855); Metropolis Bank *v.* Jones, 8 Pet. 12 (1834); Merchants' Bank *v.* Marine Bank, 3 Gill (Md.), 96 (1845); Hartford Bank *v.* Hart, 3 Day (Conn.), 491 (1807); Osgood *v.* Manhattan Co., 3 Cow. 612 (1824); Polleys *v.* Ocean Ins. Co., 14 Me. 141 (1837); Ruby *v.* Abyssinian Soc., 15 Me. 306 (1838); Oldtown Bank *v.* Houlton, 21 Me. 507 (1842); Holman *v.* Norfolk Bank, 12 Ala. 369 (1847); Soper *v.* Buffalo, etc. R. R., 19 Barb. 310 (1855); Mitchell *v.* Rome R. R., 17 Ga. 574 (1855); Toll-bridge Co. *v.* Betsworth, 30 Conn. 380 (1862); Morse *v.* Connecticut River R. R., 72 Mass. 450 (1856); McGinness *v.* Adriatic Mills, 116 Mass. 177 (1874). See also Green's Brice, Ultra Vires, pp. 500–504; Wood, Railw. Law, pp. 457–465. The declaration of an en-

how far the corporation is bound by the declarations of subordinate agents frequently arises in the courts. The general rule is very much the same as prevails in regard to admissions made by agents of a large business copartnership. If the admission pertained to matters within the scope of that particular agent's powers, or apparent powers, the principal is bound, otherwise it is not. Thus an inquiry, by a purchaser of stock, of corporate officers, as to whether it was full-paid stock, must be made of officers having authority to speak for the corporation.[1]

§ 727. *Notice to an incorporator, stockholder, agent, superintendent, treasurer, secretary, cashier, president, or director — When does their knowledge of facts constitute a notice of those facts to the corporation — Corporate books as evidence against directors and stockholders —Notice of fraud perpetrated on the corporation.*— It is well settled that a corporation is not chargeable with knowledge of facts merely because those facts were known to its incorporators[2]

gineer of a locomotive is not admissible against the railroad company in an action by a passenger for damages for an injury, the question being as to the speed at which the engine was going. Vicksburg, etc. R. R. *v.* O'Brien, 119 U. S. 99 (1886). The statement of the general agent of an insurance company, sent by it to examine into the circumstances connected with a death, to the effect that it would be better for the company to pay the policy, is not admissible in a suit on the policy. Insurance Co. *v.* Malone, 21 Wall. 152 (1874). Statements by an engineer in charge of a locomotive, made prior to an accident, as to the condition of the engine, are not admissible. Louisville, etc. R. R. *v.* Stewart, 56 Fed. Rep. 808 (1893). In the case of Anderson *v.* Rome, etc. R. R. Co., 54 N. Y. 334 (1873), the court held that it was error to admit the declarations or admissions of a track superintendent of the defendant relative to his knowledge of a defective rail which had caused an accident. An agent of a railroad corporation has no power to alter or make admissions in variation of such contract. Sullivan *v.* Louisville, etc. R. R., 128 Ala. 77 (1901). A party claiming a contract with a corporation cannot testify that he made it with the agent of the corporation if the agent is dead at the time of the trial. Florida, etc. Co. *v.* Usina, 111 Ga. 697 (1900).

[1] Browning *v.* Hinkle, 48 Minn. 544 (1892); 73 S. W. Rep. 645.

[2] Where an owner of a patent makes a contract to assign it, but afterwards, instead of doing so, forms a corporation and transfers the patent to it, the corporation is protected in its title, although the patentee was one of the incorporators and also a director of the corporation. Davis, etc. Co. *v.* Davis, etc. Co., 20 Fed. Rep. 699 (1884). Upon the reorganization of a corporation after bankruptcy the new company is not bound by the knowledge of its corporators as to the existence of incumbrances on property purchased from the old company. Burt *v.* Batavia Paper Mfg. Co., 86 Ill. 66 (1877). "If false and fraudulent representations are made to persons who afterwards become officers or agents of a corporation, and the corporation acts on the faith of such representations and is thereby defrauded, an action will lie in favor of the corporation for the damages thus sustained." Iowa, etc. Co. *v.* American, etc. Co., 32 Fed. Rep. 735 (1887). Notice before incorporation to one who

or stockholders[1] or clerk.[2] But the corporation has notice of facts which came to the knowledge of its officers or agents while engaged in the business of the corporation, provided those facts pertain to that branch of the corporate business over which the particular officer or agent has some control. Thus, a corporation has been charged with notice of facts which were known at the time to its agent,[3] who had charge of the transaction, or to

afterwards becomes an officer of the corporation is not notice to the latter. Brennan *v.* Emery, etc. Co., 99 Fed. Rep. 971 (1900). Where the officers of a corporation in their individual capacity took part in a transaction before the corporation was formed, whereby a business was taken over by the corporation on an agreement that title should not pass until payment was made, the corporation takes with notice of the facts. Adams *v.* Roscoe, etc. Co., 159 N. Y. 176 (1899). Knowledge of the corporators is not notice to the corporation. Grand Rapids, etc. Co. *v.* Grand Hotel, etc. Co., 70 Pac. Rep. 838 (Wyo. 1902).

[1] A company formed to purchase a patent-right is protected in its title, although some of its promoters and stockholders knew of an infirmity in the title. Racine, etc. Co. *v.* Joliet, etc. Co., 27 Fed. Rep. 367, 375 (1886); Housatonic Bank *v.* Martin, 42 Mass. 294, 308 (1840), where it was unsuccessfully sought by a mortgagor to defeat his deed by a subsequent assignment, on the ground that members of the corporation mortgagee had knowledge of the assignment; Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393 (1842), where, in a contest over title to land, evidence was held properly excluded which depended on the fact that a party was a stockholder in a company, and constructive notice of adverse claims was thereby sought to be established against the company. See Fairfield Sav. Bank *v.* Chase, 72 Me. 226 (1881). Knowledge of stockholders is not knowledge of the corporation. Hence, after the guilty directors are ousted by an election, the corporation itself may sue unless inequitable or rights of third persons have intervened. Pacific R. R. *v.* Missouri Pac. R. R., 111 U. S. 505 (1884). A corporation owning all the stock of another corporation is not liable for the rent due from the latter to a third corporation, even though said third corporation charges that the accounts of the lessee are not properly kept by such owner of all its stock. East St. Louis, etc. Ry. *v.* Jarvis, 92 Fed. Rep. 735 (1899). A record of a stockholders' meeting showing acceptance of an auditor's report is an admission of his employment. Clarke *v.* Warwick, etc. Co., 174 Mass. 434 (1899).

[2] Knowledge of a bank clerk of the place of residence of a party chargeable as indorser is not notice to the bank. Goodloe *v.* Godley, 21 Miss. 233 (1849).

[3] "Notice to one agent of a corporation, with respect to a matter covered by his agency, must be as efficacious as to its directors or to its president, since these also are only agents, with larger powers and duties, it is true, but not more fully charged with respect to the particular thing than he whose authority is confined to that one thing." Saint *v.* Wheeler, etc. Co., 95 Ala. 362 (1892). Notice to an agent, but not in the course of his business, is not notice to the corporation. Willard *v.* Denise, 50 N. J. Eq. 482 (1892). Where two corporations deal with each other through a common agent, the question of notice depends upon the circumstances of each case. Lyndon, etc. Co. *v.* Lyndon, etc. Inst., 63 Vt. 581 (1891). The corporation is given notice of a breach of trust by an attorney in fact for the

a local agent,[1] or superintendent.[2] So also as regards the higher officers of the company. Thus, the company has been charged

transfer of stock, the attorney being one of its directors. Tafft *v.* Presidio, etc. Co., 84 Cal. 131 (1890), rev'g 22 Pac. Rep. 485 (1889). "In case of a corporation created for, and engaged in, trade or business, service of a notice on any officer or agent of the company whose duty it is, either in his official capacity or by virtue of his employment, to communicate the fact of such service to the governing body of the corporation, is tantamount to personal service in case of a natural person." State *v.* Felton, 52 N. J. L. 161 (1889). The knowledge of an agent, whose powers are no greater than those of the master of a ship, is not notice to a corporation. Craig *v.* Continental Ins. Co., 141 U. S. 638 (1891). In Consolidated, etc. Co. *v.* Kansas, etc. Co., 45 Fed. Rep. 7 (1891), the court said: "Facts coming to the knowledge of an agent or an attorney while engaged about the business of his agency are, in law, presumed to be known to the principal or client." As to when a client is chargeable with knowledge of facts known to the attorney, see Slattery *v.* Schwannecke, 44 Hun, 75 (1887); aff'd, 118 N. Y. 543. A corporation taking an assignment of a patent without notice that another party was entitled to it is protected. Averill *v.* Barber, 6 N. Y. Supp. 255 (1889). Notice to a traveling salesman of a change in the firm is not notice to a corporation. Neal *v.* M. E. Smith, etc. Co., 116 Fed. Rep. 20 (1902).

[1] Knowledge of a local insurance agent that the insured is insuring for his firm is notice to the company. Keith *v.* Globe Ins. Co., 52 Ill. 518 (1869). Knowledge of a local agent that the insured had gone beyond the limits, and receipt of premiums thereafter, bind the company. Wing *v.* Harvey, 5 De G., M. & G. 265 (1854). Notice to insurance company of a subsequent insurance. Schenck *v.* Mercer, etc. Ins. Co., 24 N. J. L. 447 (1854). See also, in general, as to insurance, Troy, etc. Ins. Co. *v.* Carpenter, 4 Wis. 20 (1855); Bennett *v.* Maryland, etc. Co., 14 Blatchf. 422 (1878); s. c., 3 Fed. Cas. 229; McEwen *v.* Montgomery, etc. Co., 5 Hill, 101 (1843). And see text-books on insurance law. "Notice to an agent of a bank, or other corporation intrusted with the management of its business, or of a particular branch of its business, is notice to the corporation in transactions conducted by such agent, acting for the corporation, within the scope of its authority, whether the knowledge of such agent was acquired in the course of the particular dealing or on some prior occasion." Cragie *v.* Hadley, 99 N. Y. 131 (1885); Wood, Railw. Law, pp. 457–465; Smith *v.* Board, etc. Co., 38 Conn. 208 (1871). To this rule there are certain limitations more or less depending on the time of notice and the occasion of such notice; for example, while acting in the ordinary course of his employment as agent, notice to such agent of a corporation is notice to the corporation itself. But

[2] Knowledge of the general officers that an employee is incompetent is notice to the corporation, and it is liable for his negligence in running a train. Pittsburgh, etc. Ry. *v.* Ruby, 38 Ind. 294, 313 (1871). Knowledge of the company's supervising engineer that the contractors in the construction of the bridge are innocently omitting certain things is notice to the company. Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151 (1850). Knowledge of a superintendent of an unrecorded lien is not notice to his company to which he conveys the property so subject. Wickersham *v.* Chicago, etc. Co., 18 Kan. 481 (1877). Knowledge by the superintendent of a coal mine of a dangerous roof is notice to the company. Quincy, etc. Co. *v.* Hood, 77 Ill. 68 (1875).

with notice of facts known to the treasurer,[1] secretary,[2] cashier,[3]

if such notice is given at an inopportune time, or upon an inappropriate occasion, constructive notice to the corporation may *ipso facto* be easily rebutted. Seneca County Bank *v.* Neass, 5 Denio, 329 (1848); Holden *v.* New York, etc. Bank, 72 N. Y. 294 (1878). It is well known that presumptive notice to a principal by reason of knowledge of an agent or trustee interested in concealing the fact from his principal cannot be imputed to the principal. Curtis *v.* Leavitt, 15 N. Y. 194, 195 (1857); Commissioners *v.* Thayer, 94 U. S. 631 (1876). This is equally true in the case of corporate agents. Seneca County Bank *v.* Neass, 5 Denio, 329 (1848). When the agent himself is the person charged with the fraud, notice to the principal through such an agent cannot be presumed, for it is the interest of the agent to conceal the facts from his principal. Cave *v.* Cave, L. R. 15 Ch. D. 639 (1880). Knowledge obtained by the corporate attorney and agent in another transaction does not bind the corporation. Constant *v.* Rochester University, 111 N. Y. 604 (1888): Fairfield Sav. Bank *v.* Chase, 72 Me. 226 (1881). Notice to a bank clerk of matters not under his charge is not notice to the bank. Goodloe *v.* Godley, 21 Miss. 233 (1849).

1 Hotchkiss, etc. Co. *v.* Union Nat. Bank, 68 Fed. Rep. 76 (1895). Where the treasurer of two corporations takes the funds of one and places them with the other to make good a defalcation from the latter, the latter corporation is liable, since it is chargeable with the knowledge of its treasurer. Atlantic Cotton Mills *v.* Indian Orchard Mills, 147 Mass. 268 (1888). Payment to the treasurer, who enters the same on the books, is notice to the company, since the directors, if they did their duty, would know of such entry. New England, etc. Co. *v.* Union, etc. Co., 4 Blatchf. 1 (1857).

2 Knowledge of the secretary that a vessel is being run, not by the owners, but by a third person, is notice to the corporation, and it cannot sue the owners for work done. Ponchartrain R. R. *v.* Heirne, 2 La. Ann. 129 (1847). Knowledge of the secretary that his wife, the owner of the stock, had pledged that stock, is not notice to the corporation. Platt *v.* Birmingham, etc. Co., 41 Conn. 255 (1874). Notice to one acting for the secretary in his absence, and at his place of business, is as effectual as though given to the secretary himself. McKenney *v.* Diamond, etc. Assoc., 8 Houst. (Del.) 557 (1889). Notice to the secretary, who is also a director, that a note given by the corporation had been assigned by the payee to another is sufficient notice. Love *v.* Anchor, etc. Co., 45 Pac. Rep. 1044 (Cal. 1896). Where two companies have the same secretary notice to one of them is not necessarily notice to the other. *Re* Fenwick, etc. Co., [1902] 1 Ch. 507.

3 Knowledge of the cashier and manager of a bank, acquired in the bank business, that an unrecorded deed has been made, defeats the bank's deed. Johnston *v.* Shortridge, 93 Mo. 227 (1887). Even though the president of a company fraudulently executes notes to a bank in which he is cashier, the bank is not chargeable with notice thereof. Produce, etc. Co. *v.* Bieberbach, 176 Mass. 577 (1900). A bank cannot repudiate its satisfaction of a mortgage where its president and cashier took part in another capacity in the making of a new mortgage based on such satisfaction. Harris *v.* American, etc. Assoc., 122 Ala. 545 (1899). Where a cashier and director in a bank borrow money from the bank on their note the bank is not chargeable with notice of the relations between them. First Nat. Bank, etc. *v.* Briggs' Assignees, 70 Vt. 594 (1898). A bank may be a *bona fide* purchaser of a draft from its cash-

and manager.[1] Notice to the president of a bank may be notice to the company unless he is interested on the other side of the transaction.[2]

ier who has notice of defenses. Hummell *v.* Bank of Monroe, 75 Iowa, 689 (1888). Knowledge of the cashier of a bank that stock received in pledge is trust stock is notice to the bank. Loring *v.* Brodie, 134 Mass. 453 (1883). See also Second Nat. Bank *v.* Howe, 40 Minn. 390 (1889). The cashier's knowledge of fraud in a note is notice to the company. Fall, etc. Bank *v.* Sturtevant, 66 Mass. 372 (1853). Notice to the cashier of acceptance of the bank to receive payment in bonds is good notice. Branch Bank *v.* Steele, 10 Ala. 915 (1846). Notice to a cashier that bank funds have been loaned is notice to the bank. New Hope, etc. Co. *v.* Phenix Bank, 3 N. Y. 156 (1849). Where the directors acquiesce in the cashier's assumption of exclusive management of the bank's business, they will be held chargeable with knowledge of such things as by proper diligence they might and should have known as to the condition of the business. Martin *v.* Webb, 110 U. S. 7 (1884). Knowledge of the cashier that a person turning in property to the bank is insolvent is notice to the bank. Witters *v.* Sowles, 32 Fed. Rep. 762 (1887). Notice to the cashier is notice to the bank. Bank of St. Mary's *v.* Mumford, 6 Ga. 44 (1849); Trenton, etc. Co. *v.* Woodruff, 2 N. J. Eq. 117 (1838). But knowledge obtained by the cashier outside of his duties is not notice to the bank (dictum). Seneca Co. Bank *v.* Neass, 5 Denio, 329, 337 (1848).

[1] Where the general manager and secretary does the corporate business entirely as he sees fit, his knowledge of facts is notice to the corporation. Anderson *v.* Kinley, 90 Iowa, 554 (1894). A pledgee is entitled to collect the dividends, and in some instances may do so, even though the stock is not transferred to him on the books, it being shown that the officers knew of the pledge. Guarantee Co. *v.* East Rome Town Co., 96 Ga. 511 (1895). It may be a question of fact whether a sale of property to the corporation for stock was made, even though a certificate of stock was issued. The delivery of all the papers may have been in escrow. The knowledge of a promoter who then becomes general manager may be notice to the corporation. Huron, etc. Co. *v.* Kittleson, 4 S. D. 520 (1894). Notice prior to incorporation to a person who becomes an officer upon incorporation is not notice to the corporation, even though he transacts the business. Taylor *v.* Calloway, 7 Tex. Civ. App. 461 (1894). Although a managing director of one company is secretary of another company, yet knowledge that he has as to the latter company is not notice to the former company. *Re* Hampshire Land Co., [1896] 2 Ch. 743. Notice to a managing director while acting as such, and affecting business under his charge, is notice to the company. Dr. Jaeger's, etc. Ltd. *v.* Walker & Sons, 77 L. T. Rep. 180 (1897). Knowledge which a managing director had in regard to real estate three years prior to the organization of the corporation is not in itself notice to the corporation. Red River, etc. Co. *v.* Smith, 7 N. Dak. 235 (1898).

[2] Louisville T. Co. *v.* Louisville, etc. Ry., 75 Fed. Rep. 433 (1896). See s. c., 174 U. S. 552. Where the president is interested on the other side of the transaction his knowledge of facts is not notice to the corporation. Seaverns *v.* Presbyterian, etc., 173 Ill. 414 (1898). The knowledge acquired by the president of a bank while acting for himself in the interest of himself alone is not chargeable to the bank. First, etc. Bank *v.* Skinner, 62 Pac. Rep. 705 (Kan.

There are many conflicting decisions, however, on this subject of whether notice to the president is notice to the corporation, and in general the question may be said to turn largely on the particular facts in each case.[1] Where a corporation takes title to land through

1900). Notice to the president is notice to the bank in a bank transaction. Fouche *v.* Merchants', etc. Bank, 110 Ga. 827 (1900). A bank may enforce a note given by a person to the bank, even though it turns out that such note was an accommodation note, the real borrower being the president of the bank. Richardson *v.* Watson, 51 La. Ann. 1390 (1899). Where a bank knows that a stockholder has pledged his certificate of stock, the bank cannot claim a lien upon such stock for a debt incurred to the bank subsequently by the pledgor of the stock, even though the stock is not transferred on the books, and even though the statute requires that transfers should be made only on the books of the bank. But the fact that the pledgor was the cashier of the bank is not notice to the bank, nor is the fact that the president knew of the pledge notice to the bank where he took no active part in the management of the bank and was not acting for the bank when he learned of the pledge. Curtice *v.* Crawford, etc. Bank, 110 Fed. Rep. 830 (1901).

1 The case of Kissam *v.* Anderson, 145 U. S. 435 (1892), reversed the decision below on the ground that it was for the jury to say whether the bank, whose funds were used by the president to pay the broker, had notice of payments by the broker to the president. A corporation to which the principal stockholder, incorporator, and president conveys land is a purchaser with notice unless it proves the contrary. Billings *v.* Aspen, etc. Co., 51 Fed. Rep. 338, 349 (1892). A lien of a bank on stock for a debt from a stockholder to the bank is subject to a pledge of the stock where such pledge was made before the debt was incurred, and the bank incurred the debt with knowledge of the pledge. Knowledge of the facts by the president is notice to the bank. Curtice *v.* Crawford, etc. Bank, 118 Fed. Rep. 390 (1902). A creditor who knows that stock has been paid for by property taken at an overvaluation cannot afterwards complain, and if the same person is president of both the creditor and the debtor his knowledge is notice to the creditor. Berry *v.* Rood, 67 S. W. Rep. (Mo. 1902). Knowledge of the president of a trust company acquired in taking a mortgage for other parties is not notice to the trust company. Tate *v.* Security T. Co., 52 Atl. Rep. 313 (N. J. 1902). The president of a slate company has no power to make a time contract with a railroad to ship the product of the company over such road, and knowledge of such contract by the president is not notice to the corporation. Bangor, etc. Ry. *v.* American, etc. Co., 52 Atl. Rep. 40 (Pa. 1902). A bank is not given notice as to defenses to notes of a cattle company presented to the bank by its president, but in behalf of the cattle company. Corcoran *v.* Snow Cattle Co., 151 Mass. 74 (1890). Drafts which are indorsed to the corporation by its president, who held them individually, are collectible by the corporation as a *bona fide* holder, notwithstanding its president had notice of defenses. Levy, etc. Co. *v.* Kauffman, 114 Fed. Rep. 170 (1902). A corporation purchasing a note from another corporation is not notified of defenses thereto by the fact that the president of the selling corporation was superintendent of the buying corporation, it appearing that he did not manage the financial affairs of the latter. Newman *v.* Aultman, etc. Co., 51 S. W. Rep. 198 (Tenn. 1899). Knowledge which a trustee of a railroad mortgage receives as trustee binds another company in which he is presi-

its incorporators, and all of them as well as the president had constructive or actual knowledge of a flaw in the title, the corporation

dent and superintendent. New York, etc. R. R. *v.* New York, etc. R. R., 52 Conn. 274, 280 (1884). Notice to the president that stock is held in trust is notice to the company. Porter *v.* Bank of Rutland, 19 Vt. 410 (1847). Notice to the president of a bank that the village is being sued for damages due to the bank's sidewalk is notice to the bank. Port Jervis *v.* First Nat. Bank, 96 N. Y. 550 (1884). See also Gold Min. Co. *v.* National Bank, 96 U. S. 640 (1877). Knowledge of the president that a person who is turning property in to the bank is insolvent is notice to the bank. Getman *v.* Second Nat. Bank, 23 Hun, 498 (1881). See also Central, etc. Bank *v.* Levin, 6 Mo. App. 543 (1879); First Nat. Bank *v.* Fricke, 75 Mo. 178 (1881). *Cf.* First Nat. Bank *v.* Sherburne, 14 Bradw. (Ill.) 566 (1884). Notice to the president and certain stockholders who are sent to investigate for the corporation is notice to the corporation. U. S. *v.* San Pedro, etc. Co., 4 N. M. 225 (1888). Knowledge of a president in regard to property which he sells to the company is not notice to the company. Barnes *v.* Trenton, etc. Co., 27 N. J. Eq. 33 (1876). Where it was attempted to impute to a corporation the knowledge of its president of a prior unrecorded conveyance, it was held this could not be done where the knowledge was general and not specific or official. U. S. Ins. Co. *v.* Shriver, 3 Md. Ch. 381 (1851); S. C. on appeal, *sub nom.* General Ins. Co. *v.* U. S. Ins. Co., 10 Md. 517 (1857). Knowledge by the president of outstanding equities to land mortgaged by him to the corporation is not notice thereof to the company. Winchester *v.* Baltimore, etc. R. R., 4 Md. 231, 239 (1853). Notice to a stockholder who is also president of another company is not notice to the latter. First Nat. Bank *v.* Anderson, 28 S. C. 143 (1888). The company is bound to take notice of the extent of a power of attorney given by a third person to its president. Mechanics' Bank *v.* Schaumberg, 38 Mo. 228 (1866). The knowledge of the vendor of personalty to a corporation that a chattel mortgage exists is not necessarily notice to the corporation, although he becomes its president and general manager. It is for the jury to decide whether there are not *bona fide* stockholders who would be injured by such a result. International, etc. Co. *v.* McMorran, 73 Mich. 467 (1889). Knowledge of one who is president of a railroad and also of a bank, where the bank discounts paper for the railroad, is notice to the bank if he took part in its action. Waynesville Nat. Bank *v.* Irons, 8 Fed. Rep. 1 (1881); and see the note. Notice to a member of a copartnership is not notice to a corporation of which that member is president. Miller *v.* Illinois, etc. R. R., 24 Barb. 312 (1857). The president and treasurer who stand by and allow another to purchase property without saying that the company has a claim thereon bind the company thereby. Mihills Mfg. Co. *v.* Camp, 49 Wis. 130 (1880). Knowledge of a president and director of a transfer of stock is notice to the company. Factors', etc. Co. *v.* Marine, etc. Co., 31 La. Ann. 149 (1879). Knowledge of a vice-president is not notice to the company. Fisher *v.* Murdock, 13 Hun, 485 (1878). Although the president and cashier are the discount committee and discount a note which is indorsed by the president, the bank is not charged with notice that the note was given for an illegal purpose. Graham *v.* Orange County Nat. Bank, 59 N. J. L. 225 (1896). The fact that the maker of a note tells the president of a bank, at the office of another company in which they are both directors, that a certain note was fraudulent, is not notice to the bank although it afterwards discounts the note. Wash-

thereby had similar notice.[1] Where a patentee is under obligation to assign his patent, a corporation wholly owned by him is not protected as a *bona fide* purchaser of the patent from him.[2] Where an attorney in fact for the sale of a patent causes his friends to organize a corporation, and then sells the patent to the corporation on terms entirely beyond his authority, his principal may repudiate the sale, and the company is not a *bona fide* purchaser, inasmuch as its projector and organizer was the attorney. Another company to which the principal again assigns his patent may sue the former company for infringement.[3] In general the test turns on whether the corporate agent received the knowledge in the regular course of business. Knowledge by an officer, derived as an individual and not while acting officially for the corporation, cannot operate to its prejudice, and will not be imputed to it.[4]

The corporation is sometimes chargeable with knowledge of

ington Nat. Bank *v.* Pierce, 6 Wash. 491 (1893). Where the president of a bank purchases for the bank a note from a corporation in which he is a director, the bank is chargeable with notice of defenses to the note known to the vendor of the note. Traders' Nat. Bank *v.* Smith, 22 S. W. Rep. 1056 (Tex. 1893). Knowledge acquired by an attorney, as attorney, of the execution of a mortgage, is chargeable to a corporation which takes a subsequent mortgage, where the attorney is the president of the corporation. Willard *v.* Denise, 50 N. J. Eq. 482 (1893). A bank is not chargeable with knowledge of the fact that its president, in depositing money to his individual credit, was depositing trust funds. *Re* Plankinton Bank, 87 Wis. 378 (1894). Where the president of a corporation sells property to it, the corporation is not chargeable with notice of defects in the title known to him. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Where the treasurer of a corporation is also vice-president of a bank, and draws out the funds of the former, taking in payment a draft running to himself individually, the bank is not chargeable with notice of a diversion of the corporate funds to his own use. Gunster *v.* Scranton Illuminating, etc. Co., 181 Pa. St. 327 (1897).

[1] Simmons, etc. Co. *v.* Doran, 142 U. S. 417, 436 (1892).

[2] National Conduit Mfg. Co. *v.* Connecticut Pipe Mfg. Co., 73 Fed. Rep. 491 (1896). See also § 663, *supra.*

[3] Young Reversible, etc. Co. *v.* Young Lock-Nut Co., 72 Fed. Rep. 62 (1896).

[4] Casco Nat. Bank *v.* Clark, 139 N. Y. 307 (1893); Merchants' Nat. Bank *v.* Clark, 139 N. Y. 314 (1893). Concerning notice to an officer who is acting as a third party, and not for a company, see also First Nat. Bank *v.* Tompkins, 57 Fed. Rep. 20 (1893). Where the same persons are officers of a corporation and trustees for the benefit of its creditors, notice to them as such officers is not notice to them as trustees. New York Security, etc. Co. *v.* Lombard Inv. Co., 65 Fed. Rep. 271 (1895). Notice to an officer who is personally interested is not notice to the corporation. Victor, etc. Co. *v.* National Bank, 15 Utah, 391 (1897). A corporation is not chargeable with notice of the fact that the parties conveying property to it for stock are doing so in breach of trust, even though such parties are directors in the corporation. This rule will be applied, especially where the beneficiary has been guilty of laches. Whittle *v.* Vanderbilt, etc. Co., 83 Fed. Rep. 48 (1897).

facts which are known to one of its directors;[1] but there are so many exceptions to this rule that the only safety lies in a study of the cases themselves.[2]

[1] A corporation is chargeable with notice of facts known to its directors whereby the corporation acquired title to a large property from the bondholders of a foreclosed company. Rogers *v.* New York, etc. Land Co., 134 N. Y. 197 (1892). Notice to a director is not notice to the company except "in the business to which the knowledge is material through the agency of such director acting either alone or as one of the board." Butrick *v.* Nashua, etc. R. R., 62 N. H. 413 (1882). The knowledge of a patentee that a label claims more than is correct is not notice to a corporation which purchased, owns, and operates the patent, although he is a director. Lawrence *v.* Holmes, etc., 45 Fed. Rep. 357 (1891). The fact that a director in a bank negotiates the sale of commercial paper to it does not charge the bank with notice of defenses to the paper. Koehler *v.* Dodge, 31 Neb. 328 (1891). If a director act in behalf of a bank in a transaction of which the bank takes the benefit, the bank is chargeable with a knowledge of all the director's acts in such transaction. Smith *v.* South Royalton Bank, 32 Vt. 341 (1859). Notice to a director who is acting as a special agent is notice to a bank. Fulton Bank *v.* Benedict, 1 Hall (N. Y.), 480, 557 (1829); Farmers' Bank *v.* McKee, 2 Pa. St. 318 (1845). Notice to three trustees and superintendent of repairs for a corporation that the water from the bank building was not properly conducted away is notice to the corporation. The "jury may presume that the trustee did his duty by communicating to the corporation the knowledge he had obtained, and which it was material that the corporation should know." Winne *v.* Ulster, etc. Inst., 37 Hun, 349 (1885). Knowledge of a firm dissolution imparted to the board by a director at a regular meeting is notice to the bank. Bank of Pittsburgh *v.* Whitehead, 10 Watts (Pa.), 397 (1840). In *Re* Carew's Estate Act, 31 Beav. 39 (1862), where a director and local manager of a bank obtained possession of certain acceptances without consideration, had them discounted by the bank, and carried to his account, which was largely overdrawn, the bank was held to have notice sufficient to prevent its being a *bona fide* owner. Notice once given to a board of directors is notice to its successor, although the individuals constituting it are all different. Mechanics' Bank *v.* Seton, 1 Pet. 299, 309 (1828). A director who, as attorney for the company, takes an acknowledgment of a mortgage to it, binds the company with notice when he had previously taken an acknowledgment of an unrecorded deed. Fairfield Sav. Bank *v.* Chase, 72 Me. 226 (1881). *Contra*, Houseman *v.* Girard, etc. Assoc., 81 Pa. St. 256 (1876).

[2] Although three of a body of city commissioners who have defrauded the city by a conspiracy in expending money are directors in a bank which advanced the money to the city, yet the bank may collect, it being proved that these three did not attend directors' meetings in reference to the matter, and did not act for the bank in any way in regard to it. Mayor, etc. *v.* Tenth Nat. Bank, 111 N. Y. 446 (1888). See also National Park Bank *v.* German, etc. Co., 53 N. Y. Super. Ct. 367 (1886). Knowledge of a majority of the directors that an unauthorized note has been given is not notice to the company. Edwards *v.* Carson Water Co., 21 Nev. 469 (1893). Notice to a director of a bank, acquired by him not in the bank's business, but privately, is not notice to the bank. Black *v.* First Nat. Bank, 54 Atl. Rep. 88 (Md. 1903). Knowledge of a director who sells a note to his bank

A corporation has notice of facts which are known to all its officers and stockholders, and especially to a contracting firm that owns the corporation and uses it to carry on the firm's business.[1]

that there is a defense to the note is not notice to the bank. Buffalo County Nat. Bank *v.* Sharpe, 40 Neb. 123 (1894). Where two of fifteen directors sell land to the corporation, their knowledge of a prior vendor's lien is not notice to the corporation. Bang *v.* Brett, 62 Minn. 4 (1895). Knowledge of a director that a note is tainted with illegal gambling is not notice to the bank, although he recommended it for discount. Shaw *v.* Clark, 49 Mich. 384 (1882). The fact that a cashier who discounts a note for a corporation payee is also a director in the latter is not notice to the bank of facts known to the corporation payee. First Nat. Bank *v.* Loyhed, 28 Minn. 396 (1881). Knowledge of a director that a member of a firm in which the director is also a member has withdrawn therefrom is not notice to the corporation. But it was proved that the director had no management of the corporate affairs. Powles *v.* Page, 3 C. B. 16, 24, 81 (1846). Where a director causes his bank to discount a note which he holds as an indorsee, the bank is not chargeable with knowledge of facts which he knows and which would defeat payment. Loomis *v.* Eagle Bank, 1 Disney (Ohio), 285 (1859); Louisiana State Bank *v.* Senecal, 13 La. 525 (1839). Where a board of bank directors discounted a note for one of their number, who had knowledge of fraud in its inception, the maker was held liable on the ground that the knowledge of the director which was not communicated to any other director could not be considered notice to the bank. Terrell *v.* Branch Bank at Mobile, 12 Ala. 502 (1847). And see Lucas *v.* Bank of Darien, 3 Ala. (O. S.) 280, 321 (1830); Washington Bank *v.* Lewis, 39 Mass. 24 (1839); Commercial Bank *v.* Cunningham, 41 Mass. 270, 276 (1841); First Nat. Bank *v.* Christopher, 40 N. J. L. 435 (1878). Where a director had knowledge that certain bills which were discounted at the bank had been given originally as accommodation paper, but was not present when the board discounted them, and did not communicate his knowledge to any one, the bank was not regarded as having notice. Farmers', etc. Bank *v.* Payne, 25 Conn. 444 (1857); Westfield Bank *v.* Cornen, 37 N. Y. 320 (1867). But if the director who has such knowledge acts for the bank in discounting the note, his act is the act of the bank, and the latter is affected with his knowledge. National Security Bank *v.* Cushman, 121 Mass. 490 (1877); Bank of U. S. *v.* Davis, 2 Hill, 451, 464 (1842). *Cf.* North River Bank *v.* Aymar, 3 Hill, 262, 274 (1842).

Notice to an individual director, who has no duty to perform in relation to such notice, cannot be considered a notice to the corporation. And even knowledge of the president that certain deposits were only to be drawn in a certain manner was held not to be knowledge of the bank so as to render it liable when such money had, unknown to the president, been wrongfully withdrawn. Fulton Bank *v.* New York, etc. Canal, 4 Paige, 127, 136 (1833). Knowledge of directors in a matter of their own in which they are not acting for the corporation is not notice to the latter. So held in a patent case where this defect of actual or constructive notice enabled the legal title to prevail over the equitable. Davis, etc. Wheel Co. *v.* Davis, etc. Wagon Co., 20 Fed. Rep. 699 (1884). An insurance company taking mortgages subsequent in date to an unrecorded deed of the same premises will not be charged with constructive notice

[1] Holly Mfg. Co. *v.* New Chester, etc. Co., 48 Fed. Rep. 879 (1891). See also § 663, *supra*.

Where railroad property purchased at foreclosure sale is transferred by the purchaser to a corporation for the bonds and stock of the latter, the New York court of appeals holds that such corporation "paid no value, and held the property subject to any equitable lien to which it was subject in the hands of its grantors."[1]

of such deed by the fact that the grantor and mortgagor was, at the date of the deed and execution of the mortgages, a director in the insurance company. La Farge Fire Ins. Co. *v.* Bell, 22 Barb. 54, 61 (1856). Knowledge of a director, acquired by reading a notice thereof in a newspaper, that a firm has dissolved and that certain partners are no longer liable, is not notice to the corporation; he did not acquire the knowledge nor was it given to him for the corporation. National Bank *v.* Norton, 1 Hill, 572 (1841). On a question as to the ratification by a company of the unauthorized act of its president, where it is necessary to show knowledge on the part of the company, it is not enough to show an individual knowledge on the part of the minority of the board of trustees, even if a knowledge by all of them in their individual capacity, and not acting as a board, would be sufficient. Yellow Jacket, etc. Co. *v.* Stevenson, 5 Nev. 224 (1869). A corporation is not chargeable with any knowledge of a deed which a director discovers on examining the record unofficially. Farrell Foundry *v.* Dart, 26 Conn. 376 (1857). Notice to a director, not constituted an organ of communication between the parties, that a promissory note was made to be discounted for a special purpose, is not notice to the bank, although the director was present when the note was discounted. Custer *v.* Tompkins County Bank, 9 Pa. St. 27 (1848). Knowledge by a director of a deed drawn by him professionally is not notice to the corporation whose subsequent deed of the same property is first recorded. Armstrong *v.* Abbott, 11 Colo. 220 (1888). Notice of an unrecorded lien does not come to the corporation by the fact that a stockholder had notice and that he afterwards became an officer. The Admiral, 1 Fed. Cas. 178 (1856). Knowledge of a director that a bill purchased by the company is accommodation on the part of the drawee is not knowledge of the company if the director took no part in the purchase. *Re* Peruvian Ry., L. R. 2 Ch. 617 (1867). Knowledge acquired by a director while acting as a member of the firm which sells a note to the company is not notice to the company. Atlantic, etc. Bank *v.* Savery, 82 N. Y. 291 (1880). Corporations having common directors or officers are not chargeable with knowledge of each other's transactions and condition. *Re* Marseilles Extension Ry., L. R. 7 Ch. App. 161 (1871). See also, in general, Third Nat. Bank *v.* Harrison, 10 Fed. Rep. 243 (1882); West Boston Sav. Bank *v.* Thompson, 124 Mass. 506 (1878). Where the president of a corporation is vice-president and manager of a bank, and obtains money from the latter in the name of the former, but for his own use, the bank cannot recover from the corporation, the officers of the bank being cognizant of the transaction. Trapp *v.* Fidelity Nat. Bank, 101 Ky. 485 (1897).

[1] Vilas *v.* Page, 106 N. Y. 439, 465 (1887). See also ch. XL, *supra.* Where the officers of a bank use its funds to buy property which they then turn in to a corporation in payment for stock, the property is impressed with a trust and may be followed. The fact that they were officers of the corporation also is sufficient to give it notice. The bank may follow the stock or the property, at their option. Farmers', etc. Bank *v.* Kimball Milling Co., 1 S. D. 388 (1890). A consolidated company takes with notice of facts known to one of the companies consolidated. Joy *v.* St.

A director cannot claim to be a *bona fide* purchaser of bonds upon their issue by the corporation. He is bound to know what transpires in the meetings of the board of directors.[1] Where a company sells land to its president and secretary, they are charged with knowledge of facts known to the company, the latter having been present at the meetings.[2] The question sometimes arises whether a director or officer of a corporation is chargeable with notice of all facts contained in the corporate books. The general rule is that he is not chargeable with actual knowledge of such entries,[3] but such entries are admissible in evidence against him in

Louis, 138 U. S. 1 (1891). A tripartite agreement relative to a right of way through a park binds the successors of one of the companies. Joy *v.* St. Louis, 138 U. S. 1 (1891).

[1] Greenville Gas Co. *v.* Reis, 54 Ohio St. 549 (1896). The directors' minute-book is evidence against a director. Allison *v.* Coal Creek, etc. Co., 87 Tenn. 60 (1888); First Nat. Bank *v.* Tisdale, 84 N. Y. 655 (1881); Leonard *v.* Faber, 52 N. Y. App. Div. 495 (1900). See also § 714, *supra.*

[2] Rapley *v.* Klugh, 40 S. C. 134 (1893).

[3] "There is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder." Hence, in an action by the corporation for an accounting, the books of the company are not competent evidence to establish the account and hold him liable. Rudd *v.* Robinson, 126 N. Y. 113 (1891). General entries upon the ledger of the corporation do not charge a director with notice thereof, unless it is proved that he had access to the ledger or control over it. Leonard *v.* Faber, 52 N. Y. App. Div. 495 (1900), the court stating that corporate books, such as the stock-book and minute-books containing records in which third parties are not interested, are evidence of the facts set forth in them both in favor and against the corporation, but that account books showing transactions between the corporation and third persons are similar to account books of other parties and are admissible only as admissions by the corporation.

In a suit by a receiver of a national bank to recover back dividends illegally paid, the books of the bank are competent evidence to prove the acts of the corporation and its financial condition, except as to dealings between the corporation and the defendant. Hayden *v.* Williams, 96 Fed. Rep. 279 (1899). As against the officers of the company it may be proved by the books of the company that they had converted to their own use the funds of the company illegally. Saranac, etc. R. R. *v.* Arnold, 167 N. Y. 368 (1901). One who is a stockholder, director, and vice-president is chargeable with knowledge of entries on the corporate books. First Nat. Bank *v.* Tisdale, 18 Hun, 151 (1879); aff'd, 84 N. Y. 655. See also ch. XXX, *supra.* One who is a stockholder and also director is as fully bound by entries in them as a partner is by entries in the partnership books. Montgomery *v.* Exchange Bank, 6 Atl. Rep. 133 (Pa. 1886). The books of the company are not, *per se*, evidence against a director. Powell *v.* Conover, 75 Hun, 11 (1894). See § 55, *supra.* A director sued by a stockholder for negligence in not attending to his duties is not presumed to have knowledge of all that is shown by the books of the company. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891). A director is bound to take notice of calls, and cannot set up that he had no actual notice. Spellier, etc. Co. *v.* Geiger, 147 Pa. St. 399 (1892). Directors

suits brought by strangers.[1] They are not admissible as evidence, however, as against strangers.[2]

The minutes of a meeting of a corporation are admissible to

of an insolvent bank obtaining a preference are bound to know that the bank is insolvent. James Clark Co. *v.* Colton, 91 Md. 195 (1900). Even though a corporation is insolvent, yet, if the directors believe it is solvent, although in financial distress, they may loan money to the corporation and take securities as collateral thereto, and they are not bound to know that the corporation is insolvent. Converse *v.* Sharpe, 161 N. Y. 571 (1900). A discussion of what constitutes insolvency of a corporation, and stating that the directors are bound to know the condition of business, is given in Consolidated Tank Line Co. *v.* Kansas City Varnish Co., 45 Fed. Rep. 7 (1891). Where the president discounts a note for the company and pays in the money therefor, he is a *bona fide* holder of it. Hitchings *v.* St. Louis, etc. Co., 68 Hun, 33 (1893). Knowledge imparted to the corporation is not notice to its president, who buys a note from it. Peckham *v.* Hendren, 76 Ind. 47 (1881). The rule that a bank is estopped by the statement of its cashier to a surety that his principal had paid the note is not applicable where the surety is a director of the bank, for he will be conclusively presumed to know whether payment was made. His knowledge will also be imputed to a firm which was the security and of which he was a member. Merchants' Bank *v.* Rudolf, 5 Neb. 528 (1877). See also § 714, *supra*. A director cannot hold the president liable on a loan by the former to the corporation made on representations of the condition of the corporation. Hubbard *v.* Weare, 79 Iowa, 678 (1890).

1 The books of a company are "competent as evidence so far as related to any entries legitimately contained in them, and so far as they were relevant to the issues on trial" in an action by creditors to hold a director liable, under the New York statute, for making a false report. Huntington *v.* Attrill, 118 N. Y. 365 (1890). In a suit against a director to enforce a statutory liability, a creditor cannot prove his debt by the books of the company unless he proves that the director had access to or was familiar with such books. Minor *v.* Crosby, 76 N. Y. App. Div. 561 (1902). Corporate books are admissible in evidence to show money received as against a corporate officer on trial for embezzlement, even though the entries were not made by him. Humphrey *v.* People, 18 Hun, 393 (1879). The minutes of a directors' meeting are evidence of who were present and what was done, so far as a suit between the corporation and one of those who were present is concerned. Olney *v.* Chadsey, 7 R. I. 224 (1862). A director and vice-president is chargeable with knowledge of what is on the corporate records. First Nat. Bank *v.* Tisdale, 84 N. Y. 655 (1881). *Quære*, as to entries in miscellaneous corporate books. Billings *v.* Trask, 30 Hun, 314 (1883). The entries in the books of a business corporation during the period of his directorship are admissible in evidence against one who has been a director in the corporation, and as such took part in its affairs. Bedford *v.* Sherman, 68 Hun, 317 (1893).

2 A person contracting with a corporation is not bound to know what is contained in the corporate records. Blair *v.* St. Louis, etc. R. R., 25 Fed. Rep. 684 (1885). Entries in the corporation books of matters relating to any property or right claimed by them can never be evidence for them unless made so by act of the legislature. They are not admissible in favor of the corporation as against strangers. Graville *v.* New York, etc. R. R., 34 Hun, 224 (1884). See

show what took place as against members who attended the meeting.[1]

A stockholder is chargeable with notice of entries on the corporate books if made in his presence and he personally assented thereto.[2] The books of the corporation are evidence in a suit against a stockholder on a call, even though the entries are not proved to be correct by the person actually making them.[3]

But "a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers."[4] In a suit by stockholders to dissolve and wind up the corporation, the books of the company are not admissible as against them, being mere declara-

also 15 Wend. 256, note; Wait, Insolv. Corp., § 528. *Cf.* Leonard *v.* Faber, 52 N. Y. App. Div. 495 (1900). As between claimants to the property of a corporation, the corporate records are not admissible as evidence to show the title of the corporation. Dolan *v.* Wilkerson, 57 Kan. 758 (1897).

[1] Booth *v.* Dexter, etc. Co., 118 Ala. 369 (1898).

[2] See Abbott's Tr. Ev., p. 53.

[3] Sigua, etc. Co. *v.* Brown, 171 N. Y. 488 (1902). See also § 55, *supra.*

[4] So held where a stockholder in a telegraph company sued it for negligence in sending a message. Pearsall *v.* Western Union Tel. Co., 124 N. Y. 256 (1890), aff'g 44 Hun, 532. A stockholder is not chargeable with knowledge of corporate contracts of which as a fact he knows nothing. Tarbox *v.* Gorman, 31 Minn. 62 (1883). Minutes of the directors have been held to be evidence against a subscriber to disprove certain defenses set up by him to his subscription. Bedford R. R. *v.* Bowser, 48 Pa. St. 29 (1864). The cases of Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393, 398 (1842), and Graff *v.* Pittsburgh, etc. R. R., 31 Pa. St. 489, 495 (1858), hold that a stockholder present and assenting to an entry on the corporate books is bound by it. But Hill *v.* Manchester, etc. Co., 5 B. & Ad. 866 (1833), per Parke, B., holds that corporate minutes are not admissible on behalf of the company in a suit against it by one of its stockholders. Coprorate books are not only evidence of corporate acts when they are to be proved, but are to the same extent evidence against stockholders who are chargeable with knowledge of their contents. Blake *v.* Griswold, 103 N. Y. 429 (1886); Billings *v.* Trask, 30 Hun, 314 (1883). As between stockholders, the books of a corporation and sworn copies thereof are competent evidence to show the acts of a corporation. Hubbell *v.* Meigs, 50 N. Y. 480 (1872). See also Lindley, Companies, p. 312; Black *v.* Shreve, 13 N. J. Eq. 455 (1860); Haynes *v.* Brown, 36 N. H. 545 (1858); Pittsburg Coal Co. *v.* Foster, 59 Pa. St. 365 (1868). Where a person is merely in possession of bank stock as collateral security, and does not participate in the meetings of the stockholders, and is not recognized by the stockholders as a member, he is not such a part of the corporation as to be bound to have knowledge of the facts in possession of the corporation or its officers. Baker *v.* Woolston, 27 Kan. 185, 189 (1882). A pledgee of stock who takes no part in the stockholders' meetings is not chargeable with notice of a lien which the corporation has on property which he purchases. Baker *v.* Woolston, 27 Kan. 185 (1882).

tions in its favor.[1] Where a party owns all the stock of another corporation, it has been held that he is chargeable with notice of entries upon its books.[2] A stockholder in a corporation that is carrying on a patent litigation is not bound by its admissions as affecting subsequent litigations.[3]

The question of serving notice or papers upon corporations in judicial proceedings is discussed elsewhere.[4] The publication of a notice in a newspaper is not notice, unless the party notified is proved to have read the notice.[5]

The important principle of law that a person taking from a corporate officer corporate obligations in payment of a personal debt of such officer is not a *bona fide* holder of the same is considered elsewhere.[6]

[1] Matter of Dittman, 65 N. Y. App. Div. 343 (1901).

[2] Hamilton Buggy Co. *v.* Iowa Buggy Co., 88 Iowa, 364 (1893).

[3] American, etc. Co. *v.* Phœnix, etc. Co., 113 Fed. Rep. 629 (1902).

[4] See § 752, *infra.*

[5] See § 119, *supra.* Though the company takes a newspaper, the announcement therein of a dissolution of partnership is not notice to it. Vernon *v.* Manhattan Co., 22 Wend. 183 (1839), aff'g 17 Wend. 524. *Cf.* 1 Hill, 578, n. *Contra,* Bank of South Carolina *v.* Humphreys, 1 McCord (S. C.), 388 (1821); Martin *v.* Walton, 1 McCord (S. C.), 16 (1821). Notice in a newspaper taken by an individual is not notice. Rawley *v.* Horne, 3 Bing. 2 (1825). But if contained in a newspaper taken by a marine insurance company, and is marine news, and the president knew the fact involved, the company has notice. Green *v.* Merchants' Ins. Co., 27 Mass. 402 (1830).

[6] See § 293, *supra.*

CHAPTER XLIV.

RATIFICATION, ACQUIESCENCE, OR LACHES AS A BAR TO A STOCKHOLDER'S ACTION HEREIN.

§ 728. *Introductory.*— When a stockholder brings an action to remedy the frauds, *ultra vires* acts, or negligence of a director or third person, the most common and dangerous defense that he has to encounter is the defense that he has been guilty of laches in bringing his action. Like the defense of contributory negligence — a modern principle of law that defeats many actions for negligence — so the defense of laches, acquiescence, or ratification has sprung up to defeat stockholders' actions herein. The principles which govern, define, and explain this defense have become well settled. They form the subject of this chapter.

§ 729. *Laches, acquiescence, or ratification as a defense to a stockholder's action to remedy illegal corporate acts which are prohibited by statute or contrary to public policy.*— It has already been shown that a stockholder may bring an action to remedy frauds, negligence, or *ultra vires* acts. As regards the frauds and negligence of corporate officers, it is well settled that laches is a good defense to a stockholder's action herein. In reference to *ultra vires* acts, however, which are *mala prohibita* or *mala in se*, there is more difficulty. It is very clear that no assent or acquiescence of the stockholders can validate such acts.[1]

[1] See Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 186 (1879), where the court said: "A corporation may do acts which affect the public to its harm, inasmuch as they are *per se* illegal or are *malum prohibitum*. Then no assent of stockholders can validate them." A contract in which the directors are interested, where it is void by statute, cannot be enforced on the ground of waiver by the corporation. Barton *v.* Port Jackson, etc. Co., 17 Barb. 397 (1854). "Void" cannot be construed as "voidable" in a statute which is enacted from public policy, and not for the benefit of parties only. Rex *v.* Hips-

But it is a different question to determine whether, after long acquiescence, the stockholder may take advantage of the invalidity of such acts. As regards acts *mala prohibita* — that is, acts expressly prohibited by statute — the stockholder may be barred by laches from complaining thereof, since the state, through its attorney-general, may protect the interests of the public.[1] The stockholder, however, may sue on the ground that unless the evil is corrected the state may forfeit the corporate franchises.[2] As regards acts *mala in se*, probably the rule will depend on the circumstances of the case. If the stockholder has participated in the act or knowingly accepted the benefit thereof, the court will not aid him, since he who comes into equity must do so with clean hands.[3] Thus, where a lease of a railroad is *ultra vires*, a bill in equity filed by one of the parties to the contract will not lie to set it aside. The court will aid neither party, they being *in pari delicto*.[4] When, however, a stockholder has not participated or knowingly accepted the benefit of corporate contracts which are *mala in se*, there would seem to be no reason why mere delay on his part in bringing suit to set aside such acts should be fatal to his bill. As to the corporation itself, the fact of its participating in an act which is merely beyond the powers of a corporation, but is not prohibited by statute or pernicious in itself, may not be a bar to recovery upon the contract.[5] A suit in equity lies at the instance of a railroad corporation that has guaranteed negotiable bonds of another railroad corporation to have such guaranty canceled and suits upon the

well, 8 B. & C. 466 (1828), concerning a statute against binding out children. For a collection of the cases on *ultra vires* acts as *mala prohibita* and *mala in se*, see an article in The Counsellor, vol. 4, p. 151.

[1] See Stewart *v.* Erie, etc. Transp. Co., 17 Minn. 372 (1871); and Gray *v.* Chaplin, 2 Russ. Ch. 127 (1826), where the court held that the stockholder cannot claim that the public is wronged. If a public right is to be enforced, it must be at the suit of those to whom the protection of public rights belongs. *Cf.* Ashbury, etc. Co. *v.* Riche, L. R. 7 H. L. 653 (1875); s. c., L. R. 9 Exch. 224, 262. That which is forbidden by statute cannot be ratified. Nellis Co. *v.* Nellis, 62 Hun, 63 (1891); Taylor *v.* Chichester, etc. Ry., L. R. 2 Exch. 356 (1867). The state may at any time object. Alexander *v.* Searcy, 81 Ga. 536 (1889).

[2] Manderson *v.* Commercial Bank, 28 Pa. St. 379 (1857), where discounts were being improperly made.

[3] See § 39, *supra*. A stockholder in a corporation cannot sustain a bill to have the charter forfeited and the corporation wound up on the ground that it was formed to purchase and combine various competing linseed-oil mills for the purpose of forming a monopoly. The state alone can ask for such a forfeiture. Moreover, the stockholder by being a stockholder is estopped from complaining, and is presumed to have had knowledge of the facts from the time when he became a stockholder. Coquard *v.* National L. S. Co., 171 Ill. 480 (1898). *Cf.* 93 N. W. Rep. 997.

[4] St. Louis, etc. R. R. *v.* Terre Haute, etc. R. R., 145 U. S. 393 (1892).

[5] Bath Gas Light Co. *v.* Claffy, 151 N. Y. 24 (1896).

guaranty restrained, because of facts not appearing upon the face thereof and because otherwise the bonds may pass into *bona fide* hands.[1] Where a director is one of the committee appointed by the board of directors to settle claims against the corporation, and he buys some of the claims, he must turn them in at the price he paid; and even though the stockholders and directors intended to allow him the profit, yet this does not estop the corporation from objecting.[2]

§ 730. *Express ratification herein — Transferee of stock that has been voted in favor of the act cannot complain.*— There are in general two ways in which a stockholder may be said to have ratified an act of the directors which he is attempting to enjoin or set aside. The ratification may be by an express agreement or statement to that effect, or it may be by such laches or acquiescence as will amount to an implied ratification.[3] Cases involving the defense of an express ratification rarely arise, since this defense is easy to prove.[4] But a provision in a contract of subscription to the stock of the company whereby the subscriber waives notice of all contracts between the promoters and the company is not binding on the stockholder if such waiver is tricky and fraudulent.[5] If

[1] Louisville, etc. Ry. *v.* Louisville Trust Co., 174 U. S. 552 (1899).

[2] Kroegher *v.* Calivada, etc. Co., 119 Fed. Rep. 641 (1902); 54 Atl. Rep. 460.

[3] Thus, in Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769, the court said: "Consent might be either express or might be inferred from the acquiescence of the shareholders after full knowledge of the transaction which was in excess of the powers of the directors." See also Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 187 (1879).

[4] As an instance of express ratification, see Allen *v.* Wilson, 28 Fed. Rep. 677 (1886); Butterfield *v.* Cowing, 112 N. Y. 486 (1889); Burden *v.* Burden, 159 N. Y. 287, 304 (1899). A stockholder who knows that her stock has been voted by her husband in favor of selling all the corporate property for stock in another corporation cannot object thereto where she afterwards disposes of part of the new stock so issued. Hoene *v.* Pollak, 118 Ala. 617 (1898). Although on a consolidation the president of one of the companies takes a large amount of the new common stock for services, yet, if the stockholders knew all about it and agreed that he should have the stock, they cannot afterwards hold him liable therefor. Rusling *v.* Moses, 47 Atl. Rep. 1054 (N. J. 1901). *Cf.* §§ 652, 662, 681, *supra*.

[5] Greenwood *v.* Leather, etc. Co. Ltd., [1900] 1 Ch. 421. Where the promoters paid to a person who is to act as chairman of the directors, and his firm who underwrote ten thousand shares, a commission of twelve thousand shares, the court held that ten thousand of the twelve thousand was for the use of his name and only two thousand shares for the commission, and hence he was liable at the instance of an investor in the stock to pay to the corporation the difference between the amount paid for the stock and its actual value the day after an allotment, the transaction not being fully disclosed in the prospectus. A clause in the prospectus that there "may" be various trade

the complaining stockholder participated in the act complained of, he of course is barred of his remedy.[1]

contracts and business arrangements and underwriters' agreements, followed by the usual waiver as to them, does not apply to such a contract, inasmuch as the word "may" was misleading. Cackett *v.* Keswick, [1902] 2 Ch. 456.

[1] See §§ 39, 40, *supra*, and § 735, *infra*. Acquiescence and ratification of the guaranty by one railroad of stock and bonds of another railroad, the stock and bonds being owned by directors of the former company, is a bar to an action to set the same aside. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). Stockholders who have participated in a contract between the corporation and its officers cannot complain thereof. Clark *v.* Pittsburgh, etc. Co., 184 Pa. St. 188 (1898). A stockholder who votes for an act cannot afterward complain of it. McGeorge *v.* Big Stone Gap Imp. Co., 57 Fed. Rep. 262 (1893). Stockholders who participate in an alleged fraudulent reorganization cannot complain. Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894). A stockholder who votes for the purchase of property from a director cannot afterwards complain. Barr *v.* Pittsburgh Plate Glass Co., 51 Fed. Rep. 33 (1892). See also ch. XXXIX, *supra*. A director who has voted for a sale cannot as a stockholder object. Holton *v.* Wallace, 66 Fed. Rep. 409 (1895). A stockholder who, as secretary, signed certificates of stock, cannot claim that they were watered stock, and hence that they cannot be voted at a meeting called to ratify a sale of property to a director. Wisner *v.* Delhi, etc. Co., 46 La. Ann. 1223 (1894). Although a stockholder voted in favor of an *ultra vires* lease, yet, if the corporation has repudiated the lease, the estoppel is destroyed and the stockholder's suit may continue. Memphis, etc. R. R. *v* Grayson, 88 Ala. 572 (1890). See also ch. XL, *supra*. A stockholder in a corporation which is acting practically for the profit of another corporation cannot, after he expressly assents to such an arrangement, object thereto. Hart *v.* Mt. Pleasant, etc. Co., 97 Iowa, 353 (1896). A stockholder who has participated in a consolidation cannot object thereto as being irregular. Bradford *v.* Frankfort, etc. R. R., 142 Ind. 383 (1895). Parties taking part in an extension of the road cannot object that the charter amendment authorizing it was unconstitutional. Jones *v.* Concord, etc. R. R., 67 N. H. 119 (1891); s. c., 67 N. H. 234. See also, in general, Steger *v.* Davis, 8 Tex. Civ. App. 23 (1894). Although creditors may complain of a mortgage given to directors by the corporation when largely in debt, yet the president, who is also a large stockholder and who signs the mortgage, cannot do so. Perry *v.* Pearson, 135 Ill. 218 (1890). Where all the stockholders unite in the issue of watered stock to the president for his own use, and assent to a contract between him and the company, the corporation itself cannot subsequently complain. Arkansas, etc. Co. *v.* Farmers', etc. Co., 13 Colo. 587 (1889). Where an act by the directors amounts to a preference to them, the corporation being insolvent, the act cannot be validated by a vote of the stockholders, the directors themselves voting a majority of the stock. Farmers' L. & T. Co. *v.* San Diego, etc. Co., 45 Fed. Rep. 518 (1891). See also, in general, Branch *v.* Jesup, 106 U. S. 468, 476 (1882); U. S. *v.* Union Pac. R. R., 98 U. S. 569, 612 (1878). If all of the directors and stockholders know of a sale of property by a director to the corporation and do not object, and use the property, the transaction cannot be set aside. Battelle *v.* Northwestern, etc. Co., 37 Minn. 89 (1887). A bondholder who is a party to the reorganization plan, under which and as part of which the foreclosure

Moreover, a stockholder who holds stock which has been voted in favor of the act complained of cannot bring suit as the holder of that stock.[1] A purchaser or pledgee of stock cannot complain of mismanagement and loss of funds which all the stockholders

sale is held, cannot object to the legality of the sale. Crawshay *v.* Soutter, 6 Wall. 739 (1867). Knowledge of stockholders is not knowledge of the corporation. Hence, after the guilty directors are ousted by an election, the corporation itself may sue, unless inequitable, or rights of third persons have intervened. Pacific R. R. *v.* Missouri Pac. R. R., 111 U. S. 505 (1884). A stockholder in an old and new company who aids in the latter's improvement of property purchased by it from the former, and is instrumental in bringing about the sale and purchase, is estopped from objecting to the validity of the sale. St. Louis, etc. Co. *v.* Sandoval, etc. Co., 116 Ill. 170 (1886). A person who sells property to a director to be paid for partly in the stock of a corporation cannot afterwards object that the director was disqualified from reselling the property to the corporation. Mackey *v.* Burns, 64 Pac. Rep. 485 (Cal. 1901), the court holding also that even though directors sell property to the corporation in exchange for treasury stock which is issued to them at twelve and a half cents on a dollar, yet if they offer to allow all the stockholders to purchase their proportion of the stock at that price, and they all take the stock excepting one director, the latter cannot object to the transaction, where he had himself moved that the stock be so issued. *Cf.* 93 N. W. Rep. 997.

[1] See § 40, *supra*, and § 735, *infra; Re* Syracuse, etc. R. R., 91 N. Y. 1 (1883). The purchaser of stock which was issued to directors cannot complain that the directors were guilty of fraud in the issue. Barr *v.* New York, etc. R. R., 125 N. Y. 263 (1891). In Brown *v.* Duluth, etc. Ry., 53 Fed. Rep. 889 (1893), the court refused to interfere where the transferee of the stock took with notice. The court said: "The complainant, as their transferee, is in no better situation than they are. He has no greater rights than his transferrers as regards a remedy invalidating the transaction. The maxim *in pari delicto* applies, and a court of equity will not aid him. He cannot bring suit in behalf of other stockholders against the corporation or other parties participating in the issue, as his own title is tainted with the same fraud." A purchaser of stock which was voted in favor of a reorganization scheme cannot object to the scheme as being *ultra vires*, there being nothing illegal *per se* in it. Hollins *v.* St. Paul, etc. R. R., 9 N. Y. Supp. 909 (1889). A purchaser of stock that has voted for an issue of "watered" bonds and stock is estopped from complaining, even though the issue was prohibited by the constitution of the state — Pennsylvania. Wood *v.* Corry, etc. Co., 44 Fed. Rep. 146 (1890). Where three persons own all the stock of a company, two of them may buy the stock of the third and give the company's notes in partial payment for the same. The transaction is legal, inasmuch as no one is injured and all consent. Neither subsequent purchasers of the stock, nor those who become stockholders after the notes are paid, nor stockholders who consent to the arrangement, can complain of it. Schilling, etc. Co. *v.* Schneider, 110 Mo. 83 (1892). A stockholder who purchases his stock after the acts complained of took place cannot compel another stockholder to repay to the company dividends which he has received, due to contracts by which the company had sold coal to a railway company, for which railway company such latter stockholder was purchasing

acquiesced in prior to his purchase or pledge.[1] Where the stockholder, with full knowledge, has accepted the benefit of an act, he cannot complain thereafter.[2] But the defense of an implied ratification is more difficult to establish. An implied ratification is

agent. Clark *v.* American Coal Co., 86 Iowa, 436 (1892). As to whether this same principle — that stock which has participated in a fraudulent act cannot afterwards be the basis of a suit to set aside that fraud — should be applied to bonds, so far as enforcing the covenants of the mortgage is concerned, such covenants being waived by a former owner of the bonds which complainant now owns, see Belden *v.* Burke, 147 N. Y. 542 (1895). In regard to this case and the famous litigation in which it was but a part, see § 766, *infra.* In Alabama it is held that, if the stock passes into *bona fide* hands, the *bona fide* holder may object to the fraudulent or *ultra vires* act, even though the stock itself was tainted with the fraud by reason of being held by one of the guilty parties at the time of the act. Parsons *v.* Joseph, 92 Ala. 403 (1891). But the weight of authority holds that if the stock purchased is tainted with the fraud — that is to say, if the persons guilty of the act complained of owned that stock when they did the act — no action will lie by a *bona fide* transferee of that stock. Ffooks *v.* Southwestern Ry., 1 Sm. & G. 142 (1853). A transferee of stock that was voted in favor of the act cannot complain. Symmes *v.* Union Trust Co., 60 Fed. Rep. 830 (1894). Where a private corporation, with the consent of all its stockholders of record, agrees with its creditors that the property shall be taken charge of by an individual and managed for the purpose of paying the debts and then returning the property to the corporation, and one of the stockholders at that time secretly transfers some of the certificates of stock to his wife, and she holds the stock for three years and then transfers it without consideration to a party who brings suit to set aside the transaction, the court will not give such relief. Marbury *v.* Stone, 17 N. Y. App. Div. 352 (1897); aff'd, 160 N. Y. 701. A purchaser of stock from a director may join in bringing suit against the directors for negligence to the injury of all the stockholders, even though the director knew of such negligence when he sold the stock. Warren *v.* Robinson, 70 Pac. Rep. 989 (Utah, 1902). Where a corporation has sold all its property with the consent of all its stockholders the transaction cannot subsequently be attacked by a subsequent purchaser of stock. City of Spokane *v.* Amsterdamsch, etc., 22 Wash. 172 (1900). A purchaser of stock which has assented to the corporation purchasing its own stock cannot complain. Hodge *v.* United States Steel Corp., 53 Atl. Rep. 601 (N. J. 1902). Rev'd on another point in 54 Atl. Rep. 1 (1903). Under a statute requiring the lessee of a railroad to purchase dissenting stock of the lessor within thirty days on an appraisal of its value, stock which has been voted in favor of the lease cannot afterwards be the basis of a claim that it be appraised and paid for. In the appraisal proceedings all questions arising may be adjudicated. If the dissenting stock is not purchased under the statute, the lessee runs the risk of the lease being held void at the instance of a dissenting stockholder. Boston, etc. R. R. *v.* Graham, 60 N. E. Rep. 405 (Mass. 1901); 93 N. W. Rep. 1024.

[1] Erny *v.* Schmidt Co., 197 Pa. St. 475 (1901).

[2] London Assur. Co.'s Case, 5 De G., M. & G. 465, 481 (1854). See also Weed *v.* Little Falls, etc. Co., 31 Minn. 154 (1883). A party who has invested $15,000 in obtaining a bridge franchise

generally spoken of as laches. It is the subject of the remainder of this chapter.[1]

§ 731. *Stockholder chargeable with laches only after he has a full knowledge of the facts.*— Laches is a defense only when the stockholder, with a full knowledge of the facts, has delayed an unreasonable length of time in bringing his action. These two elements, knowledge and delay, are the essential elements of the defense.[2] Until the stockholder has full and complete knowledge of all the essential facts which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to commence.[3] For instance, an American stockholder in an English corporation is not estopped from complaining of an unfair, illegal scheme of reorganization, merely because he did not oppose it before it was sanctioned by the English courts in accordance with the English statute, where it is shown that he did not know anything about it.[4] Where, however, the

and for plans and specifications, and transfers the same to another party on the agreement of the latter to organize a corporation to build the bridge and to give to the former $15,000 out of $80,000 preferred stock, the common stock to be such sum as the latter may desire, may object to the latter causing the corporation to issue $95,000 in bonds, $80,000 in preferred stock, and $60,000 in common stock for building the bridge at a cost of $71,000; but if the former takes his $15,000 preferred stock and keeps it for six years, he cannot then complain. Jutte *v.* Hutchinson, 189 Pa. St. 218 (1899). If the stockholders and corporate creditors who are prejudiced thereby do not object, a going corporation may sell all its property to another corporation, payment being by the issue of stock of the latter corporation to the stockholders of the former corporation, together with the right to such stockholders to subscribe for additional stock in the purchasing corporation. Dissenting stockholders, who under protest subscribe for the new stock and then wait eighteen months before commencing legal proceedings, are estopped from objecting. Post *v.* Beacon, etc. Co., 84 Fed. Rep. 371 (1898). See also § 732, *infra.*

[1] See First Nat. Bank *v.* Drake, 29 Kan. 311 (1883), for a definition of ratification.

[2] See the leading case of Cumberland Coal Co. *v.* Sherman, 30 Barb. 553 (1859), quoting from Lewin on Trusts; and the equally important case of Hoffman, etc. Co. *v.* Cumberland, etc. Co., 16 Md. 456 (1860).

[3] Gilman, etc. R. R. *v.* Kelly, 77 Ill. 426 (1875). Where a minority stockholder had no notice of meetings and no opportunity to examine the books he is not barred by laches from complaining of a misappropriation of money by the directors, provided he brings suit within a reasonable time after he learns the facts. Even though he is barred by laches as to one cause of complaint this is no bar as to other causes of complaint. Joy *v.* Ft. Worth, etc. Co., 24 Tex. Civ. App. 94 (1900). The lapse of time without knowledge or means of knowledge is no bar. Fox *v.* Robbins, 62 S. W. Rep. 815 (Tex. 1901). Where there is not a full disclosure at a stockholders' meeting the members present are not bound by their assent. Ives *v.* Smith, 3 N. Y. Supp. 645 (1888).

[4] Bank of China *v.* Morse, 168 N. Y. 458 (1901).

facts would be well known to any intelligent man, and the means of knowledge are open to the stockholder, he is chargeable with knowledge from the date when he should have ascertained the facts.[1]

Constructive notice, however, does not apply to a case of fraud, and constructive notice cannot relieve a party from responsibility for a fraud.[2] It is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge merely because he might have ascertained the facts by an examination of the corporate books.[3] Moreover, it is the well-established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and

[1] Means of knowledge are equivalent to knowledge. Credit Co. v. Arkansas Cent. R. R., 15 Fed. Rep. 46 (1882). "Means of knowledge, plainly within reach of stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge." Jesup v. Illinois Cent. R. R., 43 Fed. Rep. 483 (1890). In a suit by a stockholder in a mining company to set aside an alleged fraudulent scheme by which the property was operated for the benefit of a railway company and finally abandoned, the delay of the plaintiff for five years after the slightest inquiry would have caused him to know of the facts is fatal. Loomis v. Missouri, etc. Ry., 165 Mo. 469 (1901). Thirteen years' delay in attacking a consolidation as not being in compliance with statutory provisions is a bar. "Whatever is sufficient to excite attention, and put the party on his guard and call for inquiry, is notice of everything to which the inquiry would have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it." It is immaterial whether the court declare the consolidation void or voidable. Leavenworth County v. Chicago, etc. R. R., 18 Fed. Rep. 209 (1883); Taylor v. South, etc. R. R., 13 Fed. Rep. 152 (1882), the court saying: "The means of knowledge are the same thing in effect as knowledge itself. . . . The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence." See also Kelly v. Newburyport, etc. R. R., 141 Mass. 496 (1886). In Phosphate, etc. Co. v. Green, L. R. 7 C. P. 43 (1871), it was held that to show assent and acquiescence it is not necessary to prove the acquiescence of each individual shareholder. It is enough to show circumstances which are reasonably calculated to satisfy the court or a jury that the thing to be ratified came to the knowledge of all who chose to inquire, all having full opportunity and means of inquiry.

[2] Converse v. Blumrich, 14 Mich. 121 (1866); Wilde v. Gibson, 1 H. L. Cas. 623 (1848).

[3] *Re* Agriculturists', etc. Co., L. R. 1 Ch. App. 161, 511 (1866), where the court said: "It is no part of the duty of a shareholder to look into the management of the business. . . . It is enough to show that they might have become acquainted with the management of their affairs. It must be shown that they did so." Ryan v. Leavenworth, etc. Ry., 21 Kan. 365 (1879). Also Holmes v. Newcastle, etc. Co., L. R. 1 Ch. D. 682 (1875), holding that knowledge of a sale of property is not knowledge of an illegal dividend from the proceeds. See also Spackman v. Evans, L. R. 3 H. L. 171 (1868); Houldsworth v. Evans, L. R. 3 H. L. 263 (1868).

delay.[1] Mere delay is not laches, but is strong evidence of acquiescence. Laches is based upon estoppel where new rights have arisen.[2] A stockholder who was not present at a stockholders' meeting is not bound by the ratification by such meeting of the issue of a large amount of the original capital stock to the directors themselves, who were illegally elected, but who thereby acquired control of the company.[3] A compromise or settlement, or receipt of the benefits of a fraudulent or *ultra vires* act, does not estop a stockholder from complaining, where he was not fully informed of the facts at the time of such compromise, settlement, or receipt of the benefits thereof.[4]

§ 732. *What length of time constitutes laches herein — Statute of limitations.*— After a stockholder has knowledge of or is chargeable with knowledge of an *ultra vires*, fraudulent, or negligent act of the directors, he must institute his suit, if at all, within a reasonable time thereafter.[5] As to what will constitute a reasonable time

[1] Evans *v.* Smallcombe, L. R. 3 H. L. 249 (1868), aff'g L. R. 3 Eq. 769, the court saying: "Lapse of time alone certainly would not make valid that which at the beginning was invalid. . . . Length of time may in many cases materially assist in establishing the presumption of acquiescence in an act which requires a confirmation to give it validity. But then it is not time, but the acquiescence, which changes what would otherwise be a void act into a valid one." Ashhurst's Appeal, 60 Pa. St. 290 (1869), where, however, the court says that "acquiescence is presumed from delay."

[2] Montgomery, etc. Co. *v.* Lahey, 121 Ala. 131 (1899).

[3] Morris *v.* Stevens, 178 Pa. St. 563 (1897). See 54 Atl. Rep. 883.

[4] "A receipt of money as a part of the earnings of a corporation is no ratification of acts of business carried on outside of the corporation without knowledge of him who is sought to be charged with them that the money came from such business." Central, etc. Bank *v.* Walker, 66 N. Y. 424, 429 (1876). Where a corporation owns all of its bonds, excepting a few held by one holder, such bonds being secured by a pledge of securities, and requests the trustee holding the securities to sell the same, which the trustee does at an insufficient price, the corporation itself being the buyer, and the single outside holder of bonds not being notified in time to protect his interests, he may either follow his securities or may hold the trustee liable. And even though he accepted a small sum in settlement from the trustee, yet if that settlement was caused by misrepresentations as to the value of the securities, he is not bound by them. Other holders of the bonds who have turned them in to the corporation on an agreement to take an exchange of new bonds secured by the same securities will also be allowed to participate the same as the bondholder who did not turn in his bonds. Anthony *v.* Campbell, 112 Fed. Rep. 212 (1901). Where a suit to set aside a forfeiture of stock by the corporation, on the ground of fraud, is compromised, the same stockholder cannot eight years thereafter file another suit to set aside the assessment on the ground of frauds unknown to him when the first suit was compromised. Marks *v.* Evans, 62 Pac. Rep. 76 (Cal. 1900).

[5] Quoted and approved in Stoddard *v.* Decatur, etc. Co., 184 Ill. 53 (1900). In Twin Lick Oil Co. *v.* Marbury, 91 U. S.

depends on the circumstances of the case. The length of time during which a stockholder may delay in bringing his suit varies with each case, according to the circumstances of that case. The court requires that reasonable promptness be exercised so that large investments of new money or changes in the ownership of the stock or property may not be prevented or jeopardized by an unreasonable delay on the part of a stockholder in objecting to the transaction. Many illustrations of this principle of law are given in the notes below.[1]

587 (1875), Mr. Justice Miller gives a clear statement of the law herein. Taylor *v.* South, etc. Ry., 13 Fed. Rep. 152 (1882); Fredericks *v.* Pennsylvania Canal Co., 109 Pa. St. 50 (1885); Nashua, etc. R. R. *v.* Boston, etc. R. R., 27 Fed. Rep. 821, 826 (1886); 72 S. W. Rep. 822.

[1] Where the trustee sells trust property to himself personally, and the *cestuis que trust* are cognizant thereof and do not object for several years, they cannot set the transaction aside. Hoyt *v.* Latham, 143 U. S. 553 (1892). See also Foster *v.* Mansfield, etc. R. R., 146 U. S. 88 (1892). A stockholder, who delays nearly four years before complaining of a consolidation, which he alleges was *ultra vires*, will not be granted any relief. Dimpfel *v.* Ohio & M. Ry., 110 U. S. 209 (1884), aff'g 9 Biss. 127. In the case of St. Louis, etc. R. R. *v.* Terre Haute, etc. R. R., 145 U. S. 393 (1892), where a suit by the lessor of a railroad to set aside an illegal lease failed, the court said: "And so far as the plaintiff corporation can be considered as representing the stockholders and seeking to protect their interests, it and they are barred by laches." A stockholder's suit to vacate a foreclosure decree seven years after it was entered and three years after a decision that he was entitled to make the application, the property in the meantime having passed into *bona fide* hands, is too late, his claim being that he was a stockholder in a company that was consolidated with another company and that the property of his corporation was sold on the foreclosure of a mortgage of the latter, which mortgage was executed prior to the consolidation. Atlantic Trust Co. *v.* New York, etc. Co., 75 N. Y. App. Div. 354 (1902). Where for six years an issue of stock for services has appeared fully on the books of the company and has not been objected to, a stockholder cannot have it set aside, even under the constitution of Colorado, especially where all the stockholders at the time of the issue assented thereto, and the party receiving the stock used a large portion of it to interest other persons in the company, and even though the stock so issued to him was $125,000, being one-half of the entire stock, and was in consideration of services rendered in obtaining contracts and options, which were turned over to the company. Calivada, etc. Co. *v.* Hays, 119 Fed. Rep. 202 (1902). Five years after a corporation has sold all its property to another corporation, and received the consideration, it cannot maintain a bill to set aside the sale as *ultra vires*, the rights of third parties having intervened in the meantime. Bear Valley, etc. Co. *v.* Savings, etc. Co., 117 Fed. Rep. 941 (1902). A stockholder cannot, after ten years' delay, maintain a suit to cancel stock issued for patents, and to compel the holder of such stock to refund dividends thereon, the transaction having been spread on the records of the company and open to the stockholders. An allegation that the patents were of no value is insufficient, even though the constitution of the state (Missouri) required that stock be issued only for "money paid, labor

There has been considerable doubt and difficulty in determining whether the statute of limitations will be applied by a court of

done, or money or property actually received," there being no allegation that the patents were known to be valueless at the time. Kimbell *v.* Chicago, etc. Co., 119 Fed. Rep. 102 (1902). Where a stockholder delays for a year in complaining of a sale of corporate property to two of the directors, and innocent third parties have acquired rights in the property in the meantime, the stockholder's remedy is barred by laches. Snow *v.* Boston, etc. Co., 158 Mass. 325 (1893). See § 733, *infra.* Although a shoe company employs as selling agents a firm in which the president and general manager of the corporation is a member, yet where this has been done for nine years without objection, a stockholder cannot claim for the corporation the benefit of the firm's profits from such contract. Warren *v.* Para, etc. Co., 166 Mass. 97 (1896). Where a person buys land for $24,000, and afterwards becomes a director and then sells it to the corporation for $80,000, a majority of the board being disinterested, the company cannot, nine years afterwards, claim that it should pay only the then market value of the land. Higgins *v.* Lansingh, 154 Ill. 301 (1895). Delay for two years on the part of one who claims he is entitled to come into a reorganization is fatal. Farmers' L. & T. Co. *v.* Bankers', etc. Tel. Co., 119 N. Y. 15 (1890), the purchaser having denied any reorganization agreement during that time. A stockholder who objects, but waits from October 17 to March 7, and then at the annual meeting tries to have action taken, is not guilty of laches. Byrne *v.* Schuyler, etc. Co.. 65 Conn. 336 (1895). A stockholder who is also a director cannot complain of a diversion of funds by the manager arising from an unauthorized "swapping" of checks, and is barred of relief where he had known of its continuance for two years. Straight *v.* Junk, 59 Fed. Rep. 321 (1893).

Where for twenty-seven years no stockholder has complained of a lease of the property of the company to a lessee, although the lessee owned a majority of the stock of the lessor, it is too late to complain. Wolf *v.* Pennsylvania R. R., 195 Pa. St. 91 (1900). A lease will not be set aside, even though a majority of the directors of the lessor are interested in the lessee, and even though after the lease was made they became stockholders and directors of the lessee, it being shown that the lessor had a floating and bonded debt and had no funds, and had never paid a dividend, and that as a result of the lease the stock advanced fifty per cent. in value, and the complaint is not made until eighteen months after the lease was made. Dickinson *v.* Consolidated, etc. Co., 114 Fed. Rep. 232 (1902). A creditor of a corporation who wishes to object to a transfer of its assets to another corporation must do so promptly after he learns of the same, and á delay of three or four years, during which others became creditors of the new corporation and the latter becomes insolvent, will bar his claim for an equitable lien on the assets. Anthony *v.* Campbell, 112 Fed. Rep. 212 (1901). Where one of the partners in a firm organized to locate, develop, and operate mines does not turn in to the firm a mine located by him, but transfers the same to the corporation for stock, and the other partners delay for two years after knowledge thereof before filing a bill claiming an interest in the stock, and in the meantime the corporation has expended money, and the stock may have passed into other hands, the court will refuse relief on the ground that the firm evidently intended to deny any obligation if the mine turned out to be worthless, but to claim an interest if it turned out to be valuable. Curtis *v.* Lakin, 94 Fed. Rep. 251 (1899). Two years' delay on the

equity to cases of this nature. It has been held in England that the statute will be applied to a corporate action to compel a di-

part of a stockholder in complaining of a mortgage given by the corporation to raise money to pay a debt due to the president is fatal, even though the president had originally agreed to require payment only out of sales of property by the corporation. Wills *v.* Porter, 132 Cal. 516 (1901). The failure of a stockholder to discover for nearly six years a sale of corporate property to one of the directors is not laches. Morgan *v.* King, 27 Colo. 539 (1900). Where minority stockholders started a suit in the federal court to set aside a sale of the property of the company to another corporation, but did not bring in as a party defendant a railway company which was about to issue securities, in accordance with contracts with the two companies, and afterwards start a suit in the state court for the same relief, and bring in the railway company as party defendants, laches in bringing in the railway company is a bar to relief against that company. A protest not followed by prompt application to a court does not excuse laches. Mumford *v.* Ecuador, etc. Co., 50 Atl. Rep. 476 (N. J. 1901). A stockholder is not guilty of laches in applying for an injunction against the ratification by the stockholders of an *ultra vires* sale of the corporate property by the board of directors, even though the sale was made by the directors on April 5th and the injunction was not applied for until June 4th, two days before the date of the meeting of the stockholders to ratify the sale. Forrester *v.* Boston, etc. Co., 21 Mont. 544, 565 (1898). See s. c., 22 Mont. 430 (1899). A delay of several years in attacking the issue of stock and a consolidation is fatal. Drake *v.* New York, etc. Co., 26 App. Div. 499 (1898). Even though a company, organized to manufacture and sell soap, buys and sells soap, yet the stockholders who are guilty of laches cannot complain of the act as *ultra vires.* Petrolia Mfg. Co. *v.* Jenkins, 29 N. Y. App. Div. 403 (1898). Where for a long time an irrigation company acquiesces in a certain construction of an agreement to furnish water, and such construction is equitable, a stockholder cannot object, even though some of the directors are interested personally. Foster *v.* Bear Valley Irr. Co., 65 Fed. Rep. 836 (1895). A stockholder who delays nine years before intervening in a foreclosure suit cannot then intervene after the sale is completed and the money ready for distribution. Boston, etc. Trust Co. *v.* American Rapid Tel. Co., 67 Fed. Rep. 165 (1895). Where the directors of a failing linen-manufacturing corporation sell a part of the plant for stock of a knit-goods manufacturing corporation, a stockholder who does not complain for two years cannot hold the directors liable for his share of the property so exchanged for stock. Pinkus *v.* Minneapolis Linen Mills, 65 Minn. 40 (1896). Where the directors sell unissued stock at a discount to a party who resells part of it to a director, other stockholders cannot, ten years afterwards, hold him liable. Keeney *v.* Converse, 99 Mich. 316 (1894). Four years' delay in bringing suit to compel a corporate officer to account for property purchased by him at an execution sale is fatal. Horbach *v.* Marsh, 37 Neb. 22 (1893). A stockholder who for two years knows that an illegal salary is being paid cannot afterwards object. Brown *v.* De Young, 167 Ill. 549 (1897). Even though a director sells property to the company and overvalues it, yet if the company caused an independent valuation to be made, and for three years acquiesced in the purchase, it cannot then complain. Stetson *v.* Northern Inv. Co., 104 Iowa, 393 (1898). Nine years' delay on the part of a mi-

rector to pay over to the corporation money received by him as a bribe, and that the statute begins to run from the time when the

nority stockholder in complaining of the act of the directors in causing the corporation to purchase stock upon which they received a secret profit is fatal to the suit. Cullen *v.* Coal Creek, etc. Co., 42 S. W. Rep. 693 (Tenn. 1897).

A reorganization agreement cannot be successfully attacked by stockholders two years after it was made, especially where the stockholders do not offer to pay the debt due nor the expenses of foreclosure, and where "the relief they ask under their bill, if granted, would not only be valueless to them and other stockholders, but would saddle the company with a vast debt of nearly $25,000,000, wholly due, and bearing a high rate of interest." Carey *v.* Houston, etc. Ry., 52 Fed. Rep. 671 (1892). Three years' time having elapsed before a stockholder ascertained a fraudulent sale of the company's stock by the directors to themselves, relief will be denied where that sale has been of great benefit to the remaining stock. Squair *v.* Lookout Mountain Co., 42 Fed. Rep. 729 (1890). Thirteen years' delay by stockholders in complaining of a gift of town lots to the town by a committee of the stockholders upon the dissolution of the corporation is fatal. Norton *v.* Kellogg, 41 Fed. Rep. 452 (1890). A delay of twenty years in complaining that a lease taken by the company was due to the fact that a part of the directors were interested in the stock and bonds of the lessor company is fatal. Jesup *v.* Illinois Cent. R. R., 43 Fed. Rep. 483 (1890).

Laches is a bar to a suit against a corporation the same as against individuals, especially as new stockholders are continually coming in. St. Paul, etc. Ry. *v.* Sage, 49 Fed. Rep. 315 (1892). Eleven and one-half years is no bar to a stockholder's suit to set aside illegal bonds and a mortgage, where no attempt was made to enforce the bonds. Chicago *v.* Cameron, 120 Ill. 447 (1887). Eleven years' delay is fatal to a complaint that another corporation has purchased a majority of the stock of the corporation in which the complainant stockholder holds stock. Alexander *v.* Searcy, 81 Ga. 536 (1889). Where for seven years a stockholder who owned a majority of the stock elected himself and two of his dummies as directors of the company, and caused the board to vote a large salary to himself as president and manager, and had leased to the company his property at a large rental, the salary and rental are illegal. Where the company had failed to pay its dividends by reason of such acts, a court of equity, upon the suit of another stockholder, ordered the president to account, and appointed a receiver of the company and directed that its affairs be wound up. Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892). Although a stockholder may enjoin a consolidation of his company with another under a statute passed after the incorporation, the object of the consolidation being different from that of the original corporation, yet where the stockholder delays applying to the court for nearly a year, and in the meantime the consolidated company has borrowed money and given mortgages, and such mortgages are about to be foreclosed, the complaining stockholder is guilty of laches and his remedy is barred. Rabe *v.* Dunlap, 51 N. J. Eq. 40 (1893). Where a fraudulent foreclosure was made on April 5th, and the fraud became known on June 5th, and suit was brought in September, the suit may be maintained, no one having been prejudiced by the delay. Ex-Mission, etc. Co. *v.* Flash, 97 Cal. 610 (1893). Seven years' delay in complaining that the directors issued bonds to themselves for no consideration, and then foreclosed and bought

corporation discovers the facts.[1] In the United States the courts

the road in, is fatal. Burgess *v.* St. Louis County R. R., 99 Mo. 496 (1890). Where a pledgee bank, having a right to sell at private sale and without notice, sells the pledge through its president, who buys the pledge himself, and the president openly pays the bank for it, long delay on the part of the bank in complaining is fatal. Raymond *v.* Palmer, 41 La. Ann. 425 (1889). Laches is a bar. Moore *v.* Silver, etc. Co., 104 N. C. 534 (1890). A consolidation of railroads under an amendment to the charter may be prevented by a single stockholder. But several years' delay in complaining is fatal. The stockholder then can only recover the value of his stock and past dividends. Deposit Bank *v.* Barrett, 13 S. W. Rep. 337 (Ky. 1890). Where a stockholder delays in bringing a suit for an unreasonable length of time for the purpose of ascertaining whether the act complained of will be profitable to him, his suit to set aside the act will fail. Boyce *v.* Montauk, etc. Co., 37 W. Va. 73 (1892). A director's purchase for the creditors and certain mortgage bondholders of the mortgaged property at a foreclosure sale cannot be set aside by a stockholder five years after the sale, where the road was sold for all it was worth, and was badly in debt, and required large expenditures, and there was no possible means of raising more money; and the stockholders knew of the condition of things, but made no effort to prevent a sale; and the director offered to allow the stockholders to come into a reorganization, and offered to resell the property for less than what he paid for it. This is the rule even though the property subsequently becomes very valuable. Osborne *v.* Monks, 21 S. W. Rep. 101 (Ky. 1893). The regularity or authorization of a corporate mortgage cannot be successfully attacked by a stockholder in an action to foreclose the mortgage where for twelve years the interest has been paid upon the bonds with the knowledge and acquiescence of the stockholder. Warren *v.* Bigelow Blue Stone Co., 74 Hun, 304 (1893). A hotel company having bought a competing hotel and paid for it in stock and held the property for two years, a stockholder cannot have the purchase set aside. Steger *v.* Davis, 8 Tex. Civ. App. 23 (1894). In Fitzgerald *v.* Fitzgerald, etc. Co., 41 Neb. 374 (1894), it was held that where two corporations, having contract relations, are controlled by the same board of directors and a fraud is committed, the delay and acquiescence of a minority director did not prevent his suing to remedy the fraud. *Cf.* 93 N. W. Rep. 1024. Stock voted to the president as a salary at a meeting where his presence is necessary to form a quorum may be recovered back, but acquiescence for ten years is fatal. U. S. etc. Co. *v.* Reed, 2 How. Pr. (N. S.) 253 (1885).

See also Downes *v.* Ship, L. R. 3 H. L. 343 (1868); Ashhurst's Appeal, 60 Pa. St. 290 (1869); Zabriskie *v.* Hackensack, etc. R. R., 18 N. J. Eq. 178 (1867); Nashua, etc. R. R. *v.* Boston, etc. R. R., 27 Fed. Rep. 821, 826 (1886); London, etc. Assoc. *v.* Kelk, L. R. 26 Ch. D. 107 (1884); McLoughlin *v.* Detroit, etc. Ry., 8 Mich. 100 (1860); Gray *v.* Chaplin, 2 Russ. Ch. 126 (1826), where the stockholder had acquiesced forty-seven years in an *ultra vires* lease. In Mills *v.* Central R. R.,

[1] Metropolitan Bank *v.* Heiron, L. R. 5 Exch. D. 319 (1880). The statute of limitations is no bar to an action against a director for fraud, when notice of the fraud came only to the directors, part of whom were also implicated. *Re* Fitzroy, etc. Co., 50 L. T. Rep. 144 (1884). The statute of limitations does not begin to run against a promoter who takes a secret profit until the facts are known to the stockholders. *Re* Sale, etc. Co., 77 L. T. Rep. 681 (1897), reversed on another point in 78 L. T. Rep. 368 (1898).

often apply to a suit, brought to remedy the frauds, *ultra vires* acts,

41 N. J. Eq. 1, 9 (1886), it was very properly held that a delay of fifty-four days was no bar, and also that a failure to vote against the act was no bar. In Gifford *v.* New Jersey R. R. & T. Co., 10 N. J. Eq. 171 (1854), a delay of twenty years was held to be a bar. In the following cases the court held delay to be a bar: Peabody *v.* Flint, 88 Mass. 52 (1863), the delay being three and a half years; Gregory *v.* Patchett, 33 Beav. 595 (1864), six years; International, etc. R. R. *v.* Bremond, 53 Tex. 96 (1880), two years; Graham *v.* Birkenhead, etc. Co., 2 Macn. & G. 146 (1850), eighteen months; Kitchen *v.* St. Louis, etc. Ry., 69 Mo. 224 (1878), five years; Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881); Ashhurst's Appeal, 60 Pa. St. 290 (1869), seven years; Sheldon, etc. Co. *v.* Eickemeyer, etc. Co., 90 N. Y. 607 (1882), four years; Pneumatic Gas Co. *v.* Berry, 113 U. S. 322 (1884); Graham *v.* Boston, etc. R. R., 118 U. S. 161 (1886); *Re* Pinto Silver Min. Co., L. R. 8 Ch. D. 273 (1878); Royal Bank *v.* Grand Junction R. R., 125 Mass. 490 (1878); *Re* Magdalena, etc. Co., 6 Jur. (N. S.) 975 (1860), where a delay of two years was held a bar; Brotherhood's Case, 31 Beav. 365 (1862), twelve years; Hervey *v.* Illinois, etc. Ry., 28 Fed. Rep. 169 (1884); Thompson *v.* Lambert, 44 Iowa, 239 (1876); Vigers *v.* Pike, 8 Cl. & F. 562, 650 (1840); Zabriskie *v.* Cleveland, etc. R. R., 23 How. 381 (1859); Allen *v.* Willson, 28 Fed. Rep. 677 (1886). *Cf.* Boardman *v.* Lake Shore, etc. Ry., 84 N. Y. 157 (1881); Badger *v.* Badger, 2 Wall. 87 (1864); Harwood *v.* Railroad Co., 17 Wall. 78 (1872); Rochdale Canal Co. *v.* King, 2 Sim. (N. S.) 78 (1851); §§ 161, 162, 198, *supra.* Seventeen years' delay bars the right of preferred stockholders to reach a fund which was to be given them as a compromise by first bondholders, a foreclosure by second bonds having subsequently followed. Sullivan *v.* Portland, etc. R. R., 94 U. S. 806 (1877). Five years' delay in attacking a consolidation is too late. Bell *v.* Pennsylvania, etc. R. R., 10 Atl. Rep. 741 (N. J. 1887). But a delay of eleven years and a half was held not fatal to a stockholder's action to set aside an *ultra vires* issue of bonds, where the railroad had been abandoned, the bonds never dealt in nor enforced, and the complainant had in view the removal of the lien, and intended to proceed and construct the road. Chicago *v.* Cameron, 120 Ill. 447 (1887). Four years' delay in suing to set aside an *ultra vires* assignment of property held fatal. Descombes *v.* Wood, 91 Mo. 196 (1887). Where a corporation is insolvent, and turns in its property at a fair price to a creditor whose debt is also secured by the guaranty of the president of the corporation, and the creditor at once sells the property to the president at an advanced price, a stockholder who delays suit for two years, during which time the property becomes valuable and the president, who purchased, dies, is barred from complaining. Hancock *v.* Holbrook, 40 La. Ann. 53 (1888). Laches bars the right of preferred stockholders to object to an *ultra vires* lease. Emerson *v.* N. Y. etc. R. R., 14 R. I. 555 (1894), aff'g Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881). Three years' delay is fatal to a stockholder's suit to hold the president liable for illegal acts, where the former was also treasurer. Dunphy *v.* Traveller Assoc., 146 Mass. 495 (1888). A lease of corporate property may be ratified by one hundred days' delay of the company in repudiating it, the lessee in the meantime expending money thereon. Hoosac, etc. Co. *v.* Donat, 10 Colo. 529 (1888). A lessor railroad cannot, nineteen years after the lease, sue in equity to set aside the lease as *ultra vires.* Laches is a bar. St. Louis, etc. R. R. *v.* Terre Haute, etc. R. R., 33 Fed. Rep. 440 (1888); aff'd, 145 U. S. 393 (1892). Ten years' delay bars an action by a stock-

or negligence of directors, the regular statute of limitations.[1] It

holder to set aside a fraudulent foreclosure of a mortgage given by the company. Foster *v.* Mansfield, etc. R. R., 36 Fed. Rep. 627 (1888); aff'd, 146 U. S. 88 (1892). A lease of a water company's property to an ice company, with the privilege to the stockholders of the former to take stock in the latter, will not be set aside at the instance of stockholders who did not offer to take such stock until too late, and who delayed complaining until after the ice company proved a success. Shaaber's Appeal, 17 Atl. Rep. 209 (Pa. 1889). The time consumed by the guilty officers in legal proceedings to collect their gains is not included in the time which constitutes laches on the stockholders' part. Davis *v.* Gemmell, 70 Md. 356 (1889).

1 Watts's Appeal, 78 Pa. St. 370 (1875). See also Taylor *v.* South, etc. R. R., 13 Fed. Rep. 152 (1882). As to California, see Dannmeyer *v.* Coleman, 11 Fed. Rep. 97 (1882), holding that under the statute in California the three-years' limitation to actions based on fraud after discovery thereof applies to directors' frauds herein. But see Philippi *v.* Philippe, 115 U. S. 151 (1885); Twin Lick, etc. Co. *v.* Marbury, 91 U. S. 587 (1875); Moyle *v.* Landers, 21 Pac. Rep. 1133 (Cal. 1889); s. c., 83 Cal. 579 (1890). See, in general, Coit *v.* Campbell, 82 N. Y. 509, 514 (1880); Farnam *v.* Brooks, 26 Mass. 212, 242 (1830); Godden *v.* Kimmell, 99 U. S. 201, 210 (1879); Preston *v.* Preston, 95 U. S. 200 (1877); Badger *v.* Badger, 2 Wall. 87 (1864); Meader *v.* Norton, 11 Wall. 442 (1870); Bowman *v.* Wathen, 1 How. 189 (1843); Beckford *v.* Wade, 17 Ves. Jr. 87 (1805). The statute of limitations is a bar to an action against directors for negligence in allowing overdrafts and illegal loans. Williams *v.* Halliard, 38 N. J. Eq. 373, 383 (1884). An action against a third person to recover money paid by the corporation to him for stock must be brought within six years or it is barred by the statute of limitations. Pierson *v.* McCurdy, 33 Hun, 520 (1884); aff'd, 100 N. Y. 608. But in Pierson *v.* Morgan, 20 Abb. N. Cas. 428 (N. Y. 1887), and Brinckerhoff *v.* Bostwick, 99 N. Y. 185 (1885), the ten-year statute was applied to fraud. The statute of limitations may constitute a bar to an action by the corporation against its secretary for funds appropriated by him. Landis *v.* Saxton, 105 Mo. 486 (1891). The six-years' statute of limitations runs against an action to hold a director liable for investing corporate funds in the stock of another company. *Re* Lands Allotment Co., [1894] 1 Ch. 616. An action by a receiver to recover money from directors is barred in six years, but a similar action by a stockholder, being in equity alone, is barred in ten years, in New York. Mason *v.* Henry, 83 Hun, 546 (1895). The statute of limitations does not run as against the president's misappropriation of funds, where the delay was due to his misrepresentations. Coxe *v.* Huntsville Gas Light Co., 106 Ala. 373 (1895). The statute of limitations at law applies, since it is a legal right that is being enforced in equity. As to negligence the time is within six years from the negligent act, in Tennessee. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630 (1891). The directors may be liable for causing the railroad company to purchase the stock of another railroad company, but the six-years' statute of limitations is a bar to a stockholders' suit to hold them liable, no fraud being alleged. Whitwam *v.* Watkin, 78 L. T. Rep. 188 (1898). Directors guilty of malfeasance are held liable as trustees on the insolvency of the company, especially as regards the statute of limitations. Boyd *v.* Mutual Fire Assoc., 90 N. W. Rep. 1086 (Wis. 1902). The statute of limitations is the only bar to a stockholders' suit to compel an officer to return funds which he has

is established law that where equity and law have concurrent jurisdiction of a case, equity will apply the statute of limitations.[1]

Where there are a series of transactions between the president and the company, the statute of limitations does not begin to run until his official connection ceases.[2] If the running of the statute been stopped as to one complaining stockholder it is stopped as to all.[3] In general a court of equity will apply the statute or will not apply it, as may seem most just, and will even shorten the time.[4]

The statute of limitations may not be a bar to a receiver's action to recover back from directors a salary which was paid in breach of trust.[5]

§ 733. *Miscellaneous applications of the doctrine of laches herein.* The ratification of an act which the stockholder might have complained of does not authorize or ratify in advance a repetition of that act.[6] A stockholder's right to object to a director's act can be exercised by him alone.[7] It is also well established that the ratification which will bind a stockholder must be by himself alone. It cannot be by the other stockholders.[8] A board of directors can-

misappropriated. Montgomery, etc. Co. *v.* Lahey, 121 Ala. 131 (1899). A suit by a promoter to compel the delivery of stock to him on the ground that without his consent and knowledge an incorporation made in accordance with his contract had been abandoned and a new one adopted from which he had been excluded is a suit for breach of trust and not for fraud, and hence the statute of limitations applicable to the latter is not a bar. Farris *v.* Wirt, 63 Pac. Rep. 946 (Colo. 1901). A stockholders' suit to hold a director liable for purchasing property of the corporation is a suit for breach of trust and not for a fraud separate from such breach, and hence a statute of limitations applicable to the former is the one applicable to such a case. Morgan *v.* King, 27 Colo. 539 (1900).

[1] Baker *v.* Cummings, 169 U. S. 189 (1898).

[2] Danville, etc. R. R. *v.* Kase, 39 Atl. Rep. 301 (Pa. 1898). A national bank may hold its officers liable for making loans to an individual in excess of ten per cent. of the capital stock, and also for making other loans in violation of the statutes, and such suit may be in equity where the transactions are complicated. The statute of limitations does not begin to run until such officers have gone out of office. National Bank, etc. *v.* Wade, 84 Fed. Rep. 10 (1897).

[3] Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 194 (1885); Cox *v.* Stokes, 156 N. Y. 491 (1898). See also Richmond *v.* Irons, 121 U. S. 27 (1887). But see Ashley's Case, L. R. 9 Eq. Cas. 263 (1870); also § 163, *supra.*

[4] Sullivan *v.* Portland, etc. R. R., 94 U. S. 806, 811 (1876). See also Ernest *v.* Croysdill, 2 De G., F. & J. 175 (1860); *Re* Exchange Banking Co., L. R. 21 Ch. D. 519 (1882).

[5] Ellis *v.* Ward, 137 Ill. 509 (1890), holding that the statute of limitations is no bar, and that a court of equity is governed by the rules of laches instead.

[6] Irvine *v.* Union Bank of Australia, L. R. 2 App. 366 (1877); Bloxham *v.* Metropolitan Ry., L. R. 3 Ch. 337, 354 (1868).

[7] Taylor *v.* Chichester, etc. R. R., L. R. 2 Exch. 356, 378 (1867).

[8] Hazard *v.* Durant, 11 R. I. 195 (1875). This principle of law is substantially a mere restatement of the principle that the majority cannot bind the minority as regards *ultra vires* acts; nor can the

not release one of their number from liability for wasting the funds of the company.[1] The fact that an officer of the company took part in a swindling scheme does not deprive the company of its right to recover back moneys of which it was wrongfully deprived by such scheme.[2] But the acquiescence of a stockholder bars an action by any transferee of that stock.[3]

If neither the defendants nor others have been induced by the delay to act upon the matters which are complained of, laches may not be a bar to the stockholder's action.[4] It is not necessary to allege that the stockholders have been free from acquiescence or laches.[5] The question of laches should be raised by answer and not by demurrer.[6] In New Jersey, however, it has been held that

directors. See Gallery *v.* National Exch. Bank, 41 Mich. 169 (1879). See also §§ 669, 683, *supra*. Where a majority of the directors of an irrigation company are members of an association which desires to obtain water from such corporation, a contract to that effect which is solely for the benefit of the association is illegal and may be repudiated by the corporation, even though such contract was openly made, and even though the directors were guilty of laches in not causing the contract to be set aside, and in the meantime the association has spent its money in installing its plant. Goodell *v.* Verdugo, etc. Co., 71 Pac. Rep. 354 (Cal. 1903), the court saying, "the publicity alone of an illegal and unauthorized act of the directors of the corporation does not make it legal or valid."

Even though the directors are to receive a commission on bonds which they sell for the corporation, yet if the stockholders are notified of the same and ratify the transaction in meeting assembled, the minority stockholders cannot complain, the transaction itself being a fair one. The directors may vote their own stock at such meeting and the ratification is legal, even though their stock was necessary in order to carry the resolutions. The court said: "Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company." Hodge *v.* United States Steel Corp., 54 Atl. Rep. 1 (N. J. 1903). The court further said: "In Leavenworth *v.* Chicago Ry. Co., 134 U. S. 688, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the case of Nye *v.* Storer, 168 Mass. 53, and Bjorngaard *v.* Goodhue County Bank, 49 Minn. 483, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders."

[1] Gilbert *v.* Finch, 173 N. Y. 455 (1903).

[2] Farrow *v.* Holland Trust Co., 74 Hun, 585 (1893). See also §§ 649–651. 656, *supra*.

[3] See §§ 40, 730, *supra*, and § 735, *infra*,

[4] Whitman *v.* Bowden, 27 S. C. 53 (1887).

[5] Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196 (1889). *Cf.* Credit Co. *v.* Arkansas Cent. R. R., 15 Fed. Rep. 46 (1882).

[6] A demurrer is not the proper way to raise the question of laches. Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461 (1893); Sage *v.* Culver, 147 N. Y. 241 (1895). *Cf.* Crumlish *v.* Shenandoah Valley R. R., 28 W. Va. 623 (1886). The complainant need not allege that he did not take part in the transaction, but the question of laches may be raised by demurrer. George *v.* Central R. R. etc. Co., 101 Ala. 607 (1894). The

a stockholder must allege that neither he nor any prior owner of his stock has acquiesced in the acts complained of, where the amount of the stock owned by him is very small, comparatively.[1]

Delay due to the fact that a bill had previously been filed and dismissed on technical grounds is not laches.[2] And a suit by one signer of a reorganization agreement, to enforce it, prevents laches being charged against other signers who do not commence suit until a long time subsequently.[3] Where all the other stockholders consent to the company buying property owned by one of the directors, a stockholder who was present and does not object cannot complain.[4] The assent of a few minor stockholders whose stock was given to them may be presumed, in case they have not objected to an agreement whereby some of the stockholders sell their stock to the others and take their pay from the corporation itself and resign their offices and substitute new parties as directors.[5] The failure of a stockholder to attend the stockholders' meeting is not a waiver of his right to object to the acts of the meeting as *ultra vires*, even though the notice of the meeting stated what was to be done.[6] Ratification does not arise from the mere fact that the directors' minutes were ratified at a stockholders' meeting.[7]

If it is evident that the stockholder waited to see whether the unauthorized act would be profitable to the corporation, the court will refuse to grant him any relief.[8] So also, if the stockholder,

bill for relief from fraud perpetrated a long time prior thereto must explain in detail the reason of the delay. Laches may be raised by demurrer. Hubbard *v.* Manhattan Trust Co., 87 Fed. Rep. 51 (1898). The question of laches may be raised by demurrer where the complaint sets forth the facts which involve laches. Mott *v.* N. Y. etc. Co., 29 N. Y. Misc. Rep. 39 (1899).

[1] Trimble *v.* American, etc. Co., 61 N. J. Eq. 340 (1901).

[2] Miner *v.* Belle Isle Ice Co., 93 Mich. 97 (1892).

[3] Cox *v.* Stokes, 156 N. Y. 491 (1898).

[4] Steinway *v.* Steinway, 2 N. Y. App. Div. 301 (1896); aff'd, 157 N. Y. 710, and in 163 N. Y. 183. *Cf.* 54 Atl. Rep. 883.

[5] Raymond *v.* Colton, 104 Fed. Rep. 219 (1900).

[6] McFadden *v.* Leeka, 48 Ohio St. 513 (1891). Under a statute authorizing one company to sell out to another for any consideration that may be agreed upon between them, it is legal that the consideration be a right extended by the new company to the old stockholders to demand partly paid up stock of the new company within a limited time, a dissenting stockholder being given the right to have the fairness of the proposed sale passed upon by the court. It is the duty of the stockholder in such a case to attend the meeting and vote against it if he objects. It is no excuse that he was ill or abroad or negligent in dissenting, under the English statute. Burdett-Coutts *v.* True Blood, etc. Ltd., [1899] 2 Ch. 616.

[7] Ives *v.* Smith, 8 N. Y. Supp. 46 (1889).

[8] Story, Eq. Jur., § 1539*a;* Kitchen *v.* St. Louis, etc. Ry., 69 Mo. 224 (1878); Gregory *v.* Patchett, 33 Beav. 595 (1864); Atchison, etc. R. R. *v.* Fletcher, 35 Kan. 236, 250 (1886); Banks *v.* Judah, 8 Conn. 145 (1830); Watts's Appeal, 78 Pa. St. 370 (1875); Sheldon, etc. Co. *v.* Eicke-

after a full knowledge of the facts, stands by and allows large operations to be completed, or money expended, or alterations to be made before he brings suit, he is guilty of laches, and his remedy is barred.[1] But delay after the damage is done, and while the complaining stockholder served as a director in the hope of bettering things, is not a bar.[2] A defendant in a foreclosure suit cannot object to a sale on the ground that it did not comply with the federal statute, where he took no appeal and made no objection until after the sale had been confirmed.[3] Under the New York statutes a suit by a bank against its president for loaning money on worthless securities survives his death.[4] Even though the stockholders of a bank assent to notes being accepted in payment of subscriptions, yet a receiver may hold the directors liable therefor.[5] But where all the stockholders acquiesce, the corporation itself cannot complain.[6]

Acts *intra vires* may be ratified by a majority of the stockholders and the minority cannot complain.[7] But an *ultra vires* or fraudulent act cannot be ratified by the majority so as to bind the minority;[8] neither can it be ratified by the board of directors.[9] A

meyer, etc. Co., 90 N. Y. 607 (1882); Boyce *v.* Montauk, etc. Co., 37 W. Va. 73 (1892). Quoted and approved in Steger *v.* Davis, 8 Tex. Civ. App. 23 (1894).

[1] See § 732, *supra;* also Houldsworth *v.* Evans, L. R. 3 H. L. 263, 276 (1868). Delay of eight months held fatal. Great Western Ry. *v.* Oxford, etc. Ry., 3 De G., M. & G. 341 (1853). See also Boston, etc. R. R. *v.* New York, etc. R. R., 13 R. I. 260 (1881); Aurora, etc. Soc. *v.* Paddock, 80 Ill. 263 (1875); Stewart *v.* Erie, etc. Transp. Co., 17 Minn. 372 (1871); Goodin *v.* Evans, 18 Ohio St. 150 (1868). In Covington, etc. R. R. *v.* Bowler, 9 Bush (Ky.), 468 (1872), however, the court held that a delay of six years was not a bar to the stockholder's remedy; and the court said that "merely remaining passive does not deprive a party of the right to seek relief, unless, in addition thereto, he does some act to induce or encourage others to expend their money or to alter their condition, and thereby render it unconscientious for him to enforce his rights." But see Pacific R. R. of Mo. *v.* Missouri Pac. Ry., 111 U. S. 505 (1884), reversing 12 Fed. Rep. 641, holding that delay pending appeal is not fatal. See also §§ 161, 162, *supra.* A stockholder who lies by and allows his corporation, which is not a success, to be merged with other property into a new company, payment being made in stock of the latter company, and the enterprise proves a success, cannot cause to be set aside an assessment to pay a debt incurred for expenses in bringing about such results. Taylor *v.* North Star, etc. Co., 79 Cal. 285 (1889).

[2] Landis *v.* Sea Isle, etc. Co., 53 N. J. Eq. 654 (1895).

[3] National, etc. Co. *v.* Nevada, etc. Syndicate, 112 Fed. Rep. 44 (1901).

[4] Seventeenth, etc. Bank *v.* Webster, 67 N. Y. App. Div. 228 (1901).

[5] Coddington *v.* Canaday, 157 Ind. 243 (1901). See also § 701, *supra.*

[6] Home, etc. Co. *v.* Barber, 93 N. W. Rep. 1024 (Neb. 1903). *Cf.* n. 2, p. 1848.

[7] Bassett *v.* Fairchild, 61 Pac. Rep. 791 (Cal. 1900).

[8] See § 740, *infra.*

[9] Even though the cashier of a bank,

court, however, may authorize its receiver to compromise such claims.[1]

Although a corporate debt is not incurred with the formalities required by statute, yet acquiescence therein by a stockholder bars any complaint by him.[2]

with the consent of the directors, takes a part of the profit realized by the purchaser of land from the bank, yet a stockholder may compel him to repay that amount to the bank, although the purchaser has not yet paid the amount to the cashier. Tenison *v.* Patton, 64 S. W. Rep. 810 (Tex. 1901). Directors of an insurance company who use its money to procure the resignations of the directors of another insurance company and a substitution of new directors are personally liable for money so expended, and the fact that parties receiving the money had repaid a portion of it by way of compromise is no bar to such suit for the balance. A release by the board of directors is no defense. Gilbert *v.* Finch, 72 N. Y. App. Div. 38 (1902); aff'd, 173 N. Y. 455. See also §§ 649, 652, 662, *supra.*

1 See § 701, *supra.* The court may authorize the receiver to sell all the assets to a new company and release the directors of the old company from personal liability to the stockholders, where such contract is a fair one, even though some of the stockholders dissent. People *v.* Anglo-American, etc. Assoc., 66 N. Y. App. Div. 9 (1901).

2 Manhattan Hardware Co. *v.* Roland, 128 Pa. St. 119 (1889).